

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
AVADIM HEALTH, INC., et al., ¹)	Case No. 21-10883 (___)
)	
Debtors.)	(Joint Administration Requested)
)	

**DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS
AUTHORIZING THE PAYMENT OF PREPETITION TAXES AND FEES**

The above-captioned debtors and debtors-in-possession (the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), hereby file this motion (the “Motion”) seeking entry of an interim order (the “Interim Order”) and a final order (the “Final Order”), substantially in the forms attached to this Motion as **Exhibit A** and **Exhibit B**, pursuant to sections 105(a), 507(a)(8), and 541(d) of title 11 of the United States Code (the “Bankruptcy Code”) authorizing, but not directing, the Debtors to pay certain prepetition taxes, assessments, fees, and other charges in the ordinary course of business, including any such taxes, assessments, fees, and charges subsequently determined upon audit to be owed (collectively, the “Taxes and Fees”), in their sole discretion, and as they deem necessary. In support of the Motion, the Debtors respectfully states as follows:

¹ The Debtors, along with the last four (4) digits of each Debtor’s federal tax identification number are: Avadim Health, Inc. (8411); Avadim Health IP, Inc. (7594); Bionome Properties Corp. (6483); Quality Assurance Associates, Inc. (5613); and Relion Manufacturing, Inc. (0430). The Debtors’ business address is 81 Thompson Street, Asheville, NC 28803.

Jurisdiction

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over 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 District of Delaware*, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Debtors confirm their consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

3. The statutory bases for the relief sought herein are sections 105(a), 507(a)(8), and 541(d) of the Bankruptcy Code.

Background

4. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in the Debtors’ chapter 11 cases, and no committees have been appointed or designated.

5. Founded in 2007, Avadim Health, Inc. (collectively referred to herein with its Debtor affiliates as the “Company”) is a vertically integrated healthcare and wellness company that sells topical products that improve neuromuscular health and skin barrier health, and are a key element of hospital infection prevention bundles. Avadim has commercialized a number of products primarily under two brand families: Theraworx Protect, which targets institutional care and community health, and Theraworx Relief, marketed through retail pharmacies. As of the end of 2019, the Company’s products were used in approximately 300 acute care hospitals, 850 nursing homes and other long-term care facilities, and were available in more than 49,000 pharmacy locations worldwide. The Company maintains its own research and development, manufacturing and commercialization infrastructure, and is strategically positioned to take advantage of several emerging trends in healthcare: antibiotic stewardship, negativity around opioids, consumerization of healthcare and growth in self-care. The Company’s products are designed to take advantage of the increasing desire for easily accessible, self-directed care, with options that are safe and easy to use.

6. The factual background regarding the Debtors, including their current and historical operations and the events precipitating the chapter 11 filing, is set forth in detail in the *Declaration of Keith Daniels, Chief Restructuring Officer of the Debtors, in Support of the Debtors’ Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”)² filed concurrently herewith and fully incorporated herein by reference.

² Capitalized terms not otherwise defined in this Motion shall have the meaning given to them in the First Day Declaration.

The Debtors' Tax Obligations

7. In the ordinary course of business, the Debtors collect, withhold and incur an assortment of Taxes and Fees that they remit periodically to various federal, state, and local taxing, licensing, regulatory, and other governmental authorities (collectively, the "Taxing Authorities"). The Taxes and Fees generally fall into the following categories, each of which is discussed in more detail below: (a) Sales and Use Taxes, (b) Income and Franchise Taxes, (c) Personal Property Taxes, and (d) Other Taxes and Fees (each as defined below). The Taxes and Fees are paid to the respective Taxing Authorities either monthly, quarterly, or annually.

8. The Debtors seek to pay certain Taxes and Fees to, among other things, prevent Taxing Authorities from taking actions that may interfere with the Debtors' administration of their chapter 11 cases. Such interference could include bringing personal liability actions against directors, officers, and other key employees, asserting liens on the Debtors' property, or assessing penalties or significant interest on past-due taxes. In addition, non-payment of the Taxes and Fees may give rise to priority claims pursuant to section 507(a)(8) of the Bankruptcy Code. Further, the Debtors believe that many of the Taxes and Fees collected prepetition are not property of the Debtors' estates, but rather are held in trust for the Taxing Authorities. Failure to pay the Taxes and Fees could have a material adverse impact on the Debtors' ability to operate in the ordinary course of business, and, accordingly, the relief requested herein is in the best interest of the Debtors' estates.

9. The amounts of the Debtors' accrued and unpaid Taxes and Fees are summarized in the chart below:

Category	Approximate Prepetition Amounts Due as of the Petition Date
Sales and Use Taxes	\$10,000
Franchise and Income Taxes	\$0
Personal Property Taxes	\$0
Other Taxes and Fees	\$500
Total:	\$10,500

A. Sales and Use Taxes

10. The Debtors incur or collect from customers a variety of state and local sales taxes, gross receipts taxes, and similar obligations in connection with the sale of their products within those states or localities (collectively, the “Sales Taxes”). Sales Taxes are essentially general consumption taxes charged at the point of purchase for certain goods and services, which taxes usually are established by the applicable Taxing Authorities as a percentage of the retail price of the good or service purchased.

11. The Debtors incur use taxes on account of the purchase of various supplies or other goods utilized by the Debtors in the ordinary course of business (collectively, the “Use Taxes” and, together with Sales Taxes, “Sales and Use Taxes”). Use Taxes typically arise if a supplier does not have business operations in the state in which it is supplying goods and, therefore, does not charge sales tax on goods that are otherwise taxable to the purchaser. As a general matter, the Debtors are required to remit Sales and Use Taxes to the applicable Taxing Authorities monthly, quarterly, or annually, depending on the jurisdiction of the relevant Taxing Authorities. On average, the Debtors remit approximately \$10,000 per month in aggregate Sales

and Use Taxes. The Debtors estimate that, as of the Petition Date, they have accrued approximately \$10,000 in prepetition Sales and Use Taxes.

B. Franchise and Income Taxes

12. The Debtors incur franchise and income taxes assessed by certain Taxing Authorities to operate their businesses in the applicable jurisdiction (“Franchise Taxes”), which are remitted by the Debtors on an annual or quarterly basis.³ Franchise Taxes vary by jurisdiction and may be based on a flat fee, net operating income, gross receipts, or capital employed. In connection with Franchise Taxes, the Debtors are required to make payments for amounts due to certain states and localities that require the Debtors to pay income or corporate taxes, including gross receipts taxes (“Income Taxes,” and together with the Franchise Taxes, the “Franchise and Income Taxes”). Generally, most Income Taxes are calculated as a percentage of net income (i.e., the difference between gross receipts and expenses, after accounting for additional write-offs).

13. In fiscal year 2020, the Debtors remitted approximately \$170,000 in aggregate Franchise and Income Taxes. The Debtors estimate that, as of the Petition Date, they do not have any accrued prepetition Franchise and Income Taxes.

C. Property Taxes

14. State and local laws in the jurisdictions in which the Debtors operate generally grant Taxing Authorities the power to levy property taxes against the Debtors’ personal

³ For example, the Debtors anticipate paying quarterly Delaware franchise tax fees that will come due postpetition on June 1, 2021, in the amount of approximately \$41,000.

property (the “Personal Property Taxes”) and against the Debtors’ real property (the “Real Property Taxes”). To avoid the imposition of statutory liens on their personal property, the Debtors typically pay property taxes in the ordinary course of business on an annual basis. On average, the Debtors pay approximately \$40,000 in aggregate Personal Property Taxes on an annual basis on account of, among other things, fixtures, furniture, and general supplies and inventory, and the Debtors pay approximately \$800 to \$1000 in Real Property Taxes for certain land owned by Debtor Bionome Properties, Inc. The Debtors do not believe they have any accrued and outstanding Personal Property Taxes or Real Property Taxes owed as of the Petition Date or that will become due within the first 21 days of the Chapter 11 Cases.

D. Other Taxes and Fees

15. State and local laws require the Debtors to pay fees for a wide range of licenses, permits, obligations related to unclaimed property and other assessments required to conduct the Debtors’ business (“Other Taxes and Fees”). These Other Taxes and Fees include (a) license, permit renewal, and inspection fees for facilities and (b) balances for unclaimed property. The methods for calculating Other Taxes and Fees and the deadlines for paying such amounts vary by jurisdiction.

16. In the twelve months preceding the Petition Date, the Debtors remitted approximately \$29,000 in aggregate Other Taxes and Fees to the applicable Taxing Authorities. As of the Petition Date, the Debtors estimate that they have accrued approximately \$500 in aggregate Other Taxes and Fees.

Relief Requested

17. By this Motion, the Debtors seek entry of an order pursuant to sections 105(a), 507(a)(8), and 541(d) of the Bankruptcy Code, authorizing the Debtors to pay any Sales and Use Taxes, Franchise and Income Taxes, Personal Property Taxes, and Other Taxes and Fees (collectively, the “Prepetition Tax Obligations”) to the respective Taxing Authorities or to the parties who ordinarily collect the Prepetition Tax Obligations in the ordinary course of the Debtors’ businesses, including, without limitation, Taxes and Fees determined on audit to be owed for periods prior to the Petition Date. The Debtors seek authority to remit Prepetition Tax Obligations in an aggregate amount (excluding amounts paid prepetition by checks that have not yet cleared⁴ and amounts that may be subsequently determined on audit to be owed a particular Taxing Authority or party who ordinarily collect the Prepetition Tax Obligations) not to exceed \$20,000 (the “Interim Prepetition Tax Obligations Cap”) on an interim basis, and not to exceed \$20,000 (the “Final Prepetition Tax Obligations Cap”) on a final basis, without prejudice to the Debtors’ rights to contest the amounts of any Prepetition Tax Obligations on any grounds they deem appropriate.⁵

18. The Debtors also request that all banks and other financial institutions on which checks to third parties are drawn and/or electronic payments are made pursuant to this Motion be authorized to receive, process, honor, and pay any and all such checks (whether issued

⁴ The Debtors request authority to reissue any amounts paid by check prepetition that have not cleared as of the Petition Date and are dishonored.

⁵ Nothing in this Motion shall be deemed to constitute an admission to any asserted liability or obligation with respect to any Tax. The Debtors reserve any and all rights to contest any Tax asserted against them by any Taxing Authority.

or presented prior to or after the Petition Date) and electronic payments, and to rely on the representations of the Debtors as to which checks are authorized to be paid.⁶

Basis for Relief

19. The Court should grant the relief requested herein because: (a) portions of the Prepetition Tax Obligations are not property of the estate; (b) portions of the Prepetition Tax Obligations are entitled to priority status pursuant to section 507(a)(8) of the Bankruptcy Code; (c) the Taxing Authorities or the parties who ordinarily collect the Prepetition Tax Obligations may file liens, initiate audits, or otherwise proceed against Debtors for unpaid Prepetition Tax Obligations and such actions will result in unnecessary expense and distraction from the Debtor's efforts to maximize the value of their estates; and, (d) section 105(a) of the Bankruptcy Code and the Court's general equitable powers permit the Court to grant such relief.

A. Certain of the Taxes Are Not Property of the Debtors' Estates

20. The Debtors' payment of the Prepetition Tax Obligations, though arguably a payment of a prepetition claim, is justified in large part because certain of these amounts are not property of the Debtors' estates pursuant to section 541(d) of the Bankruptcy Code. Specifically, section 541(d) of the Bankruptcy Code provides, in relevant part, that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to

⁶ Contemporaneously herewith, the Debtors have filed a motion seeking authority to continue to utilize their cash management system (the "Cash Management Motion"). Details regarding accounts used by the Debtors to pay all obligations in the ordinary course, including taxes, are described in the Cash Management Motion.

the extent of the debtors' legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d) (emphasis added).

21. Consistent with section 541(d) of the Bankruptcy Code, courts have held that certain types of taxes are not part of a debtor's estate. *See, e.g., Begier v. Internal Revenue Serv.*, 496 U.S. 53, 57-60 (1990) (holding that any prepetition payment of trust fund taxes is not a transfer subject to avoidance because such funds are not the debtor's property); *DuCharmes & Co., Inc. v. Mich. (In re DuCharmes & Co.)*, 852 F.2d 194 (6th Cir. 1988) (per curiam) (same); *Shank v. Wash. State Dept. of Revenue (In re Shank)*, 792 F.2d 829, 833 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is a "trust fund" tax and not released by bankruptcy discharge); *DeChiaro v. New York State Tax Comm'n*, 760 F.2d 432, 435-36 (2d Cir. 1985) (same); *Rosenow v. Ill. Dept. of Revenue (In re Rosenow)*, 715 F.2d 277, 279-82 (7th Cir. 1983) (same); *Western Surety Co. v. Waite (In re Waite)*, 698 F.2d 1177, 1179 (11th Cir. 1983) (same).

22. Here, the Sales and Use Taxes constitute amounts held in trust, which the Debtors are required to collect and/or hold in trust for payment to the Taxing Authorities. To the extent these Sales and Use Taxes constitute "trust fund" taxes, they are not property of the Debtors' estates under section 541(d) of the Bankruptcy Code. *See In re Am. Int'l Airways, Inc.*, 70 B.R. 102, 104-05 (Bankr. E.D. Pa. 1987); *In re Dameron*, 155 F.3d 718, 721-22 (4th Cir. 1998) (funds from various lenders held by closing agent in trust for designated third parties not property of debtor's estate). Given that the Debtors do not have an equitable interest in such

Sales and Use Taxes, the Debtors should be permitted to remit these Sales and Use Taxes to the Taxing Authorities as they become due, irrespective of the commencement of these cases.

B. Payment of the Taxes Will Avoid Unnecessary Distractions

23. Any regulatory dispute or delinquency that impacts the Debtors' ability to conduct business in a particular jurisdiction could have a wide-ranging and adverse effect on the Debtors' operations as a whole. Specifically, the Debtors' failure to remit the Prepetition Tax Obligations could adversely affect the Debtors' remaining business operations because, among other things (a) the Taxing Authorities could initiate audits of the Debtors or prevent the Debtors from continuing its business and administering its estate, which, even if unsuccessful, would unnecessarily divert the Debtors' attention from the process of maximizing the value of their estates; (b) the Taxing Authorities could attempt to suspend the Debtors' operations, file liens, seek to lift the automatic stay and pursue other remedies that will harm the estates; (c) some of the Taxing Authorities may seek to collect penalties, cancel franchises or other licenses, or undertake other unfavorable enforcement actions if the Debtors do not pay the Franchise Taxes; and (d) certain directors, officers and employees might be subject to personal liability - even if such a failure to remit such Prepetition Tax Obligations was not a result of malfeasance on their part -- which would undoubtedly distract these key employees from their duties. In fact, the Taxing Authorities may take such actions regardless of this chapter 11 filing. *See, e.g.*, 11 U.S.C. §§ 362(b)(9) (permitting tax audits and assessments) and 362(b)(18) (allowing creation or perfection of liens for property taxes).

24. Accordingly, the Debtors respectfully requests the authority to remit the Taxes as they become due to ensure that they remain focused on maximizing the value of their estates for the benefit of their creditors.

C. Certain of the Prepetition Tax Obligations May Constitute Priority Claims

25. The Debtors submit that authorizing the payment of the Prepetition Tax Obligations is in the best interests of their creditors and estates because substantially all of the Prepetition Tax Obligations constitute priority claims that will be paid in full in the Debtors' bankruptcy cases. Accordingly, the proposed relief will only affect the timing of the payment of the Prepetition Tax Obligations and not whether such amounts will be paid. As such, payment of the Prepetition Tax Obligations will not prejudice the rights of general unsecured creditors or other parties in interest.

26. Moreover, to the extent that such claims are entitled to priority treatment under section 507(a)(8)(B) of the Bankruptcy Code, the respective Taxing Authorities may attempt to assess interest and penalties. *See* 11 U.S.C. § 507(a)(8)(G) (granting eighth priority status to "a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss").

27. In sum, payment of the Prepetition Tax Obligations is in the best interest of the Debtors and their estates, will not harm unsecured creditors and other parties in interest, and will reduce harm and administrative expense to the Debtors' estates.

28. Similar relief is routinely granted by courts in this district and elsewhere. *See, e.g., In re GNC Holdings, LLC*, Case No. 20-11662 (KBO) (Bankr. D. Del. July 20, 2020)

(authorizing debtors to pay prepetition taxes and fees in the ordinary course of business); *In re Blackhawk Mining LLC*, Case No. 19-11595 (LSS) (Bankr. D. Del. Aug. 9, 2019) (same); *In re Z Gallerie, LLC*, Case No. 19-10488 (LSS) (Bankr. D. Del. Apr. 9, 2019) (same); *In re Things Remembered, Inc.*, Case No. 19-10234 (KG) (Bankr. D. Del. Feb. 26, 2019) (same); *In re ATD Corp.*, Case No. 18-12221 (KJC) (Bankr. D. Del. Oct. 24, 2018) (same); *In re VER Technologies Holdco LLC*, Case No. 18-10834 (KG) (Bankr. D. Del. May 4, 2018) (same).

D. Payment of the Taxes Is Warranted Under the Doctrine of Necessity

29. Courts generally acknowledge that, under appropriate circumstances, they may authorize a debtor to pay (or provide special treatment for) certain prepetition obligations. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824-25 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor’s business); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (granting the debtor the authority to pay prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 398 (Bankr. S.D.N.Y. 1983) (granting the debtor the authority to pay prepetition claims of suppliers who were potential lien claimants). When authorizing payments of certain prepetition obligations, courts have relied upon several legal theories rooted in sections 105(a) and 363(b) of the Bankruptcy Code.

30. Consistent with a debtor’s fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to “articulate some business justification, other than the mere appeasement of major creditors,” courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy

Code. *See, e.g., In re Ionosphere Clubs, Inc.* 98 B.R. at 175 (finding that a sound business justification existed to pay prepetition wages); *In re James A. Phillips, Inc.*, 29 B.R. at 397 (relying upon section 363 as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants).

31. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court 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). Under section 105(a) of the Bankruptcy Code, courts may permit payments of prepetition obligations when such payments are essential to the continued operation of the debtor’s business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. *See In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization); *Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

32. In addition to the authority granted to a debtor-in-possession under sections 105(a) and 363(b) of the Bankruptcy Code, courts have developed the “doctrine of necessity” or the “necessity of payment” rule, which originated in the landmark case of

Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286 (1882). Since *Miltenberger*, courts have expanded their application of the doctrine of necessity to cover instances of a debtor's reorganization, see *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization matter, that the court was not "helpless" to apply the rule to supply creditors where the alternative was the cessation of operations), including the United States Court of Appeals for the Third Circuit, which recognized the doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981).

33. In *Lehigh*, the United States Court of Appeals for the Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating that a court may authorize payment of prepetition claims when there "is the possibility that the creditor will employ an immediate economic sanction, failing such payment"); see also *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the necessity of payment doctrine permits "immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid"); *In re Just for Feet, Inc.*, 242 B.R. at 824-25 (noting that debtors may pay prepetition claims that are essential to continued operation of business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (same).

34. The necessity of payment doctrine is designed to foster the rehabilitation of a debtor in reorganization cases, which courts have recognized is "the paramount policy and goal of Chapter 11." *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *Just For Feet*, 242 B.R. at 826

(finding that payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization.”); *see also In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code”, but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (finding that it is appropriate to provide for the “unequal treatment of pre-petition debts when [such treatment is] necessary for rehabilitation”); 3 COLLIER ON BANKRUPTCY ¶ 105.04[5][a] (15th ed. rev. 2004) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately).

35. Here, the Debtors’ payment of the Prepetition Tax Obligations is an exercise of sound business judgment and is necessary to maximize the value of the Debtors’ estate for the benefit of their creditors. Disputes with the Taxing Authorities could have negative effects on the Debtors’ efforts to efficiently administer their chapter 11 cases and maximize the value of their estates. If the Debtors do not continue paying the Prepetition Tax Obligations when they come due on a timely basis, it is very possible that Taxing Authorities or those parties

who ordinarily collect the Prepetition Tax Obligations may seek to interfere with the Debtors' businesses and the efficient administration of the estates.

E. Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers

36. In connection with the payment of the Prepetition Tax Obligations, the Debtors also request that all applicable banks and other financial institutions be authorized to receive, process, honor, and pay all checks presented for payment, and to honor all electronic payment requests made by the Debtors related to the prepetition obligations described herein, whether such checks were presented or electronic requests were submitted prior to or after the Petition Date. The Debtors further request that all such banks and financial institutions be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion. The Debtors intend to pay all tax and regulatory obligations in a timely manner, in accordance with their ordinary business practice, and as authorized by the orders approving this Motion.

37. The Debtors have made or will make arrangements to readily identify checks or wire transfer requests as relating to an authorized payment in respect of the Prepetition Tax Obligations. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested herein.

Satisfaction of Bankruptcy Rule 6003

38. The Debtors believe that they are entitled to immediate authorization for the relief contemplated by this Motion. Pursuant to Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following: . . . (b) 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, but not a motion under Rule 4001.” To the extent that the requirements of Bankruptcy Rule 6003 are applicable to the relief requested in the Motion, the Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm. Specifically, if the Prepetition Tax Obligations are not paid, the Debtors will be at risk for the business disruptions that would result from, among other things, (i) any liability of the directors and officers for failures to remit the “trust fund” Taxes, (ii) the administrative disruption of unnecessary local audits, and (iii) any operational disruptions or challenges to the Debtors’ right to operate within certain jurisdictions where the Prepetition Tax Obligations were not paid. Addressing any potential subsequent action taken by those Taxing Authorities or those parties who ordinarily collect the Prepetition Tax Obligations would be costly, would place an administrative burden on management, and divert management’s attention from the restructuring process. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rule 6003.

Reservation of Rights

39. Nothing contained herein is intended or shall be construed as (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (iii) a waiver of any claims or causes of action that may exist against any creditor or interest holder; or (iv) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be, and should not be construed as, an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

Waiver of Bankruptcy Rule 6004

40. The Debtors seek a waiver of any stay of the effectiveness of any order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." As set forth in the Motion, the payments proposed herein are essential to prevent immediate and irreparable harm to the Debtors' business operations. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

Notice

41. Notice of this Motion shall be given to the following parties: (a) the Office of the United States Trustee; (b) counsel to the Debtors' prepetition and postpetition secured lenders; (c) the Taxing Authorities; and (d) the Debtors' thirty-five largest unsecured creditors on a consolidated basis. As the Motion is seeking "first day" relief, within two business days after the hearing on the Motion, the Debtors will serve copies of the Motion and any order entered respecting the Motion as required by Del. Bankr. LR 9013-1(m). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

42. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors request entry of the proposed Interim Order and Final Order, pursuant to sections 105(a), 507(a)(8), and 541(d) of the Bankruptcy Code, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, (a) authorizing the Debtors to pay the Prepetition Tax Obligations, in its sole discretion, as it deems necessary; (b) authorizing financial institutions to receive, process, honor, and pay all checks issued, and electronic payment requests made, related to the foregoing; and (c) granting such other and further relief as is just and proper.

Dated: May 31, 2021

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Proposed Counsel for the Debtors and Debtors in Possession

EXHIBIT A

Proposed Interim Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
AVADIM HEALTH, INC., et al., ¹)	Case No. 21-10883 (___)
Debtors.)	(Joint Administration Requested)
)	

**INTERIM ORDER PURSUANT TO SECTIONS 105(a), 507(a)(8), AND 541(d) OF THE
BANKRUPTCY CODE (I) AUTHORIZING THE PAYMENT OF PREPETITION
SALES, USE, FRANCHISE AND OTHER SIMILAR TAXES AND FEES**

Upon consideration of the motion (the “Motion”)² of the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), seeking entry of an interim order (this “Interim Order”), pursuant to sections 105(a), 507(a)(8), and 541(d) of the Bankruptcy Code, authorizing, but not directing, the Debtors to pay certain prepetition taxes, assessments, fees, and other charges in the ordinary course of business, including any such taxes, assessments, fees, and charges subsequently determined upon audit to be owed, in their sole discretion, and as they deem necessary, and granting certain related relief, all as more fully set forth in the Motion; and upon consideration of the First Day Declaration; and this Court having jurisdiction over 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 District of Delaware*, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and this

¹ The Debtors, along with the last four (4) digits of each Debtor’s federal tax identification number are: Avadim Health, Inc. (8411); Avadim Health IP, Inc. (7594); Bionome Properties Corp. (6483); Quality Assurance Associates, Inc. (5613); and Relion Manufacturing, Inc. (0430). The Debtors’ business address is 81 Thompson Street, Asheville, NC 28803.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at an interim hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis, as set forth herein.
2. The Debtors are authorized, but not directed, to pay the Prepetition Tax Obligations due and owing, including, without limitation, through the issuance of postpetition checks or wire transfer requests, as the Debtors, in their sole discretion, deem necessary, in an amount not to exceed \$20,000, on an interim basis.
3. The Debtors are further authorized, but not directed, to pay the Prepetition Tax Obligations, in consultation with the DIP Agent and in accordance with the Approved Budget (defined below), that are currently under review or that may be subject to review in the future, but for which no formal assessment has been made, subject in all respects to the Debtors' rights to contest any such amounts. The Debtors are authorized, in consultation with the DIP Agent, to negotiate, compromise and pay any Prepetition Tax Obligations subsequently determined to be owed for prepetition periods.

4. All payments authorized by this Interim Order may be made solely to the extent in compliance with the Approved Budget (as defined in the interim or final order authorizing the Debtors to obtain postpetition senior secured financing and related relief (the “DIP Order”)) then in effect. To the extent there is any inconsistency between the terms of this Interim Order and the DIP Order, the DIP Order shall control.

5. All applicable banks and other financial institutions are authorized to receive, process, honor, and pay any and all prepetition checks or by automated clearinghouse payment issued by the Debtors for the payment of prepetition obligations approved herein, whether prior to or after commencement of these chapter 11 cases.

6. The Debtors are authorized (consistent with this Interim Order) to issue postpetition checks or to effect postpetition automated clearinghouse requests in replacement of any checks or automated clearinghouse requests relating to taxes that were dishonored or rejected.

7. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order shall be deemed: (a) an admission as to the validity of any prepetition claim against a Debtor entity; (b) a waiver of the Debtors’ or any other party in interest’s rights to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay a prepetition claim; (d) an implication or admission that any particular claim is of a type specified or defined in the 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; or (f) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law.

8. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

10. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

11. This Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Interim Order.

12. The final hearing (the "Final Hearing") on the Motion shall be held on _____, 2021, at __:___.m., prevailing Eastern Time. Any objections or responses to entry of a final order on the Motion shall be filed on or before 4:00 p.m., prevailing Eastern Time, on _____, 2021, and shall be served on (i) the Debtors, c/o of Carl Marks Advisors, 900 Third Avenue, 33rd Floor, New York, NY 10022, Attn: Keith Daniels (kdaniels@carlmarks.com); (ii) proposed counsel for the Debtors, Chapman and Cutler LLP, 1270 Avenue of the Americas, New York, NY 10020, Attn: Larry Halperin (halperin@chapman.com), and Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box 8705, Wilmington, DE 19899-8705 (Courier 19801) Attn: Laura Davis Jones (ljones@pszjlaw.com); (iii) counsel to the Debtors' prepetition and postpetition secured lenders, (a) Weil Gotshal & Manges LLP. 767

Fifth Avenue, New York, New York 10153, Attn: David Griffiths, Esq. (david.griffiths@weil.com) and Bryan R. Podzius, Esq. (bryan.podzius@weil.com) and (b) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801, Attn: Zachary I. Shapiro (shapiro@rlf.com); (iv) counsel to any statutory committee appointed in these cases; and (v) the Office of The United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: Richard Schepacarter, Esq. (Richard.Schepacarter@usdoj.gov). In the event no objections to entry of a final order on the Motion are timely received, this Court may enter such final order without need for the Final Hearing.

EXHIBIT B

Proposed Final Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
AVADIM HEALTH, INC., et al., ¹)	Case No. 21-10883 (___)
)	
Debtors.)	(Joint Administration Requested)
)	

**FINAL ORDER PURSUANT TO SECTIONS 105(a), 507(a)(8), AND 541(d) OF THE
BANKRUPTCY CODE (I) AUTHORIZING THE PAYMENT OF PREPETITION
SALES, USE, FRANCHISE AND OTHER SIMILAR TAXES AND FEES**

Upon consideration of the motion (the “Motion”)² of the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), seeking entry of a final order (this “Final Order”), pursuant to sections 105(a), 507(a)(8), and 541(d) of the Bankruptcy Code, authorizing, but not directing, the Debtors to pay certain prepetition taxes, assessments, fees, and other charges in the ordinary course of business, including any such taxes, assessments, fees, and charges subsequently determined upon audit to be owed, in their sole discretion, and as they deem necessary, and granting certain related relief, all as more fully set forth in the Motion; and upon consideration of the First Day Declaration; and this Court having jurisdiction over 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 District of Delaware*, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and this

¹ The Debtors, along with the last four (4) digits of each Debtor’s federal tax identification number are: Avadim Health, Inc. (8411); Avadim Health IP, Inc. (7594); Bionome Properties Corp. (6483); Quality Assurance Associates, Inc. (5613); and Relion Manufacturing, Inc. (0430). The Debtors’ business address is 81 Thompson Street, Asheville, NC 28803.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at an interim hearing before this Court (the "Hearing"), and the Court having entered an interim order on the Motion [Docket No. ___]; and the Debtors having provided notice of the final hearing; and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT:**

1. The Motion is granted on a final basis, as set forth herein.
2. The Debtors are authorized, but not directed, to pay the Prepetition Tax Obligations due and owing, including, without limitation, through the issuance of postpetition checks or wire transfer requests, as the Debtors, in their sole discretion, deem necessary, in an amount not to exceed \$20,000.
3. The Debtors are further authorized, but not directed, to pay the Prepetition Tax Obligations, in consultation with the DIP Agent and in accordance with the Approved Budget (defined below), that are currently under review or that may be subject to review in the future, but for which no formal assessment has been made, subject in all respects to the Debtors' rights to contest any such amounts. The Debtors are authorized, in consultation with the DIP

Agent, to negotiate, compromise and pay any Prepetition Tax Obligations subsequently determined to be owed for prepetition periods.

4. All payments authorized by this Final Order may be made solely to the extent in compliance with the Approved Budget (as defined in the interim or final order authorizing the Debtors to obtain postpetition senior secured financing and related relief (the “DIP Order”)) then in effect. To the extent there is any inconsistency between the terms of this Final Order and the DIP Order, the DIP Order shall control.

5. All applicable banks and other financial institutions are authorized to receive, process, honor, and pay any and all prepetition checks or by automated clearinghouse payment issued by the Debtors for the payment of prepetition obligations approved herein, whether prior to or after commencement of these chapter 11 cases.

6. The Debtors are authorized (consistent with this Final Order) to issue postpetition checks or to effect postpetition automated clearinghouse requests in replacement of any checks or automated clearinghouse requests relating to taxes that were dishonored or rejected.

7. Notwithstanding the relief granted in this Final Order and any actions taken pursuant to such relief, nothing in this Final Order shall be deemed: (a) an admission as to the validity of any prepetition claim against a Debtor entity; (b) a waiver of the Debtors’ or any other party in interest’s rights to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay a prepetition claim; (d) an implication or admission that any particular claim is of a type specified or defined in the 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; or (f) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law.

8. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

9. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Final Order are immediately effective and enforceable upon its entry.

10. This Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Final Order.