

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: HSF HOLDING, INC., <i>et al.</i> , ¹ Debtors.	Chapter 11 Case No. 09-_____ () Jointly Administered
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MOTION FOR ORDER (I) AUTHORIZING PAYMENT OF PREPETITION WAGES, SALARIES, AND OTHER EMPLOYEE BENEFITS; (II) AUTHORIZING PAYMENT OF POST-PETITION EMPLOYEE BENEFIT PLANS AND PROGRAMS; (III) AUTHORIZING PAYMENT OF PRE-PETITION COBRA BENEFITS; (IV) AUTHORIZING PAYMENT OF PREPETITION FEDERAL, STATE AND LOCAL WITHHOLDING OBLIGATIONS; (V) AUTHORIZING PAYMENT OF CERTAIN PREPETITION CLAIMS OF INDEPENDENT CONTRACTORS; (VI) AUTHORIZING PAYMENT OF REIMBURSABLE EXPENSES; AND (VII) DIRECTING ALL BANKS AND FINANCIAL INSTITUTIONS TO HONOR PREPETITION CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE OBLIGATIONS

The above-captioned debtors and debtors in possession (the “Debtors”), by and through their undersigned attorneys, hereby file this motion (the “Motion”), seeking entry of an order pursuant to sections 105(a), 363(b), 507(a)(4), 507(a)(5), and 541 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, (the “Bankruptcy Code”), and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing, but not directing, the Debtors to (i) pay prepetition claims of current employees, including, but not limited to, claims for wages, salaries, vacation, and sick leave, up to the statutory maximum of \$10,950 for each employee; (ii) continue post-petition employee benefit plans and programs in effect immediately prior to the filing of these cases; (iii) pay certain former employee pre-petition COBRA benefits; (iv) pay prepetition federal, state and local withholding obligations; (v) pay certain prepetition claims of independent contractors; (vi) reimburse employees and independent contractors for

¹ The Debtors are the following entities: (i) HSF Holding, Inc., a Delaware corporation and (ii) Hawaii Superferry, Inc., a Hawaii corporation.

prepetition expenses; and (vii) direct all banks and financial institutions to honor prepetition checks for payment of employee obligations. In support of this Motion, the Debtors submit the Affidavit of C. Alexander Harman in Support of Chapter 11 Petitions and First Day Motions (the “Harman Affidavit”) filed contemporaneously herewith, and further state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
3. The predicates for the relief requested herein are sections 105(a), 363(b), 507(a)(4), 507(a)(5), and 541 of the Bankruptcy Code and Bankruptcy Rule 6003.

BACKGROUND

4. On the date hereof (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).
5. The Debtors continue to operate their business and manage their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
6. No trustee, examiner, creditors’ committee, or other official committee has been appointed in the Debtors’ chapter 11 cases.
7. Reference is made to the Harman Affidavit for a description of the Debtors’ business, the capital structure, and the circumstances leading to the chapter 11 filings.

SUMMARY OF RELIEF REQUESTED

8. By this Motion, the Debtors seek an order authorizing, but not directing, the Debtors to (i) pay prepetition claims of current employees (each an “Employee” and collectively, the “Employees”), including, but not limited to, claims for prepetition wages,

salaries, benefits, vacation, sick leave, paid holidays, and certain costs and disbursements related to the foregoing (collectively, the “Employee Compensation”), up to the statutory maximum of \$10,950 for each employee; (ii) continue post-petition employee benefit plans and programs in effect immediately prior to the filing of these cases; (iii) pay certain former employee pre-petition COBRA benefits; (iv) pay prepetition federal, state and local withholding obligations; (v) pay certain prepetition claims of independent contractors and (vi) reimburse employees and independent contractors for prepetition expenses.

9. The Debtors also seek the entry of an order directing all banks and financial institutions to honor the Debtors’ prepetition checks or electronic transfers for payment of any of the foregoing, and prohibiting banks and financial institutions from placing any holds on, or attempting to reserve against, any such payments.

10. The Debtors submit that it is in the best interest of their estates for this Court to authorize the Debtors to make such payments and honor obligations owed to, or for the benefit of, the Employees so as to enable the Debtors to maintain morale, retain their remaining Employees during this critical time, and minimize the personal hardship such Employees may suffer if prepetition employee-related obligations are not paid when due or honored as expected.

11. The Debtors further submit that it is in the best interest of their estates for this Court to authorize the Debtors to make such payments and honor such obligations as are owed with respect to independent contractors. The morale and dedication of these independent contractors are also critical to preserving the value of the Debtors’ business.

12. The Debtors have analyzed their books and records and, excluding unused vacation time, which, as discussed more fully below, may be paid out under certain conditions but, in most instances will be used by such Employees, Employee compensation does not exceed

\$10,950 per Employee with respect to all of the wages and benefits mentioned herein that are accrued but unpaid as of the Petition Date.

BASIS FOR RELIEF

A. **Employee Compensation.**

1. **Wages or Salaries.**

13. As of the Petition Date, the Debtors' workforce consists of approximately eight (8) full-time employees (the "Employees"). Prior to March 2009, when the Debtors' operations were dramatically reduced, the Debtors employed approximately 162 Employees.

14. The Employees include: (i) the President; (ii) two Administrative Assistants; (iii) the Director of Port Operations; (iv) the Information Technology Support Engineer; (v) the Assistant Controller; (vi) the Manager of Budgeting and Reporting; and (vii) the Budget/Reporting Analyst.

15. Employees are paid weekly in arrears for work performed from Saturday through Friday. The Debtors' average two-week gross payroll for all Employees is approximately \$40,000. Since the filing of these chapter 11 cases occurred at the start of a pay period, there are no known outstanding payroll amounts due and owing Employees. However, the Debtors reserve the right to pay any outstanding prepetition payroll amounts if, and when, they become known.

16. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to continue to pay Employee pre-petition wages in the ordinary course, provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950.

2. **Additional Compensation.**

17. The Debtors also offer their Employees other forms of compensation, including vacation pay, holiday pay, paid sick time and other benefits (collectively, the “Additional Compensation”). These forms of Additional Compensation are usual, customary, and necessary if the Debtors are to retain qualified employees in their business.

a) **Vacation Time.**

18. All Employees are eligible to accrue paid vacation time (“Vacation Time”) pursuant to the Debtors’ policies. Employees accrue Vacation Time for each month worked, at rates that vary depending on seniority and contract terms. Vacation Time carries over from one year to the next on a limited basis; Employees may accumulate one (1) week per year with a maximum of five (5) weeks total.

19. The Debtors anticipate that Employees will utilize Vacation Time in the ordinary course. As of the Petition Date, the Debtors estimate that the aggregate value of accrued but unused Employee Vacation Time is approximately \$52,000, of which a significant portion is owed to one or two senior Employees.

20. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to continue to permit Employees to utilize Vacation Time in the ordinary course and to pay Employees on account of unused Vacation Time, provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950.

b) **Sick Time.**

21. The Debtors’ Employees are eligible to accrue paid sick time (“Sick Time”) pursuant to the Debtors’ policies.

22. Employees are allotted three (3) weeks per year of Sick Time that carries over year-to-year up to an accrued limit of twelve (12) weeks of Sick Time. Employees are not paid any unused Sick Time upon retirement, resignation or termination.

23. The Debtors anticipate that many of their Employees will utilize Sick Time in the ordinary course of business. By this Motion, the Debtors seek authority, but not direction, to continue to allow Employees to utilize Sick Time in the ordinary course of business and to pay Employees on account of Sick Time in the ordinary course, provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950.

24. By this Motion, the Debtors seek authority, but not direction, to continue the Additional Compensation in the ordinary course. The Debtors are not seeking authority at this time to pay any prepetition amounts under any outstanding severance packages.

B. Employee Benefit Plans.

25. In the ordinary course of their business, the Debtors offer Employees many standard employee benefits (the “Employee Benefits”) under their employee benefit plans and programs (collectively, the “Employee Benefit Plans”). Generally, the Debtors’ Employees are offered the following: (i) medical insurance, including dental and vision coverage, and complimentary alternative health coverage; (ii) basic life insurance, and (iii) 401(k) benefits. The Debtors are fully-insured with respect to the Employee Benefit Plans discussed below.

1. Medical Insurance.

26. Employees are eligible to receive medical insurance that includes dental and vision coverage and complimentary alternative health coverage through the UHA 600 Preferred Provider Plan (the “Health Plan”). In general, Employees and their eligible dependents

are eligible for coverage under the Health Plan on the first day of the month coinciding with, or following, their date of hire.

27. The Debtors' aggregate contributions to the Health Plan per month are approximately \$2,400. Payment on account of the Health Plan is made in advance, such that liability for June 2009 medical benefits accrued in May 2009. As of the Petition Date, such payment has not yet been processed.

28. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the Health Plan; provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950; and (ii) continue to administer the Health Plan post-petition in the ordinary course.

2. **Other Insurance.**

29. In addition, the Debtors provide Employees with basic life insurance ("Basic Life Program") through Prudential Insurance Company of America. This program is fully insured and is administered by PruValue Insurance Benefits Trust.

30. For May 2009, the Debtors paid \$61.00 for the Basic Life Program, including administration and claims processing fees. The Debtors estimate that, as of the Petition Date, they owe \$30.00 on account of obligations related to the Basic Life Program. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the Basic Life Program provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not

exceed the statutory cap of \$10,950; and (ii) continue to administer the Basic Life Program post-petition.

3. **Savings and Retirement Plans.**

31. The Debtors provide Employees with a retirement plan through which Employees can accumulate savings for their future. The Debtors offer a 401(k) plan (the “401(k) Plan”) to their Employees who have completed three (3) months of service. Participants in the 401(k) Plan may contribute up to the maximum federally-permitted amount of their eligible compensation. The Debtors provide a matching contribution up to three percent (3%) of the Employee’s pay. Employees may select from several mutual funds available under the 401(k) Plan to invest their contributions and the matching contribution from the Debtors. Prior to the Petition Date, the Debtor provided notice to their 401(k) Plan provider of their intent to terminate the 401(k) Plan effective July 31, 2009.

32. The Debtors estimate that, as of the Petition Date, they owe \$7,500 on account of obligations related to the 401(k) Plans.

33. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to: (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the 401(k) Plan; provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950; and (ii) continue to administer post-petition the 401(k) Plan in the ordinary course.

C. **COBRA Obligations**

34. Under sections 601 – 606 of the Employee Retirement Income Security Act of 1974 (“ERISA”) and section 4980B of the Internal Revenue Code, an employer that maintains a group health plan must offer premium reductions and additional election

opportunities for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 (commonly referred to and hereinafter called “COBRA”). COBRA provides continuation coverage rights to each qualified beneficiary (the covered employee, spouse and dependents) whose losses are covered as a result of a qualifying event (such as termination of employment, divorce, death, disability, Medicare entitlement, or loss of dependent eligibility status).

35. The Debtors have COBRA responsibilities (the “COBRA Obligations”) with respect to existing COBRA qualified participants. The Debtors currently have approximately twelve (12) terminated employees participating in a COBRA benefits plan. The Debtors’ aggregate monthly premium costs for COBRA Obligations is approximately \$7,500 per month for medical and dental coverage. However, because a qualified participant may elect to receive COBRA benefits in the future for past months, the monthly COBRA Obligations may increase. The Debtors estimate that, as of the Petition Date, they owe \$13,100 on account of the COBRA Obligations.

36. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the COBRA Obligations; provided, however, that the aggregate amount paid to each former employee on account of prepetition COBRA Obligations does not exceed the statutory cap of \$10,950; and (ii) continue to administer the COBRA Obligations post-petition in the ordinary course.

D. **Prepetition Withholding Obligations.**

37. As part of the foregoing relief, the Debtors also seek authorization to pay all Employee federal and state withholding and payroll-related taxes relating to the prepetition period including, but not limited to, all withholding taxes, social security taxes, unemployment taxes, medicare taxes and garnishments, as well as all other withholdings such as contributions to

savings, retirement or pension plans, insurance contributions and charitable contributions, if any (collectively, the “Withholding Obligations”).

38. The Debtors routinely withhold from Employee paychecks the Withholding Obligations, and are required to transmit these amounts to third parties. The Debtors believe that such withheld funds, to the extent that they remain in the Debtors’ possession, constitute monies held in trust and therefore are not property of the Debtors’ estates. Thus, whether or not such funds are prepetition amounts, the Debtors believe that directing such funds to the appropriate parties does not require Court approval. Nevertheless, out of an abundance of caution, the Debtors are seeking Court authority to pay any outstanding amounts owed by the Debtors for Withholding Obligations, in the ordinary course of business, including those incurred prior to the Petition Date. The Debtors’ average weekly combined Withholding Obligations is approximately \$15,000.

E. **Independent Contractors.**

39. The Debtors utilize two independent contractors (collectively, the “Independent Contractors”) in order to provide IT systems assistance in the ordinary course of business. Independent Contractors are hired on an as needed basis. The Independent Contractors have knowledge regarding (i) the reservation system required to continue reporting and data retrieval for processing of refunds to customers; (ii) the interface from the reservation system to the general ledger and (iii) the various IT processes required for monthly reconciliations.

40. The Debtors estimate that, as of the Petition Date, they owe approximately \$5,000 on account of Independent Contractor obligations (the “Independent Contractor Claims”). Accordingly, by this Motion, the Debtors seek authority, but not direction, to pay prepetition amounts due on account of Independent Contractor Claims in the ordinary course of business,

provided, however, that payments to Independent Contractors on account of Independent Contractor Claims shall not exceed the amounts afforded priority status by any applicable provision of section 507 of the Bankruptcy Code.

F. **Reimbursable Expenses.**

41. The Debtors have policies whereby their Employees and Independent Contractors seek reimbursement of various business-related expenses (the “Reimbursable Expenses”). The Reimbursable Expenses are incurred by Employees and Independent Contractors in the ordinary course of business in the performance of their job functions. The Reimbursable Expenses include, but are not limited to, air travel, hotel, automobile, meals, cellular telephones and other business-related expenses.

42. In some instances, the Employee or Independent Contractor incurs the expense personally and must seek reimbursement from the Debtors by submitting an expense report or other proof (collectively, the “Expense Reports”) acceptable to the Debtors. In other instances, the expense is incurred on a corporate credit card issued to the Employee and the credit card provider remits periodic invoices directly to the Debtors.

43. Certain Reimbursable Expenses incurred prior to the Petition Date have not been paid because bills have not been processed or Expense Reports and credit card invoices have not been received. It is difficult to estimate the amount outstanding as of the Petition Date but, on average, the Debtors spend approximately \$5,000.00 per month on Reimbursable Expenses.

44. It is critical that the Debtors be authorized to fund Reimbursable Expenses in the ordinary course of business in order to assure Employees and Independent Contractors that they will be reimbursed for their actual out-of-pocket expenses while acting within the scope of their employment or service. Such Reimbursable Expenses were incurred on the Debtors’ behalf

with the understanding that they would be reimbursed. Accordingly, by this Motion, the Debtors seek, *inter alia*, discretion to pay Reimbursable Expenses incurred prior to the Petition Date.

45. Similarly, this Motion seeks authority to pay certain credit card companies for Reimbursable Expenses incurred on company cards prior to the Petition Date in those instances where Employee-cardholders may be jointly liable with the Debtors. Such relief is appropriate because these Employees had an expectation that they would not be personally liable for business expenses incurred in the ordinary course, and to require otherwise would impose a financial hardship on them and adversely impact operations and employee morale.

G. **Direction to Banks.**

46. The Debtors also seek the entry of an order authorizing and directing all banks and financial institutions to receive, process, honor, and pay any and all checks or electronic transfers drawn on the Debtors' payroll and general disbursement accounts related to ordinary course Employee Compensation, including wages, salaries, incentives, and other compensation, COBRA Obligations, Employee Benefits, Employee Benefit Plans, Sick Time, Reimbursable Expenses, and Independent Contractor Claims, whether presented before or after the Petition Date, and without further order of Court, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

APPLICABLE AUTHORITY

A. **Priority Wage Claims**

47. Under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, claims against a debtor for "wages, salaries, or commissions, including vacation, severance, and sick leave pay" earned within 180 days before the Petition Date, and claims against a debtor for contributions to employee benefit plans arising from services rendered within 180 days before the Petition Date, are afforded priority status to the extent of \$10,950 per individual. The

Debtors believe that the Employee Compensation that they seek to pay does not exceed the \$10,950 statutory cap and, thus, is entitled to priority under Bankruptcy Code sections 507(a)(4) and (5), and, as such, will be paid in full as a condition to confirmation of a plan pursuant to section 1129 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(9). Payment of the Employee Compensation, including Employee Benefits, in the ordinary course of business therefore simply accelerates the timing of payment of obligations that would otherwise have to be paid in any event, thereby doing nothing to alter the priority scheme set forth in the Bankruptcy Code.

B. Trust Fund Taxes

48. The Withholding Obligations should be paid because they constitute “trust fund taxes” such that the funds withheld from employee paychecks are held in trust and are not property of the Debtors’ estates. *See* 11 U.S.C. § 541; *Begier v. I.R.S.*, 496 U.S. 53, 59 (1990) (because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not “property of the estate.”). Even if the funds in question were part of the Debtors’ estates, the withholdings likely would constitute priority claims of the relevant taxing authorities. *See* 11 U.S.C. § 507(a)(8).

49. In addition, many federal, state and local taxing authorities impose personal liability on certain of the officers, directors or any entity that is responsible for collecting taxes from employees if such taxes are not remitted. Accordingly, if such obligations remained unpaid, the Debtors’ officers and directors may be subject to claims or lawsuits during these chapter 11 cases that would constitute a significant distraction for such individuals. For these reasons, the Debtors, their estates and their creditors would benefit, overall, from payment of the Withholding Obligations in the ordinary course of business.

C. Payment of Employee Compensation, Employee Benefits, Independent Contract or Claims and Reimbursable Expenses

50. Sections 363(b) and 105(a) of the Bankruptcy Code further authorize a grant of the requested relief. Under section 363(b) of the Bankruptcy Code, a debtor-in-possession may, in the exercise of its business judgment, use property of the estate outside of the ordinary course of business. *See* 11 U.S.C. § 363(b). Further, section 105(a) of the Bankruptcy Code, which codifies the equitable powers of bankruptcy courts, authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). This Court may authorize the Debtors’ proposed payment of the Employee Compensation, including Employee Benefits, under sections 105(a) and 363(b)(1) of the Bankruptcy Code.

51. Section 363(b)(1) of the Code authorizes a bankruptcy court, after notice and a hearing, to authorize a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” *See* 11 U.S.C. § 363(b)(1). Although stated various ways, courts generally hold that a debtor’s decision to enter into a transaction outside of the ordinary course of business is governed by the business judgment standard. *3 Colliers on Bankruptcy* ¶ 363.01[1][g] (15th ed. rev. 2002); *see In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re US Airways Group, Inc.*, 287 B.R. 643, 645 (Bankr. E.D. Va. 2002); *see also In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993), quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (“The business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company,’” that has continued applicability in bankruptcy).

52. When applying the “business judgment” rule, courts show great deference to the debtor’s decision making. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1986); *Austin Assocs. v. Howison (In re Murphy)*, 288 B.R. 1, 5 (D. Me. 2002); *Pitt v. First Wellington Canyon Assocs. (In re First Wellington Canyon Assoc.)*, No. 89-593, 1989 WL 165028, at *1 (N.D. Ill. Dec. 28, 1989); *In re Castre*, 312 B.R. 426, 430 (Bankr. D. Colo. 2004); *In re Bakalis*, 220 B.R. 525, 532 (Bankr. E.D.N.Y. 1998); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981). The Debtors submit that, because the Employee Compensation, including Employee Benefits, is entitled priority status, and because the retention of the Debtors’ remaining workforce is vital to preserving the value of the Debtors’ business, it is in the best interest of the Debtors’ estates to pay such claims in the ordinary course of business during these chapter 11 cases.

53. In case law construing sections 363 and 105(a) of the Bankruptcy Code, it is well-established that bankruptcy courts have the equitable power to authorize the payment of prepetition claims where such payments are necessary to preserve the going concern value of a debtor’s business, thereby facilitating its reorganization. *See, e.g., Miltenberger v. Logansport, Crawfordsville & SW. Ry. Co.*, 106 U.S. 286, 311 (1882) (holding that “[m]any circumstances may exist which may make it necessary and indispensable to . . . the preservation of the property, for the receiver to pay preexisting debts of certain classes, out of the earnings of the receivership”); *see also In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (noting that the “‘necessity of payment’ doctrine . . . permit[s] 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 shall have been paid”) (citations and internal quotations omitted).

54. Moreover, this Court has approved the payment of prepetition claims of employees for wages, salaries, independent contractor obligations, expenses, and benefits on the grounds that the payment of such claims was necessary to effectuate a successful reorganization or liquidation. *See e.g., In re Foamex International, Inc.*, Case No. 09-10560 (KJC) (Bankr. D. Del. Feb. 18, 2009); *In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. October 9, 2008); *In re Avado Brands, Inc.*, Case No. 07-11276 (MFW) (Bankr. D. Del. Sept. 9, 2007) (Docket No. 49); *In re Proxim Corp.*, Case No. 05-11639 (PJW) (Bankr. D. Del. June 15, 2005) (Docket No. 32); *In re Maxide Acquisition, Inc.*, Case No. 05-10429 (MFW) (Bankr. D. Del. Feb. 12, 2005) (Docket No. 31); *In re Redback Networks*, Case No. 03-13359 (RB) (Bankr. D. Del. Nov. 5, 2003) (Docket No. 42); *In re Fleming Companies, Inc. et al.*, Case No. 03-10945 (MFW) (Bankr. D. Del. April 4, 2003) (Docket No. 70).

55. As part of the foregoing relief, the Debtors seek authority to pay all Independent Contractor Claims. Such payments are authorized under section 105 of the Bankruptcy Code because they are critical to the Debtors' viability. Like the Employees, the Independent Contractors are critical to the Debtors' business. If the Independent Contractor Claims are not timely paid, the degraded morale and goodwill of the Independent Contractors could cause immediate and irreparable harm to the Debtors' business. This Court has in the past approved payment of prepetition claims similar to the Independent Contractor Claims. *See e.g., In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. October 9, 2008); *In re Advanced Marketing Services, Inc.*, Case No. 06-11480 (CSS) (Bankr. D. Del. Jan. 3, 2007) (Docket No. 51).

56. As part of the foregoing relief, the Debtors seek authority to pay all Reimbursable Expenses relating to the prepetition period. Such payments are authorized under

section 105 of the Bankruptcy Code as they are critical to the maintenance of a strong and dedicated workforce, and to the Debtors' viability and opportunities for a successful restructuring effort. Moreover, this Court has in the past approved the payment of prepetition claims for reimbursable expenses under section 105 of the Bankruptcy Code. *See e.g., In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. October 9, 2008); *In re Proxim Corp.*, Case No. 05-11639 (PJW) (Bankr. D. Del. June 15, 2005) (Docket No. 32); *In re Maxide Acquisition, Inc.*, Case No. 05-10429 (MFW) (Bankr. D. Del. Feb. 12, 2005) (Docket No. 31).

D. Failure to Grant the Relief Requested Herein Within Twenty (20) Days of the Petition Date May Cause Immediate and Irreparable Harm

57. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty (20) days after filing the petition regarding a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate only if such relief is necessary to avoid immediate and irreparable harm.

58. As described above, the Debtors' smooth transition into chapter 11 depends on their ability to make the payments and continue the programs described in this Motion. Failure to authorize the relief sought herein during the first twenty (20) days of these chapter 11 cases would be disruptive to the Debtors' business and cause immediate and irreparable harm. Authorization of the relief sought in this Motion is in the best interests of creditors and other parties-in-interest.

59. The relief requested in this Motion is appropriate and should be authorized under sections 105(a), 363(b), 507(a)(4) and 507(a)(5) of the Bankruptcy Code and Bankruptcy Rule 6003. Courts routinely recognize that payment of employee obligations is essential to a debtor's bankruptcy efforts and authorize payment of prepetition wage, salary, commission, expense, severance and benefit claims based on the foregoing justifications. *See, e.g., In re*

Foamex International, Inc., Case No. 09-10560 (KJC) (Bankr. D. Del. Feb. 18, 2009) (Docket No. 58); *In re JHT Holdings, Inc.*, Case No. 08-11267 (BLS) (Bankr. D. Del. October 9, 2008) (Docket No. 37); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 3, 2006) (Docket No. 191); *In re Pliant Corp.*, Case No. 06-10001 (Bankr. D. Del. Jan. 4, 2006) (Docket No. 32).

60. Nothing in this Motion nor any payments made by the Debtors pursuant to the Motion shall be deemed an assumption or rejection of any Employee Benefit Plan, employment agreement, other program or contract, or otherwise affect the Debtors' rights under sections 365 and 1113 of the Bankruptcy Code to assume or reject any executory contract between the Debtors and any Employee.

NOTICE AND PRIOR MOTIONS

61. Notice of this Motion has been given to (i) the U.S. Trustee; (ii) those creditors listed on the Debtors' Consolidated List of Creditors Holding 30 Largest Unsecured Claims and (iii) all other parties required to receive service under Rule 2002-1(b) of the Local Rules. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice of this Motion is necessary or required.

62. No previous request for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter an order (a) authorizing, but not directing, the Debtors to (i) pay prepetition claims of current employees, including, but not limited to, claims for wages, salaries, vacation, and sick leave, up to the statutory maximum of \$10,950 for each employee; (ii) continue post-petition employee benefit plans and programs in effect immediately prior to the filing of these cases; (iii) pay certain former employee pre-petition COBRA benefits; (iv) pay prepetition federal, state and local

withholding obligations; (v) pay certain prepetition claims of independent contractors; (vi) reimburse employees and independent contractors for prepetition expenses and (vii) direct all banks and financial institutions to honor prepetition checks for payment of employee obligations and (b) granting the Debtors such other and further relief as it deems is just and proper under the circumstances.

Dated: May 30, 2009
Wilmington, Delaware

Respectfully submitted,

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