

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL. 213.626.2311 • FAX 213.629.4520

1 David S. Kupetz (CA Bar No. 125062)
Email:dkupetz@sulmeyerlaw.com
2 Mark S. Horoupian (CA Bar No. 175373)
Email:mhoroupian@sulmeyerlaw.com
3 **SulmeyerKupetz**
A Professional Corporation
4 333 South Hope Street, Thirty-Fifth Floor
Los Angeles, California 90071-1406
5 Telephone: 213.626.2311
Facsimile: 213.629.4520
6

7 Bankruptcy Counsel for eStyle, Inc.,
Debtor and Debtor in Possession
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**
11

12 In re
13 ESTYLE, INC., a Delaware corporation,
dba babystyle, Cadeau, and Cadeau
14 Designs,
15 Debtor.
16
17
18
19
20 Tax Id # 95-4712564
21
22
23
24
25
26
27
28

Case No. 2:08-bk-13518-SB

Chapter 11

**DEBTOR'S EMERGENCY MOTION FOR
ORDER AUTHORIZING PAYMENT OF
CUSTOMS DUTIES AND CERTAIN
PREPETITION CLAIMS OF SHIPPERS,
FREIGHT HANDLERS, WAREHOUSERS,
AND CUSTOMS BROKERS**

DATE: March 21, 2008
TIME: 10:00 a.m.
PLACE: U.S. Bankruptcy Court
Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF RELIEF REQUESTED	1
II. DEBTOR AND DEBTOR'S BUSINESS	1
III. AUTHORIZATION FOR THE DEBTOR TO PAY CUSTOMS DUTIES AND CERTAIN PREPETITION CLAIMS OF SHIPPERS, FREIGHT HANDLERS, WAREHOUSERS, AND CUSTOMS BROKERS IS ESSENTIAL AND IS IN THE BEST INTERESTS OF THE DEBTOR AND THE ESTATE.....	4
IV. IT IS NECESSARY AND APPROPRIATE THAT THE COURT AUTHORIZE THE DEBTOR TO PAY CUSTOMS DUTIES AND CERTAIN PREPETITION CLAIMS OF SHIPPERS, FREIGHT HANDLERS, WAREHOUSERS, AND CUSTOMS BROKERS.....	5
A. Necessity of Payment Doctrine.....	5
B. Section 363.....	7
C. Section 507(a)(8).....	8
D. Lien Rights.....	8
V. CONCLUSION.....	8

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL. 213.626.2311 • FAX 213.629.4520

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

Dudley v. Mealey, 147 F.2d 268 (2nd Cir. 1945), cert. denied, 325 U.S. 873,
65 S. Ct. 1415, 80 L. Ed 1991 (1945)..... 6

In re CEI Roofing, Inc., 315 B.R. 50 (Bankr. N.D.TX 2004)..... 5

In re CoServ L.L.C., 273 B.R. 487 (Bankr. N.D. Tex. 2002)..... 7

In re Eagle-Picher Indus., Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991)..... 6

In re Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989)..... 5, 6

In re Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989)..... 5, 6

In re Lehigh & New England Railway Co., 657 F.2d 570 (3rd Cir. 1981) 5, 6

In re Penn Central Transp. Co., 467 F.2d 100 (3rd Cir. 1972) 6

NLRB v. Bildisco & Bildisco, 465 U.S. 513, 1045, Ct. 1188, 1197, 79 L.Ed.
2d (1984) 6

Statutes

11 U.S.C. § 105(a) 6

11 U.S.C. § 363 6

I.

SUMMARY OF RELIEF REQUESTED

eStyle, Inc. (the "Debtor" or "eStyle"), debtor and debtor in possession in the above-captioned chapter 11 case, respectfully requests that the Court authorize (but not direct) payment of customs duties and certain prepetition claims of shippers, freight handlers, warehousemen, and customs brokers. This Motion is made in accordance with 11 U.S.C. §§ 363, 105 and 507(a)(8) and Local Bankruptcy Rule 2081-1(b)(2)(L). Creditors will not be prejudiced if the Debtor receives the requested authorization. The Debtor's ongoing operations require that the Debtor maintain its ability to receive delivery of goods from suppliers, including receiving shipments from foreign suppliers that have already been paid in full or in part for goods that are in the process of being shipped. If the Debtor does not pay shippers, freight handlers, warehousemen and customs brokers (collectively, the "Shippers") and customs duties on a timely basis, then such service providers may not only refuse to complete delivery, but may be able to assert possessory liens on the goods and inventory in their possession, and the customs authorities might prevent uninterrupted flow of goods. In order to continue to operate as a going concern, it is imperative that the Debtor maintains the flow of goods that constitute the products it sells in its retail business. Moreover, if the Debtor is not authorized to pay the Shippers and customs obligations as requested herein, the Debtor's business operations, reorganization, and efforts to maximize creditor recovery could be immediately and severely disrupted and irreparably harmed. The relief sought by and the grounds and reasons supporting this Motion are discussed further below and in the Omnibus Declaration of Robert S. Kelleher in Support of Debtor's Emergency "First-Day" Motions.

II.

DEBTOR AND DEBTOR'S BUSINESS

The Debtor commenced the above-captioned chapter 11 case by filing a voluntary chapter 11 petition on March 19, 2008 (the "Petition Date"). The Debtor continues to manage and operate its business as a debtor in possession. As a

1 consequence of the filing of its chapter 11 petition, the Debtor is precluded from paying
2 and/or honoring unsecured claims that arose prior to the commencement of the case
3 without Court authorization.

4 The Debtor is a multichannel retailer of maternity, baby and kids apparel,
5 and toys, gear and related products. As of the Petition Date, the Debtor sells its products
6 through its 23 retail stores (21 babystyle and 2 Cadeau retail stores), its babystyle.com
7 website, and a direct mail program. The Debtor sells product under the babystyle and
8 Cadeau labels, and under leading brand labels. The Debtor also sells the Cadeau brand
9 product to wholesale accounts.

10 The Debtor has two primary categories of supply chains. The first is for
11 private label merchandise made overseas. The second is for domestic private label and
12 branded goods. The private label merchandise is broken into two groups: babystyle
13 private label (primarily imported from Asia); and Cadeau private label (primarily imported
14 from Italy, with some goods imported from China).

15 The babystyle private label goods are sourced overseas directly with
16 factories and/or through the Debtor's foreign agent, Arcadia Group. Once produced,
17 these goods are delivered to the overseas consolidator, UPS Supply Chain Logistics
18 ("UPS Logistics"). UPS Logistics handles the arrangements for the freight shipments, all
19 brokerage services, pays the custom duties, and handles the shipment of the goods from
20 the port (Long Beach, California) to the Debtor's distribution center in Ontario, California
21 (the "Ontario Warehouse"). The Ontario Warehouse is controlled and operated by New
22 Breed, Inc. ("New Breed"). The Debtor's relationship with New Breed is governed by a
23 "Warehousing, Fulfillment and Distribution Services Agreement." UPS Logistics
24 aggregates all of the freight and duty charges and bills the Debtor for all of these
25 services. Further, there is a bond in place in accordance with customs requirements.

26 The Debtor's Cadeau goods are sourced overseas through an agent or
27 directly with the factory. Coordination of the shipments of the goods are handled by
28 Albatrans, Inc. ("Albatrans"). There is a bond in place in accordance with custom

1 requirements. The Debtor pays customs duties directly to U.S. Customs and Border
2 Protection for the imported Cadeau goods. The goods are shipped to a New Jersey
3 warehouse (the "Bergen Warehouse") maintained by Bergen Shippers ("Bergen"). These
4 goods are then prepared and held for shipment to the Ontario Warehouse or directly to
5 certain wholesale vendors. Domestic private label goods and branded goods are either
6 shipped to the Ontario Warehouse of New Breed by a consolidator, Cargo Unlimited, by
7 United Postal Service ("UPS"), or by freight methods arranged by the vendor.

8 The Debtor's Cadeau goods stored in the Bergen Warehouse are shipped
9 via UPS either directly to the wholesale customer, drop shipped to the Debtor's Cadeau
10 stores directly, or sent to the Ontario Warehouse for processing for the Debtor's
11 babystyle stores. Goods shipped to customers from orders placed on the Debtor's
12 website are shipped either via UPS or United States Postal Service ("USPS"). USPS is
13 used to send out shipments which weigh under 2 pounds and any orders going to military
14 post office boxes. Shipments weighing over 2 pounds, expedited shipments, and
15 shipments for orders requiring delivery in Hawaii and Alaska are sent via UPS.

16 Goods shipped to the Debtor's babystyle and Cadeau stores from the
17 Ontario Warehouse are sent via Eagle Global Logistics (with respect to the Debtor's
18 Texas stores) or The Gilbert Company (all other stores). Occasionally, UPS is used for
19 shipments to stores that the other carriers are unable to deliver. Goods shipped to
20 customers from babystyle stores (this is done only occasionally) or back to the Ontario
21 Warehouse are generally sent via UPS.

22
23
24
25
26
27
28

1 III.

2 **AUTHORIZATION FOR THE DEBTOR TO PAY CUSTOMS DUTIES AND CERTAIN**
3 **PREPETITION CLAIMS OF SHIPPERS, FREIGHT HANDLERS, WAREHOUSERS,**
4 **AND CUSTOMS BROKERS IS ESSENTIAL AND IS IN THE BEST INTERESTS OF**
5 **THE DEBTOR AND THE ESTATE**

6 In order to maintain a supply of merchandise without interruption and to
7 retain customer loyalty, it is essential that shippers, freight handlers and warehouseurs do
8 not stop the flow of the Debtor's product or hold it in transit. Failure to maintain the flow
9 of goods to its retail stores and for sale on its direct to consumer web site could
10 irreparably harm the Debtor's reorganization. The supply and delivery system of the
11 Debtor's merchandise involves the use of reputable domestic and international common
12 carriers, shippers, and warehouseurs. Timely and efficient clearance of the Debtor's
13 goods through customs is also a vital component of the Debtor's supply and delivery
14 system. It is essential for the continued viability of the Debtor's business and the success
15 of the reorganization effort that the Debtor maintains a reliable and efficient supply chain
16 by satisfying any outstanding customs duties and prepetition claims of Shippers.

17 The Debtor's primary shippers, freight handlers, and warehouseurs consist of
18 the following: UPS Supply Chain Logistics, New Breed, Bergen, Cargo Unlimited, UPS,
19 USPS, Albatrans, Inc., Eagle Global Logistics, and The Gilbert Company. The Debtor
20 estimates that as of the Petition Date, outstanding prepetition obligations to such
21 Shippers and for customs duties are in the approximate sum of \$702,000, as follows: (1)
22 UPS Logistics (\$200,000); (2) UPS (\$75,000); (3) New Breed (\$260,000); (4) Bergen
23 (\$7,000); (5) Cargo Unlimited (\$30,000); (6) USPS (\$15,000); (7) Albatrans, Inc.
24 (\$30,000); (8) The Gilbert Company (\$50,000); (9) Eagle Global Logistics (\$15,000); and
25 (10) U.S. Customs (\$20,000).

1 IV.

2 IT IS NECESSARY AND APPROPRIATE THAT THE COURT AUTHORIZE THE
3 DEBTOR TO PAY CUSTOMS DUTIES AND CERTAIN PREPETITION CLAIMS OF
4 SHIPPERS, FREIGHT HANDLERS, WAREHOUSERS, AND CUSTOMS BROKERS

5 A. Necessity of Payment Doctrine

6 Bankruptcy courts have granted the type of relief sought in this matter in
7 many other cases. Moreover, such relief is generally granted on a routine "first day"
8 basis in many cases. See, e.g., In re Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989);
9 In re Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989). Allowing relief for the
10 payment of the Shipper expenses and customs duties sought herein is based on the
11 recognition that an efficient supply and delivery chain is necessary to the continued
12 operation of the Debtor's business and the success of this chapter 11 case. Accordingly,
13 such payment will ultimately benefit all creditors. As stated, in an analogous context, by
14 the court in In re CEI Roofing, Inc., 315 B.R. 50 (Bankr. N.D.Tex. 2004):

15 [T]here has evolved a rule for the payment of prepetition wages and
16 benefits which is based on both common sense and the express provisions
17 of the Bankruptcy Code. If employees are not paid, they will leave. If they
18 leave the Debtor's business, the bankruptcy case fails shortly after the filing.
19 No one will benefit from the process. The Code gives employees a statutory
20 priority that elevates the claims above the general unsecured claims, and,
21 in fact, most claims in the bankruptcy case. To the extent that the existing
22 holders of claims of higher priority than the wage claims consent or do not
23 timely object, such priority claims may be made during the pendency of the
24 bankruptcy case. The treatment and payment of such claims before
25 confirmation does no violence to the Code or existing case law.... in fact,
26 such orders are usually "necessary" and "appropriate" to implement a
27 debtor's reorganization under Chapter 11.

22 Id., at 60.

23 The "necessity of payment" doctrine "recognizes the existence of the
24 judicial power to authorize a debtor in a reorganization case to pay prepetition claims
25 where such payment is essential to the continued operation of the debtor." In re
26 Ionosphere Clubs, Inc., 98 B.R. at 176. The Third Circuit, in In re Lehigh & New England
27 Railway Co., 657 F.2d 570, 581 (3rd Cir. 1981), described the doctrine as follows:
28

1 [T]he 'necessity of payment' doctrine... [permits]
2 immediate payment of claims of creditors where those
3 creditors will not supply services or materials
4 essential to the conduct of the business until their pre-
5 reorganization claims shall have been paid.

6 In re Lehigh & New England Railway Co., 657 F.2d at 581 (quoting In re Penn Central
7 Transp. Co., 467 F.2d 100, 102, n.1 (3rd Cir. 1972)). While the "necessity of payment"
8 doctrine originally developed in the context of railroad reorganizations under the
9 Bankruptcy Act, it has been applied in nonrailroad bankruptcies. See In re Gulf Air, Inc.,
10 112 B.R. at 153; In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio
11 1991) ("[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that
12 the payment is necessary to avert a serious threat to the Chapter 11 process."); In re
13 Ionosphere Clubs, Inc., 98 B.R. at 176 ("The rationale for the 'necessity of payment' rule,
14 i.e., facilitating the continued operation and rehabilitation of the debtor in railroad
15 reorganization cases, is also a paramount goal of Chapter 11."). In Dudley v. Mealey,
16 147 F.2d 268 (2nd Cir. 1945), cert. denied, 325 U.S. 873, 65 S. Ct. 1415, 80 L. Ed 1991
17 (1945), a reorganization case involving a hotel, Judge Learned Hand, in applying the
18 necessity of payment doctrine, stated:

19 Let it [a hotel] once be shut down, and it will lose
20 much of its value.... Some priority [the tradesmen
21 supplying the hotel prepetition] may be essential to
22 preservation of the business during that period as it is
23 later.

24 Id., at 271.

25 The Court has the power to authorize the payment of the Shippers and
26 customs obligations under the circumstances of the instant case, pursuant to the
27 "necessity of payment" doctrine under 11 U.S.C. § 363 and 11 U.S.C. § 105(a). See In
28 re Eagle-Picher Indus., Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991); In re Gulf Air, Inc.,
112 B.R. 152 (Bankr. W.D. La. 1989); and In re Ionosphere Clubs, Inc., 98 B.R. 174
(Bankr. S.D.N.Y. 1989). Approval of the Motion is essential in order to maximize
creditors' recovery, avoid disruption that could irreparably harm the Debtor's operations
and reorganization prospects, and preserve jobs for the Debtor's employees --

1 paramount policies underlying and goal of this chapter 11 case. See NLRB v. Bildisco &
2 Bildisco, 465 U.S. 513, 527-28, 1045, Ct. 1188, 1197, 79 L.Ed. 2d (1984). Analogously
3 to priority wage claims, which are typically “payable out of necessity as well as by virtue
4 of their priority” (In re CoServ L.L.C., 273 B.R. 487, 493 n.10 (Bankr. N.D. Tex. 2002),
5 payment of the Shipper claims will allow the Debtor to avoid the assertion of possessory
6 liens on goods held by the Shippers.

7 There will be no prejudice to unsecured creditors resulting from the Court's
8 authorization for the Debtor to pay the Shipper obligations and customs duties as
9 requested herein. Authorization to make such payments is necessary so that the
10 Debtor's continued operations and the pending reorganization process designed to
11 maximize creditor recovery are not jeopardized.

12 **B. Section 363**

13 Section 363 of the Bankruptcy Code provides authority for payment of the
14 Shippers' claims and customs duties. Courts have held that it is appropriate to authorize
15 a debtor to expend funds outside the ordinary course of business, wherein the debtor's
16 judgment, the payment is in the best interest of the estate. See In re Eagle-Picher Indus.,
17 Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991); In re Gulf Air, Inc., 112 B.R. 152 (Bankr.
18 W.D. La. 1989); and In re Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989);
19 see also In re Federated Dep't Stores, Inc., 1990 Bankr. LEXIS 102 (Bankr. S.D. Ohio
20 1990) (prepetition deposits and payments honored). In In re Ionosphere Clubs, Inc., the
21 court stated:

22 Section 363(b) gives the court broad flexibility in tailoring its
23 orders to meet a wide variety of circumstances. However, the
24 debtor must articulate some business justification, other than
25 mere appeasement of major creditors, for using . . . property
26 out of the ordinary course of business. . . . Eastern had
27 sustained its burden of articulating sound business reasons
28 for its decision to pay prepetition wages. Eastern stated that it
was critical for it to pay such prepetition claims in order to
preserve and protect its business and ultimately reorganize,
retain its currently working employees and maintain positive
employee morale.

1 Id., at 175 (citations omitted). In Ionosphere Clubs, Inc., like in Chateaugay, the court
2 looked to the business judgment of the Debtor, in determining that certain payments on
3 prepetition claims were in the best interests of the reorganization effort. See Id.; see also
4 In re Chateaugay, 80 B.R. 175-176; see also In re Structurelite Plastics Corp., 86 B.R.
5 922, 932 (Bankr. S.D. Ohio 1988) (finding payment of prepetition claims justified where
6 otherwise debtor's rehabilitative effort would be immediately aborted).

7 **C. Section 507(a)(8)**

8 Customs duties likely qualify as priority claims under Bankruptcy Code §
9 507(a)(8). Thus, such claims would be paid ahead of general unsecured creditors in any
10 event and payment would not adversely affect general unsecured creditors.

11 **D. Lien Rights**

12 Uniform Commercial Code Section 7209 (as adopted by the applicable
13 states where the Debtor's goods are in the possession of the Shippers) provides a basis
14 for the Shippers to assert possessory liens.

15 **V.**

16 **CONCLUSION**

17 In order to ensure the flow of goods to the Debtor, and the continuity and
18 quality of the Debtor's business operations, and to avoid jeopardizing the Debtor's
19 reorganization, the Court should authorize (but not direct) the Debtor to pay the Shipper
20 related obligations and customs duties. Without such authorization, the Debtor may be
21 unable to successfully proceed, without unnecessary disruption, with the administration of
22 this chapter 11 case. Such authorization will not prejudice creditors, but rather will
23 protect their interests.

24 **WHEREFORE**, the Debtor respectfully requests that the Court authorize
25 (but not direct) the Debtor to pay prepetition obligations owing to Shippers and to pay
26
27
28


1 prepetition customs obligations. A form of the proposed order granting this Motion is
2 attached hereto as Exhibit 1.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: March 19, 2008

Respectfully submitted,

SulmeyerKupetz
A Professional Corporation

By: 
David S. Kupetz
Bankruptcy Counsel to eStyle, Inc.,
Debtor and Debtor in Possession

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL. 213.626.2311 • FAX 213.629.4520

EXHIBIT 1

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL. 213.626.2311 • FAX 213.629.4520

1 David S. Kupetz (CA Bar No. 125062)
Email:dkupetz@sulmeyerlaw.com
2 Mark S. Horoupian (CA Bar No. 175373)
Email:mhoroupian@sulmeyerlaw.com
3 **SulmeyerKupetz**
A Professional Corporation
4 333 South Hope Street, Thirty-Fifth Floor
Los Angeles, California 90071-1406
5 Telephone: 213.626.2311
Facsimile: 213.629.4520
6

7 Bankruptcy Counsel for eStyle, Inc.,
Debtor and Debtor in Possession
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**

11
12 In re
13 ESTYLE, INC., a Delaware corporation,
dba babystyle and Cadeau Maternity,
14 Debtor.
15
16
17
18
19 Tax Id # 95-4712564
20
21

Case No. 2:08-bk-13518-SB

Chapter 11

**ORDER GRANTING DEBTOR'S
EMERGENCY MOTION FOR ORDER
AUTHORIZING PAYMENT OF CUSTOMS
DUTIES AND CERTAIN PREPETITION
CLAIMS OF SHIPPERS, FREIGHT
HANDLERS, WAREHOUSERS, AND
CUSTOMS BROKERS**

DATE: March 21, 2008
TIME: 10:00 a.m.
PLACE: U.S. Bankruptcy Court
Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

22
23
24
25
26
27
28

1 The "Debtor's Emergency Motion for Order Authorizing Payment of Certain
2 Customs Duties and Certain Prepetition Claims of Shippers, Freight Handlers,
3 Warehousemen, and Customs Brokers" (the "Motion"), filed by eStyle, Inc. (the "Debtor"),
4 debtor and debtor in possession in the above-captioned chapter 11 case, came on for
5 hearing before the Court on March 21, 2008. Appearances at the hearing are reflected in
6 the record.

7 Having considered the Motion, the Omnibus Declaration of Robert S.
8 Kelleher in Support of Debtor's "First-Day" Motions, any and all responses to the Motion,
9 the representations of counsel made at the hearing, the facts and circumstances of this
10 matter, and good cause appearing therefor,

11 **IT IS ORDERED** as follows:

12 1. The Motion is granted.

13 2. The Debtor is authorized to pay shippers, freight handlers,
14 warehousemen, customs duties, and customs brokers (collectively, the "Shippers"), as
15 described in the Motion, with respect to prepetition obligations.

16 3. The Debtor's bank (Wachovia Bank, National Association) is directed
17 to honor prepetition checks issued by the Debtor and payment of claims of the Shippers.

18
19 DATED: _____

HON. SAMUEL L. BUFFORD
UNITED STATES BANKRUPTCY JUDGE

20
21
22 Presented By:

23 **SULMEYERKUPETZ**
24 a Professional Corporation

25
26 By: _____
27 David S. Kupetz
28 Bankruptcy Counsel for eStyle, Inc.,
Debtor and Debtor in Possession