

Joseph T. Moldovan
David J. Kozlowski
Morrison Cohen LLP
909 Third Avenue
New York, NY 10022
Telephone: 212-735-8600
Facsimile: 212-735-8708
jmoldovan@morrisoncohen.com
dkozlowski@morrisoncohen.com

Proposed Counsel for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

S & A RETAIL, INC., *et al.*¹

Debtors.

Chapter 11
(Subchapter V)

Case No. 21-22174 (RDD)

(Joint Admin. Requested)

**MOTION FOR ENTRY OF ORDER AUTHORIZING, BUT NOT
DIRECTING, THE PAYMENT OF CERTAIN PREPETITION
TAXES AND FEES, AND GRANTING RELATED RELIEF**

The above-captioned debtors and debtors-in-possession (“**Debtors**”) hereby move (“**Motion**”) for the entry of an order (“**Order**”), substantially in the form attached hereto as **Exhibit A**, authorizing, but not directing, the payment of certain prepetition taxes and fees, and granting related relief. In support of the Motion, Debtors rely upon and incorporates by reference the *Declaration of Bridgette Nally in*

¹ The Debtors in these Chapter 11 Cases are S & A Distribution, Inc. (“**Distribution**”) and S & A Retail, Inc. (“**Retail**”). The last four digits of the Debtors’ federal tax identification numbers are: Distribution – 5366 and Retail – 1261. The Debtors’ mailing address is 334 S Buckhout St., Irvington, NY 10533.

Support of Chapter 11 Petition and First Day Relief (“**First Day Declaration**”), which was filed with the Court concurrently herewith, and respectfully represents:

JURISDICTION

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012. Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (“**Bankruptcy Rules**”), to the entry of a final order by the Bankruptcy Court in connection with this Motion to the extent that it is later determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are 11 U.S.C. §§ 105(a), 363(b), 507(a)(8), and 541 (11 U.S.C. § 101 *et seq.*, “**Bankruptcy Code**”), Bankruptcy Rules 6003 and 6004.

4. The statutory bases for the relief requested herein are sections of the Bankruptcy Code, and Rules of the Bankruptcy Rules.

BACKGROUND

5. On March 26, 2021, Debtors filed voluntary Petitions (“**Petition Date**”) for relief under Subchapter V of Chapter 11 of the Bankruptcy Code. Under sections

1107(a) and 1108 of the Bankruptcy Code, Debtors are authorized and intend to continue to operate their businesses as a debtors-in-possession. No trustee has been appointed in these cases.

6. Debtors sell Geox branded footwear and apparel through wholesale and ecommerce distribution channels and at two retail locations in New York and Florida. Due to the worldwide COVID-19 pandemic, the retail locations closed pursuant to government-mandated shutdowns. One remains closed. The other, upon reopening, saw significantly decreased foot traffic. Debtors' wholesale relationships suffered similar declines. Debtors filed for bankruptcy relief in order to restructure their debt and operations, focus efforts on expanding their ecommerce footprint, and adjust their wholesale approach to emerge as a stronger and streamlined operation. A more fulsome description of the companies, their operations, capital and debt structure, and the events leading to these filings is set forth in the First Day Declaration.

RELIEF REQUESTED

7. Debtors seek entry of the Proposed Order authorizing, but not directing, Debtors to pay certain accrued and outstanding prepetition taxes and fees, including any obligations subsequently determined upon audit or otherwise to be owed for the prepetition period. Debtors estimate the total taxes and fees to be paid pursuant to this Motion to be \$7,000. Debtors also request authority for their financial institutions to rely on Debtors' direction to pay amounts authorized under this Motion. Debtors request authority, in their discretion, to settle some or all of the

prepetition tax or fees claims for less than the face amount without further notice or need for a hearing.

DEBTORS' TAX OBLIGATIONS

8. In the ordinary course of business, Debtors collect, incur, and pay to various federal, state, and local governmental units (collectively, "**Taxing Authorities**"), among other taxes, sales taxes, use taxes, annual report and licensing fees, personal and real property taxes, and various other governmental taxes, fees, and assessments (collectively, "**Taxes and Fees**"). A schedule identifying the Taxing Authorities is attached hereto as **Exhibit B**. These Taxes and Fees are paid via check or electronic transfers processed through the financial institutions at which Debtor maintains its bank accounts.

9. Debtors estimate (forecasting based on February 2021 sales as final March sales data is not yet available) that they owe approximately \$7,000 in Taxes and Fees as of the Petition Date, all of which are in the nature of sales taxes to various state taxing authorities. Debtors request authority, but not direction, to pay these amounts and any additional amounts owed on account of taxes and fees that may become due and owing in the ordinary course of business during the chapter 11 cases.

10. To the best of Debtors' knowledge, there are no other prepetition tax obligations outstanding. However, out of an abundance of caution, should future audits or investigations uncover additional prepetition Taxes and Fees assessed against Debtors, Debtors seek authority, but not direction, to pay such obligations as they arise or become known.

11. The relief sought is appropriate for Debtors to avoid disruption to their businesses. Failure to pay taxes could result in Debtors' inability to conduct business in certain jurisdictions, or lead to audits or suspension of operations, liens against Debtors' assets, or motions by the Taxing Authorities seeking stay relief, causing delay and incurring administrative expense fees for Debtors. Additionally, unpaid Taxes and Fees could result in penalties and interest, negatively impacting the business and estate. Moreover, many of the Taxes and Fees collected are in the nature of "trust fund" taxes, collected and held by Debtors for the benefit of the applicable Taxing Authority. These funds may not constitute property of Debtors' estates, and nonpayment could subject Debtors' officers and directors to personal liability, diverting their attention from the continued operation of the business at this crucial juncture. Debtors therefore seek authority, but not direction, to pay the Taxes and Fees in the ordinary course of business.

BASIS FOR RELIEF

12. Section 507(a)(8) of the Bankruptcy Code provides for priority status for certain governmental tax-related claims. As such certain of the Taxes and Fees may be entitled to priority status and must be paid in full for a plan of reorganization to be confirmed under section 1129(a)(9)(C) of the Bankruptcy Code. Such priority tax claims may also include penalties assessed for nonpayment, further diminishing estate assets. *See*, 11 U.S.C. § 507(a)(8)(G) (granting priority status to certain tax penalties). Granting authority to pay such taxes provides the Taxing Authorities with no more than they would otherwise be entitled to under a plan of reorganization, and

will not prejudice—but may benefit by avoiding penalties and fees—rights of junior classes of creditors.

13. Additionally, as stated above, some of the Taxes and Fees may constitute “trust fund” type obligations collected by Debtors from third parties and held in trust for the Taxing Authorities. *See, e.g.*, I.R.C. § 7501 (taxes collected and payable to the United States are held in trust); *see also, DeChiaro v. N.Y. State Tax Comm’n*, 760 F.2d 432, 433–34 (2d Cir.1985) (sales tax required to be collected by sellers from customers is “trust fund” tax); *In re Calabrese*, 689 F.3d 312 (3d Cir. 2012) (sales tax required to be collected by sellers from their customers is a “trust fund” tax and not released by bankruptcy discharge). Such “trust fund” taxes are not property of Debtor’s estate under section 541 of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 541(d); *Begier v. IRS*, 496 U.S. 53, 57–60 (1990) (finding trust fund taxes are not the debtor’s property); *DeChiaro v. N.Y. State Tax Comm’n*, 760 F.2d 432, 435–36 (2d Cir. 1985); *Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.)*, 997 F.2d 1039, 1051 (3d Cir. 1993) (noting refunds required to be collected by federal law created trust fund that was not property of debtor’s estate); *In re Shank*, 792 F.2d 829, 833 (9th Cir. 1986) (sales tax required to be collected by sellers from their customers is a “trust fund” tax and not released by bankruptcy discharge). As such, Debtors have no equitable interest in the “trust fund” taxes and should be permitted to pay those funds to the Taxing Authorities.

14. Section 363(b) of the Bankruptcy Code also allows bankruptcy courts to authorize payment of prepetition obligations where there exists a sound business purpose. *See, In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989). *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (“Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.”).

15. Authority for payment of prepetition obligations may also derive from section 105(a) of the Bankruptcy Code, which allows bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Courts have relied on this section to authorize payments of prepetition obligations when essential to the continued operation of a debtor’s business. *See, In re Lehigh & New Eng. Ry.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that a court may authorize payment of prepetition claims if such payment is essential to a debtor’s continued operation); *see also, Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting courts routinely authorize payment of prepetition debt as necessary for the debtors to reorganize and maximize the value of the estate).

16. Finally, bankruptcy courts are permitted to authorize payment of prepetition claims pursuant to the “doctrine of necessity,” where such payment is critical to the continued operation of debtor’s business. *See, In re Ionosphere Clubs*,

Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); *see also, In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (recognizing the “doctrine of necessity”).

17. Debtors here seek authority to pay the Taxes and Fees as doing so is necessary for an efficient and successful reorganization, and to maximize the value of the estates for the benefit of Debtors and their creditors. Failure to pay the Taxes and Fees could result in Debtors’ failure to maintain good standing in certain states and resultant hindrance or inability to operate their businesses, diversion of estate and management resources, and/or depletion of estate assets through increased administrative fees and additional tax liability resulting in higher priority claim amounts. Authority, but not direction, to pay the Taxes and Fees pursuant to Bankruptcy Code sections 105(a) and 363(b) and the doctrine of necessity should be granted to avoid disruption and preserve the value of the estate.

18. Similar relief to that requested in the Motion has been granted in other chapter 11 cases in this and other jurisdictions. *See, e.g., In re Furla (U.S.A.), Inc.*, Case No. 20-12604 (SCC) (Bankr. S.D.N.Y. Nov. 12, 2020); *In re NTS W. USA Corp., a Delaware Corporation*, Case No. 20-35769 (CGM) (Bankr. S.D.N.Y. July 28, 2020); *In re Centric Brands Inc.*, Case No. 20-22637 (SHL) (Bankr. S.D.N.Y. June 10, 2020); *In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD) (Bankr. S.D.N.Y. Apr. 22, 2019); *In re Sears Holdings Corp.*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y. Nov. 16, 2018); *In re Walter Inv. Mgmt.*, Case No. 17-13446 (JLG) (Bankr. S.D.N.Y. Dec. 28, 2017).

19. Debtors also request that all banks and financial institutions be authorized and directed to honor and process payments on account of the Taxes and Fees. Debtors represent they have sufficient funds to pay the Taxes and Fees in the ordinary course of business, and the payment-processing procedures described herein are appropriate.

RELIEF IS AUTHORIZED UNDER BANKRUPTCY RULE 6003

20. Under Bankruptcy Rule 6003, a motion to “use, sell, lease, or otherwise incur an obligation regarding property of the estate,” including a motion to pay all or part of a claim that arose before the filing of the petition (other than a motion filed under Rule 4001) shall not be granted within 21 days of the petition date except to the extent that relief is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003.

21. As set forth in this Motion, Debtors believe an immediate and orderly transition into chapter 11 is critical to the viability of their operations and that any delay in granting the relief requested could severely disrupt Debtors’ operations at this critical juncture and imperil their restructuring, causing irreparable harm. Moreover, this relief is being sought in the context of a subchapter V bankruptcy case, which is an accelerated bankruptcy process. The Code does not contemplate the appointment of a committee of creditors in this type of case and requires Debtors to file a plan of reorganization (“**Plan**”) within 90 days of the Petition Date. As stated in the First Day Declaration, Debtors intend to file a Plan much sooner than the Code’s deadline. Accordingly, Debtors submit that it has satisfied the “immediate and

irreparable harm” standard of Bankruptcy Rule 6003 to support granting the relief requested herein in a final order.

REQUEST FOR WAIVER OF BANKRUPTCY RULES 6004(A) AND 6004(H)

22. To implement the foregoing successfully, Debtors respectfully request that the Court enter an order finding that notice has been sufficient under Bankruptcy Rule 6004(a), and waiving the 14-day stay imposed by Bankruptcy Rule 6004(h). A sufficient business need to close a transaction within the 14-day period is cause to waive the stay under Rule 6004(h). *In re Borders Grp., Inc.*, 453 B.R. 477, 486 (Bankr. S.D.N.Y. 2011).

NOTICE

23. Debtors will provide notice of this Motion to the following parties and/or their respective counsel, as applicable: (i) the Office of the United States Trustee for the Southern District of New York, (ii) the Subchapter V trustee, (iii) Debtors’ 20 largest unsecured creditors on a consolidated basis; (iv) the Taxing Authorities; (v) the Office of the United States Attorney for the Southern District of New York; (vi) the banks and financial institutions where Debtors maintain accounts; and (vii) any such other party entitled to notice pursuant to Rule 9013–1(b) of the Local Bankruptcy Rules for the Southern District of New York or that requests notice pursuant to Bankruptcy Rule 2002. Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

RESERVATION OF RIGHTS

24. Nothing contained herein or any actions taken pursuant to such relief requested is intended to or should be construed as (a) an admission as to the validity of any prepetition claim against Debtors, (b) a waiver of Debtors' or any other party in interest's right to dispute any prepetition claim on any grounds, (c) a promise or requirement to pay any prepetition claim, (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion, (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, (f) a waiver of Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law, or (g) a concession by Debtors that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the relief requested in this Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of Debtor's rights to subsequently dispute such claim.

LOCAL RULE 9013-1(a) STATEMENT

25. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of

their application to this Motion. Accordingly, Debtors submit that this Motion satisfies Local Rule 9013–1(a).

NO PRIOR REQUEST

26. No prior request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, Debtors respectfully request entry of an Order substantially in the form attached as **Exhibit A**, granting the relief requested herein, and granting such other and further relief as is just and proper.

New York, New York
March 26, 2021

/s/ Joseph T. Moldovan
Joseph T. Moldovan
David J. Kozlowski
MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
Telephone: 212-735-8600
Facsimile: 212-375-8708
jmoldovan@morrisoncohen.com
dkozlowski@morrisoncohen.com

*Proposed Counsel for Debtors and
Debtors-in-Possession*

EXHIBIT A
(Proposed Order)

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

S & A RETAIL, INC., *et al.*¹

Debtors.

Chapter 11
(Subchapter V)

Case No. 21-22174 (RDD)

(Joint Admin. Requested)

**ORDER (I) AUTHORIZING THE PAYMENT OF CERTAIN PREPETITION
TAXES AND FEES AND (II) GRANTING RELATED RELIEF**

Upon the motion (“**Motion**”)² of the above-captioned debtors and debtors-in-possession (“**Debtors**”) for entry of an order (“**Order**”), (i) authorizing, but not directing, Debtors to remit and pay certain prepetition taxes and fees that will become payable during the pendency of these chapter 11 cases in the ordinary course of business, and (ii) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b), and (iv) notice of the Motion and the Hearing was sufficient under the circumstances; and that this Court may enter an order consistent with Article III of the United States Constitution; and after due deliberation the Court having

¹ The Debtors in these Chapter 11 Cases are S & A Distribution, Inc. (“**Distribution**”) and S & A Retail, Inc. (“**Retail**”). The last four digits of the Debtors’ federal tax identification numbers are: Distribution – 5366 and Retail – 1261. The Debtors’ mailing address is 334 S Buckhout St., Irvington, NY 10533.

² Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

determined that the relief requested in the Motion is in the best interests of Debtor, its estate and its creditors; and good and sufficient cause having been shown;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Debtors are authorized, but not directed to: (a) pay or remit the Taxes and Fees to the Taxing Authorities that accrued prior to the Petition Date and that are or will become payable in the ordinary course during the pendency of these chapter 11 cases at such time when the Taxes and Fees are payable, including any Assessments; and (b) pay Taxes and Fees that arise or accrue in the ordinary course of business on a postposition basis. All payments made pursuant to this Order will be paid in the ordinary course and not accelerated in any manner.
3. Before payment on account of any prepetition amounts not specifically contemplated in the Motion, Debtors will provide at least five days' notice to the U.S. Trustee and subchapter V Trustee before making such payment.
4. Notwithstanding the relief granted in this Order and actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the validity of any claim against either Debtor; (b) a waiver of the Debtors' right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of Debtors' rights under the Bankruptcy Code or any other applicable law;

or (g) a concession by Debtors that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the Motion are valid, and Debtors expressly reserved their rights to contest the extent, validity, or perfection or seek avoidance of such liens.

5. The banks and financial institutions on which checks were drawn or electric payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such check and electronic payment requests when present for payment, and all such banks and financial institutions are authorized to rely on Debtors' designation of any particular check or electronic payment request as approved by this Order.

6. Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with any Taxes and Fees.

7. This Order shall be immediately effective and enforceable upon its entry.

8. Notice is sufficient under Bankruptcy Rule 6004(a).

9. The fourteen-day stay imposed by Bankruptcy Rule 6004(h) is hereby waived.

10. Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

11. This Court retains jurisdiction over all matters arising from or related to the implementation or interpretation of this Order.

Dated: _____, 2021
New York, New York

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

(Taxes and Fees)

Taxing Authority	Purpose	Estimated Prepetition Amount¹
Florida Department of Revenue	Sales Tax	\$5,000.00
Illinois Department of Revenue	Sales Tax	\$1,000.00
Comptroller of Maryland	Sales Tax	\$500.00
NYS Sales Tax Processing	Sales Tax	\$500.00

¹ Estimates for sales tax are estimated for the period of March 1st through March 26th and are based on payments made on account of sales tax collected in February.