

**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 INTERIM AND FINAL ORDERS
PURSUANT TO 11 U.S.C. §§ 105(a), 363(b), 1107(a) AND 1108 (A) AUTHORIZING
DEBTORS TO PAY OR HONOR PREPETITION OBLIGATIONS TO CERTAIN
COMMON CARRIERS AND OTHER SUBCONTRACTORS AND (B) AUTHORIZING
AND DIRECTING FINANCIAL INSTITUTIONS TO HONOR ALL RELATED
CHECK AND ELECTRONIC PAYMENT REQUESTS**

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 interim and final pursuant to sections 105(a), 363(b), 1107(a) and 1108 of title 11 of the United States Code (the “**Bankruptcy Code**”) (a) authorizing, but not directing, the Debtors to

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.

pay certain prepetition claims of shippers, warehousemen and other subcontractors and (b) authorizing and directing financial institutions to receive, process, honor and all pay related checks issued and electronic payment requests. In support of this Motion, the Debtors respectfully state as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. Venue is proper in the district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory and legal predicates for the relief sought herein are sections 105(a), 363(b), 1107(a) and 1108 of the Bankruptcy Code and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

BACKGROUND

3. 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**”).

4. 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.

5. 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

6. By this Motion, the Debtors seek entry of an interim order (the “**Interim Order**”), in substantially the form attached hereto as **Exhibit A**, and a final order (the “**Final**

Order”), in substantially the form attached hereto as **Exhibit B**, authorizing, but not directing, the Debtors to pay the prepetition claims of Common Carriers and Subcontractors, up to a maximum of \$1.15 million in the aggregate and \$500,000 during the interim period, in accordance with the procedures set forth below.

7. In the ordinary course of business, the Debtors do business with common carriers, shippers, warehousemen, truckers, shipping auditing services, customs brokers and customs agents (collectively, the “**Common Carriers**”) that ship, transport, store and deliver raw materials (primarily, spare parts and other goods for the Debtors’ motor coaches) used in the Debtors’ operations. Most of the Common Carriers have contracts with the Debtors. Certain common Carriers are hired on an as-needed basis. The Common Carriers are generally not paid in advance, but rather invoice the Debtors for services previously rendered.

8. The Debtors rely extensively on the Common Carriers to deliver components, parts, and equipment to the Debtors’ facilities and to store parts and other materials, if necessary, during transit. The services provided by these Common Carriers are critical to the Debtors’ ability to maintain their motor coaches and otherwise to operate their business.

9. Furthermore, in the ordinary course of their business, the Debtors also do business with contractors and vendors that install, repair and/or provide parts for the Debtors’ motor coaches (collectively, the “**Subcontractors**”).

10. Although the Debtors generally make timely payments to the Common Carriers and Subcontractors, some Common Carriers and/or Subcontractors may not have been paid for prepetition services for which payment was not yet due as of the Petition Date. Absent timely payments, these Common Carriers and Subcontractors may be entitled under applicable non-bankruptcy law to assert possessory liens on the goods in their possession, which secure the charges or expenses incurred in connection with the transportation or storage of the goods.²

² For example, section 7-307 of the Uniform Commercial Code provides, in pertinent part, that a “carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal

Moreover, notwithstanding the automatic stay under section 362 of the Bankruptcy Code, the Subcontractors may have a right to assert and perfect materialmen's, mechanic's, artisan's, or other liens (collectively, the "**Subcontractor Liens**") against the Debtors' property.

11. The Debtors estimate that, as of the Petition Date, amounts owed to Common Carriers for prepetition goods or services total approximately \$10,000 (the "**Common Carrier Claims**")³ and amounts owed to Subcontractors (excluding Common Carrier Claims, which obligations have given or could give rise to a Subcontractor lien against the Debtors or their property,) total approximately \$1.15 million (the "**Subcontractor Lien Claims**").

12. The goods and services provided by the Common Carriers and the Subcontractors are essential to the Debtors' business. If the Common Carriers and/or the Subcontractors refuse to continue providing their services to the Debtors on reasonable terms, or if they assert possessory liens on the Debtors' motor coaches and other property, the Debtors' efforts in these Chapter 11 Cases will be compromised.

Common Carrier Claim And Subcontractor Lien Payment Procedures

13. The Debtors seek to pay, and consequently discharge, the Common Carrier Claims and Subcontractor Lien Claims pursuant to the following procedures:

- (a) **Debtors' Sole Discretion.** The Debtors, in their sole discretion, shall determine, in the exercise of their business judgment, which Common Carriers and Subcontractors, if any, are entitled to payment under this Motion. Prior to making a payment to a party under this Motion, the Debtors may in their discretion, settle all or a portion of the Common Carrier Claims or Subcontractor Lien Claims for less than their face amount without further notice or hearing.
- (b) **Agreed Trade Terms.** The Debtors may condition payment of Common Carrier Claims or Subcontractor Lien Claims on the agreement of the Common Carriers and Subcontractors to continue supplying goods and services to the Debtors on the same trade terms that were in effect prior to the Petition Date. The Debtors reserve the right to negotiate new trade

charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." See U.C.C. § 7-307(1).

³ Common Carrier Claims include warehousemen's liens.

terms with any Common Carriers or Subcontractors as a condition to payment of any Common Carrier Claim or Subcontractor Lien Claim. The Debtors shall have the right, on a case-by-case basis, to request written acknowledgement from Common Carriers and Subcontractors of the trade terms to which the parties have agreed.

- (c) Subcontractor Lien Claims. With respect to Subcontractor Lien Claims only, the Debtors shall have authority to pay a Subcontractor Lien Claim when, if the Debtors determine, in their discretion, that imposition of a lien would unduly disrupt the Debtors' business; provided, however, that, with respect to a Subcontractor: (i) the Debtors shall not pay such Subcontractor Lien Claim unless the Subcontractor has perfected or, in the Debtors' judgment, is presently capable of perfecting or will be capable of perfecting in the future a lien or liens (not subject to avoidance) with respect to the Subcontractor Lien Claim; (ii) the payment of such Subcontractor Lien Claim shall be made with a full reservation of rights regarding the extent, validity, perfection or possible avoidance of any liens; and (iii) the Subcontractor agrees to promptly release any filed liens upon payment of its Subcontractor Lien Claim
- (d) Breach of Agreed Trade Terms. To the extent a Common Carrier or Subcontractor refuses to comply with agreed trade terms, any payment made to such Common Carrier or Subcontractor on account of a Common Carrier Claim or Subcontractor Lien Claim shall be deemed to have been in payment of the then outstanding post-petition obligations owed to such Common Carrier or Subcontractor, and such Common Carrier or Subcontractor shall be required to immediately repay to the Debtors any payment made to it on account of its prepetition claim to the extent the aggregate amount of such payments exceeds the post-petition obligations then outstanding, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or otherwise.

14. Nothing herein shall preclude the Debtors, their lenders or any other party in interest from challenging the validity or extent of any Common Carrier Claim or Subcontractor Lien Claim and seeking disgorgement of any payments made pursuant to the relief requested herein.

15. Finally, the Debtors request that all banks and other financial institutions on which checks to the Common Carriers and the Subcontractors are drawn be authorized and directed to receive, process, honor and pay any and all such checks, whether presented prior to or after the Petition Date, upon each such bank receiving notice of such authorization. In addition,

the Debtors request authority to issue post-petition checks as necessary to replace any prepetition checks issued with respect to the Common Carrier Claims that may be dishonored.

BASIS FOR RELIEF

A. Ample Authority Exists To Support Payment Of The Common Carrier Claims And The Lien Claim

16. Courts acknowledge that it is appropriate to authorize the payment of prepetition obligations under appropriate circumstances. *See, e.g., In re Wickes Holdings, LLC*, Case No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); *In re Tweeter Home Entm't Group, Inc.*, Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); *In re Pope & Talbot, Inc.*, Case No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re Hancock Fabrics, Inc.*, Case No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (KJC) (Bankr. D. Del. Nov. 20, 2006); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006). The authority to permit the payment of prepetition obligations is grounded in sections 105(a), 363(b), 1107(a), and 1108 of the Bankruptcy Code.

17. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, a debtor-in-possession is a fiduciaries that “holds the bankruptcy estate and operat[es] the business for the benefit of creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the fiduciary duties of any debtor-in-possession is the obligation to “protect and preserve the [value of the] estate, including an operating business’s going-concern value.” *Id.* Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty “only. . . by the pre-plan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted the pre-plan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *Id.*

18. Consistent with a debtor's fiduciary duties, courts have also authorized payment of prepetition obligations under section 363(b)⁴ of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to allow contractor to pay prepetition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

19. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code. Section 105(a), which codifies the inherent equitable powers of the bankruptcy court, empowers the court to "issue any order, process, or judgment that is necessary or appropriate to carry out provisions of this title." 11 U.S.C. §105(a). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when essential to the continued operation of the debtor's business. Specifically, the Court may use its power under section 105(a) to authorize payment of prepetition obligations pursuant to the "necessity of payment" rule or "doctrine of necessity".

20. This principle originated in railway cases and was first articulated by the United States Supreme Court in *Miltenberger v. Logansport. C.&S.W.R. Co.*, 106 U.S. 286 (1882). The doctrine was subsequently expanded to non-railroad debtors. *See Dudley v. Mealey*, 147 F.2d 268,271 (2d Cir. 1945) (holding that the court was not "helpless" to apply the rule to supply creditors of non-railroad debtors where the alternative was cessation of operations). The United States Court of Appeals for the Third Circuit recognized the so-called "necessity of payment" doctrine in *In re Lehigh & New England Ry. Co.*, 657 F.2d 570,581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of prepetition claims if such

⁴ Section 363(b) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

payment was essential to the continued operation of the debtor. *Id.* (stating courts may authorize payment of pre-petition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); *see also In re Penn Central Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding 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 RR. 821, 824-845 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay pre-petition 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); *Pension Benefit Guaranty Corp. v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 159 B.R. 730, 736 (Bankr. D. Del. 1993).

21. Indeed, it is not uncommon for courts to authorize payments to prepetition creditors, and in particular shippers, warehousemen and other lien claimants. Such relief has been granted by this Court in the past. *See, e.g., In re J.L. French Automotive Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006) (authorizing payment of prepetition shipping and warehousing charges in an amount not to exceed \$400,000 and lien claimant claims in an amount not to exceed ‘\$6,000,000’); *In re Pliant Corp.*, Case No. 06-10001 (MFW) (Bankr. D. Del. Jan. 4, 2006); *In re Waccamaw’s HomePlace*, Case No. 01-0181 (PJW) (Bankr. D. Del. January 17, 2001); *In re Acme Steel Company, et al.*, Case No. 98-2179 (MFW) (Bankr. D. Del. Sept. 29, 1998) (shippers and warehousing charges).

B. It Is Essential That The Debtors Are Able To Pay Immediately The Common Carrier Claims And The Subcontract Lien Claims To Preserve The Value Of Their Estates

22. The relief sought by this Motion is appropriate under each of the standards discussed above. As set forth herein and in the First Day Declaration, the Debtors have determined, in the exercise of their sound business judgment, that it is in the best interest of their stakeholders to use the chapter 11 process to reduce the Debtors’ leverage and either reorganize

or seek to sell their assets pursuant to section 363 of the Bankruptcy Code. To maximize the value of the Debtors' estates, the Debtors must continue to operate their business as normal during these Chapter 11 Cases, with minimal disruptions. Any interruptions in the ordinary operation of the Debtors' business will compromise their efforts in these Chapter 11 Cases.

23. Payment of the Common Carrier Claims and Subcontractor Lien Claims is essential to the Debtors' day-to-day operations, which thrive on the timely delivery replacement parts and manufactured products to the Debtors' facilities, as well as the timely and efficient repair of their motor coaches. Any delay in the foregoing would cause operational disruption, loss of revenue, and goodwill.

C. Cause Exists To Authorize And Direct The Debtors' Financial To Honor Checks And Electronic Fund Transfers

24. The Debtors have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of cash reserves, expected cash flows from ongoing business operations and anticipated access to post-petition financing. Also, under the Debtors' existing cash management system, the Debtors are able to identify checks or wire transfer requests as relating to authorized payments, will not be honored inadvertently. The Debtors therefore request that all applicable financial institutions be authorized and directed, when asked by the Debtors, to receive, process, honor and pay any and all checks or wire transfers related to the payment of any Common Carrier Claims and/or Subcontractor Lien Claim.

D. The Debtors Have Satisfied Bankruptcy Rule 6003

25. 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 herein, the Debtors' business operations are entirely dependent on the normal and regular supply of fuel, and it is fundamental to the Debtors' continued operations that their fuel purchase, delivery, storage, and other service

arrangements continue uninterrupted. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

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

26. To implement the foregoing immediately, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

27. 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; and (vii) all parties that have requested notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

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WHEREFORE, the Debtors respectfully request the entry of the Interim Order, in substantially the form attached hereto as **Exhibit A**, and the Final Order, in substantially the form attached hereto as **Exhibit B**, granting the relief requested herein and such other and further relief as this Court deems just and proper.

Respectfully submitted,

LOWENSTEIN SANDLER PC

Sharon Levine, Esq.
S. Jason Teele, Esq.
Nicole Stefanelli, Esq.
65 Livingston Avenue
Roseland, New Jersey 07068
Telephone: (973) 597-2500
Facsimile: (973) 597-2400
slevine@lowenstein.com
steele@lowenstein.com
nstefanelli@lowenstein.com

-and -

POLSINELLI SHUGHART

/s/ Christopher A. Ward

Christopher A. Ward (Del. Bar No. 3877)
Justin K. Edelson (Del. Bar No. 5002)
Jarrett K. Vine (Del. Bar No. 5400)
222 Delaware Avenue, Suite 1101
Wilmington, Delaware 19801
Telephone: (302) 252-0920
Facsimile: (302) 252-0921
cward@polsinelli.com
jedelson@polsinelli.com
jvine@polsinelli.com

*Proposed Counsel to the Debtors and
Debtors in Possession*

Dated: January 3, 2012
Wilmington, Delaware