

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

In re:

COACH AM GROUP HOLDINGS CORP.,
*et al.*¹

Debtors.

Chapter 11

Case No. 12-_____(____)

(Joint Administration Requested)

**MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER PURSUANT
TO 11 U.S.C. §§ 365(a), 363(b) AND 105(a) (I) AUTHORIZING, BUT NOT
DIRECTING, THE DEBTORS TO PAY PREPETITION OBLIGATIONS OWED
TO FOREIGN CREDITORS, (II) AUTHORIZING AND DIRECTING FINANCIAL
INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND
TRANSFERS, AND (III) AUTHORIZING THE ASSUMPTION OF
EXECUTORY CONTRACTS WITH FOREIGN COUNTERPARTIES**

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”), by and through their proposed counsel, submit this motion (the “**Motion**”) for entry of an order an order pursuant 11 U.S.C. §§ 365(a), 363(b) and 105(a) (i) authorizing, but not directing, the Debtors to pay prepetition obligations owed to foreign creditors, (ii) authorizing

¹ Coach Am Group Holdings Corp. (4830); Coach Am Holdings Corp. (1816); Coach America Holdings, Inc. (2841); American Coach Lines, Inc. (2470); America Charters, Ltd. (8246); American Coach Lines of Atlanta, Inc. (4003); American Coach Lines of Jacksonville, Inc. (1360); American Coach Lines of Miami, Inc. (7867); American Coach Lines of Orlando, Inc. (0985); Coach America Group, Inc. (2816); B & A Charter Tours, Inc. (9392); Dillon’s Bus Service, Inc. (5559); Florida Cruise Connection, Inc. (9409); Hopkins Airport Limousine Services, Inc. (1333); Lakefront Lines, Inc. (5309); The McMahon Transportation Company (0030); Midnight Sun Tours, Inc. (2791); Royal Tours of America, Inc. (2313); Southern Coach Company (6927); Tippet Travel, Inc. (8787); Trykap Airport Services, Inc. (0732); Trykap Transportation Management, Inc. (2727); KBUS Holdings, LLC (6419); ACL Leasing, LLC (2058); CAPD, LLC (4454); Coach America Transportation Solutions, LLC (6909); CUSA, LLC (3523); CUSA ASL, LLC (2030); CUSA AT, LLC (2071); CUSA AWC, LLC (2084); CUSA BCCAE, LLC (2017); CUSA BESS, LLC (3610); CUSA CC, LLC (1999); CUSA CSS, LLC (1244); CUSA EE, LLC (1982); CUSA ELKO, LLC (4648); CUSA ES, LLC (1941); CUSA FL, LLC (1920); CUSA GCBS, LLC (1891); CUSA GCT, LLC (1833); CUSA KBC, LLC (1808); CUSA K-TCS, LLC (1741); CUSA Leasing, LLC (1321); CUSA PCSTC, LLC (1701); CUSA PRTS, LLC (1591); CUSA RAZ, LLC (0640); CUSA Transit Services, LLC (8847); Get A Bus, LLC (1907); Coach BCCAE, L.P. (3488); Coach Leasing BCCAE, L.P. (6784). The Debtors’ corporate offices are located at 8150 North Central Expressway, Suite M1000, Dallas, Texas 75206.

and directing financial institutions to honor and process related checks and transfers, and (iii) authorizing the assumption of executory contracts with foreign counterparties. In support of this Motion, the Debtors respectfully state:

JURISDICTION

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On the date hereof (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (collectively, the “**Chapter 11 Cases**”).

3. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed in the Chapter 11 Cases. Contemporaneously herewith, the Debtors filed a motion seeking the joint administration of the Chapter 11 Cases.

4. Detailed information regarding the Debtors’ business and the events leading to the Chapter 11 Cases is set forth in the *Declaration in Support of Chapter 11 Petitions and First Day Motions* (the “**First Day Declaration**”), filed contemporaneously herewith.

RELIEF REQUESTED

5. By this Motion, the Debtors request entry of an order pursuant to sections 365(a), 363(b) and 105(a) of the Bankruptcy Code (i) authorizing, but not directing, the Debtors to pay prepetition obligations owed to foreign creditors, (ii) authorizing and directing financial institutions to honor and process related checks and transfers, and (iii) authorizing the assumption of executory contracts with foreign counterparties. Because foreign parties may not be subject to the laws of the United States or orders of this Court, it is imperative that the

Debtors immediately assumed the Agreements (defined below) and otherwise obtain the necessary authority to continue performing their obligations with respect to such foreign parties.

International Services Agreement

6. In the ordinary course of business, Debtor CUSA EE, LLC dba El Expreso Bus Company (“**El Expreso**”) entered into an International Service Agreement (the “**ISA**”), dated as of October 1, 2009, with Coordination of Autobuses Estrella Blanca, S.A. de C.V. through its members, jointly and severally, Autobuses Americanos S.A. de C.V and Omnibus Americanos S.A. de C.V. (collectively, the “**Foreign Counterparties**”).

7. The ISA sets forth El Expreso’s and the Foreign Counterparties’ agreement to operate through-buses for the transportation of passengers and cargo from Houston, Texas to Monterrey, Mexico. El Expreso operates the buses from Houston to the International Bridge between Laredo, Texas and Nuevo Laredo, Tamaulipas, Mexico. The Foreign Counterparties operate the buses from the Mexican border to Monterrey. There, the parties turn over control and possession of each bus to the other party’s representative, thereby transferring responsibility for operation of the bus along the route. Service on each party’s segment of the route is provided by drivers/operators employed and paid by such party. Furthermore, each party is responsible for (i) loss, damage or destruction of buses, damage, and (ii) loss or damage to baggage, that occurs on their segment. The contract also governs how liability will be allocated where the location of damage occurred cannot be determined.

8. Revenues are apportioned according to percentage of the mileage of any given trip over the respective party’s segment. There are two points of revenue along the route: ticket sales and vehicle leases. Ticket sales for transportation operated on both parties’ route segments is divided on the basis of percentage of mileage operated by each company over the route. When a party sells a ticket for transportation solely on its own segment, that party retains 100% of the sale. When a party sells a ticket for transportation on the other party's segment, the seller is entitled a 10% sale commission. The parties also agree to lease to each other the

vehicles used on the route. The rate expressed in the ISA is \$0.15 cents per mile and \$0.31 cents maintenance fee per mile. Fuel costs are prorated in accordance to the number of miles of the party's traveled segment, with an accounting settlement performed each month.

9. The ISA includes an *ipso facto* clause providing for the termination of the ISA in the event of bankruptcy, receivership, or dissolution of any of the parties. The ISA also grants the non-debtor party a security interest in any amounts due and owing at the time of the filing of the bankruptcy, receivership or dissolution. The ipso facto clause assumes a position of importance in this context because the Foreign Counterparties may not be subject to the laws of the United States or orders of this Court, and may deem the ISA terminated (and assert a security interest in certain of the Debtors' property) as a result of the commencement of the Chapter 11 Cases.

10. As of the Petition Date, the Debtors owe approximately \$250,000 under the ISA that would give rise to a cure payment obligation under section 365 of the Bankruptcy Code. Accordingly, by this Motion, the Debtors seek authority to pay any amounts due and owing under the ISA pursuant to section 365 of the Bankruptcy Code.

Prepaid Funding Agreement

11. In addition to the ISA, El Expreso and the Foreign Counterparties entered into a Prepaid Funding Agreement (the "**Funding Agreement**" and, together with the ISA, the "**Agreements**"), dated as of October 1, 2009. Under the Funding Agreement, El Expreso pays the Foreign Counterparties an upfront fee for the refurbishment of the vehicles leased under the ISA. These fees are credited to El Expreso and are used to reduce the payments that would otherwise be owed under the ISA. The Funding Agreement provides any portion of the advance payment that has not been repaid from credits under the ISA after twelve months following the commencement of service under the ISAA, the remaining amount will be refunded within 30 days of that time. Thus, the Debtors believe that all payment obligations under the Funding Agreement have now expired. However, there continuing non-monetary obligations under the

Funding Agreement, such as the obligation cooperate with Foreign Counterparties in their efforts to obtaining registration of vehicles.

12. The Debtors believe there are no outstanding monetary obligations under the Funding Agreement that would give rise to a cure payment obligation under section 365 of the Bankruptcy Code. However, in an abundance of caution, through this Motion, the Debtors seek authority to pay any cure costs that the Debtors agree with the Foreign Counterparties are due and owing.

Other Foreign Creditors

13. In connection with operating the through-bus service under the ISA, El Espresso utilizes the services of a Mexican vendor - El Expreso Transporte - to provide payroll and related services in Mexico. As of the Petition Date, the Debtors owed El Expreso Transporte approximately \$35,000 for services provided prior to the Petition Date.

14. The benefits received by the Debtors under the Agreements, and their relationship with El Expreso Transporte, are important to their overall operations. These benefits include, but are not limited to, increased revenue and the goodwill associated with providing services along the routes covered by the ISA, which are important to many of the Debtors' customers.

Terms Governing Payment

15. In connection with the payment of the claims of any foreign creditor, the Debtors propose (unless otherwise waived by the Debtors in their discretion) that in exchange for payment of their prepetition claims, the foreign creditors continue to provide goods and services and to perform under the Agreements (defined below) to the Debtors on the most favorable terms in effect between the creditor and the Debtors in the twelve (12) month period preceding the Petition Date or on such other terms as the Debtors and the creditor may otherwise agree; provided, however, that the Debtors pay for the goods and services in accordance with the payment terms provided in the Agreements.

16. The Debtors' ability to pay any claims of foreign creditors is subject in all respects to the terms of the proposed debtor in possession financing facility.

BASIS FOR RELIEF

A. The Debtors Should Be Authorized To Assume The Agreements.

17. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). By enacting section 365(a) of the Bankruptcy Code, Congress intended to allow a debtor to assume those leases and contracts that benefit the estate, and to reject those that are of no value or are burdensome to the estate. *See Cinicloa v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001); *In re Whitcomb & Keller Mortgage Co., Inc.*, 715 F.2d 375, 379 (7th Cir. 1983); *In re Sandman Assocs, LLC*, 251 B.R. 473, 481 (W.D.Va. 2000) (noting that "[t]he authority granted by section 365 allows the trustee or debtor in possession to pick and choose among contracts, assuming those that are favorable and rejecting those that are not").

18. It is well established that decisions to assume or reject executory contracts or unexpired leases are matters within the "business judgment" of the debtor. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) (noting that "[i]n determining whether a debtor may be permitted to reject an executory contract, courts usually apply the business judgment test. Generally, absent a showing of bad faith, or an abuse of discretion, the debtor's business judgment will not be altered") (citations omitted). *See also Sharon Steel Corp. v. National Fuel Gas Dist. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). Accordingly, courts approve the assumption or rejection of an executory contract or unexpired lease unless evidence is presented that the debtor's decision to assume or reject was "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *In*

re Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986). Indeed, to impose more exacting scrutiny would slow a debtor's reorganization, thereby increasing its cost and undermining the "Bankruptcy Code's provisions for private control" of the estate's administration. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

19. It is clear that the Agreements are executory contracts under section 365 because the parties have continuing obligations to perform thereunder. To the extent any defaults exist under the Agreements, the Debtors are prepared to promptly cure them and submit that the revenue from their ongoing operations constitutes sufficient adequate assurance of future performance. To the extent necessary, however, the Debtors are prepared to provide evidence as to adequate assurance in connection with any hearing held on an objection that raises the issue.

20. The Debtors submit that their decision to assume the Agreements is supported by sound business judgment and is in the best interests of their estates and creditors. The Debtors' continued ability to perform under the Agreements is important to the Debtors' overall operations.

B. Payment Of Prepetition Claims Of Foreign Creditors Is Necessary And Appropriate

21. The Debtors must have the ability to continue to fund and maintain their operations in Mexico on an uninterrupted basis. The foreign creditors have little or no connection to the United States. Although the scope of the automatic stay set forth in section 362 of the Bankruptcy Code is universal, it would be difficult to enforce the stay in a foreign jurisdiction if the creditor to which enforcement is sought has no presence in the United States. As a result, despite the commencement of these Chapter 11 Cases and the imposition of the automatic stay, the foreign creditors described above likely would be able to immediately pursue remedies and seek to collect prepetition amounts owed to them. Indeed, under the ISA, there is the real risk that the Foreign Counterparties may attach certain property of the Debtors in Mexico even before obtaining a judgment. Additionally, if the relief requested in this Motion is denied, the foreign

creditors may decline to provide necessary goods and services. Either of these events would disrupt the Debtors' operations and compromise their efforts in this Court.

22. The Court has authority pursuant to sections 363(b) and 105(a) of the Bankruptcy Code to authorize the Debtors to pay any prepetition obligations outstanding to the foreign creditors. The Court may grant the relief requested herein pursuant to sections 363(b) and 364 of the Bankruptcy Code. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (section 363 empowers court to authorize a debtor to expend funds outside the ordinary course of business, and the court has broad flexibility in tailoring its orders to meet a wide variety of circumstances). The Debtors must articulate some business justification, other than mere appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business, before the court may permit such disposition under section 363(b). *Official Comm. of Unsecured Creditors v. Enron Corp. (In re Enron Corp.)*, 335 B.R. 22, 27-28 (S.D.N.Y. 2005) (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

23. The business judgment rule is satisfied where, as here, the Debtors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)), appeal dismissed, 3 F.3d 49 (2d Cir. 1993). "Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

24. Relying on section 363(b), courts have permitted debtors to pay prepetition claims of foreign creditors in circumstances where, as here, the estates will obtain more value for all creditors or avoid more harm by making the prepetition payments. *See, e.g., In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (authorizing debtor

to pay, pursuant to 363(b), certain foreign creditors' prepetition claims where the payments were "necessary" and "appropriate" to debtor's reorganization). Here, because the relief requested in this Motion is important to the Debtors' overall operations and the associated revenue-generating capacity, and generally contemplates that payments will be made to foreign creditors who agree to provide goods or services on customary trade terms, the relief is warranted under section 363(b) of the Bankruptcy Code.

25. The Court has authority, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to authorize the Debtors to pay any prepetition amounts that may be owed to foreign creditors because the payments are necessary for the Debtors to carry out their fiduciary duties under section 1107(a) of the Bankruptcy Code. Section 1107(a) of the Bankruptcy Code "contains an implied duty of the debtor-in-possession" to act as a fiduciary to "protect and preserve the estate, including an operating business' going concern value," on behalf of the debtor's creditors and other parties in interest. *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)). Section 105(a) of the Bankruptcy Code empowers 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); *In re Aquatic Dev. Group, Inc.*, 352 F.3d 671, 680 (2d Cir. 2003) ("it is axiomatic that bankruptcy courts are 'courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process'") (quoting *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994)).

26. Courts consistently have permitted post-petition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport, C&S W.R. Co.*, 106 U.S. 286, 312 (1882) (payment of pre-receivership claim before reorganization permitted to prevent "stoppage of [crucial] business relations"); *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir.) (extending doctrine for payment of prepetition claims beyond railroad reorganization cases), cert. denied 325 U.S.

873 (1945); *In re Chateaugay Corp.*), 80 B.R. 279, 285-86 (S.D.N.Y. 1987) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

27. The “necessity of payment” doctrine supports the relief requested in the this Motion. The “necessity of payment” doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” *Ionosphere Clubs*, 98 B.R. at 176; *In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987); *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992). This rule is consistent with the paramount goal of chapter 11, *i.e.*, “facilitating the continued operation and rehabilitation of the debtor. . . .” *Ionosphere Clubs*, 98 B.R. at 176. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay the prepetition claims of certain critical vendors. *See In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a prepetition claim is essential to the continued operation of [the debtor], payment may be authorized”).

C. The Court Should Authorize and Direct Banks and Other Financial Institutions to Honor and Pay Checks Issued and Make Other Transfers to Pay Foreign Creditors

28. 23. The Debtors request that the Court authorize and direct the Debtors’ banks and other financial institutions at which the Debtors maintain disbursement accounts, at the Debtors’ direction, to receive, process, honor, and pay, to the extent of funds on deposit, all checks drawn or electronic fund transfers requested or to be requested by the Debtors relating to the Debtors’ obligations to the foreign creditors. The Debtors also seek authority to issue new post-petition checks, or effect new electronic fund transfers, on account of those obligations to replace any prepetition checks or electronic fund transfer requests that may be lost, dishonored, or rejected because of the commencement of the Chapter 11 Cases.

D. The Debtors Have Satisfied Bankruptcy Rule 6003

29. Bankruptcy Rule 6003 provides that to the extent “relief is necessary to avoid immediate and irreparable harm,” a Bankruptcy Court may approve a motion to “pay all or

part of a claim that arose before the filing of the petition” prior to twenty-one days after the Commencement Date. Fed. R. Bankr. P. 6003. As described above, absent the relief requested herein, foreign creditors are likely to take action either remedially or by not providing services or performance under the Agreements, which will have adverse consequences for the Debtors’ overall operations.

E. Waiver Of Bankruptcy Rules 6004(a) And (h)

30. To successfully implement the relief requested herein, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). Pursuant to 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 above, the payments proposed herein are essential to prevent potentially irreparable damage to the Debtors’ operations, value, and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

NOTICE

31. No trustee, examiner or creditors’ committee has been appointed in the Chapter 11 cases. Notice of this Motion has been given to (i) Office of the United States Trustee for the District of Delaware, Attn: Tiiara Patton, Esq.; (ii) the creditors listed on the Debtors’ consolidated list of 30 largest unsecured creditors; (iii) counsel to JPMorgan Chase Bank, N.A., as administrative agent for the Debtors’ prepetition senior secured lenders and proposed post-petition secured lenders; (iv) counsel to The Bank of New York Mellon, as administrative agent for the Debtors’ prepetition subordinated lenders; (v) all known holders of liens upon the Debtors’ assets; (vi) the Internal Revenue Service; (vii) all parties that have requested notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002; and (viii) the Foreign Counterparties

and foreign creditors identified herein. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form submitted herewith, granting the relief requested herein and such other and further relief as this Court deems just and proper.

Respectfully submitted,

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Dated: January 3, 2012
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