

Introduction

4. Over the past several months, the Debtors, with the assistance of their advisors, have developed a plan to optimize their operations by focusing more on their core and growth product lines, and exiting unprofitable legacy businesses. To ensure the future viability of their operations the Debtors have taken steps to reduce costs and increase productivity. This has forced the Debtors to make difficult decisions regarding workforce reduction. From 2006 to 2011, the Debtors and their non-Debtor affiliates reduced employee workforce from approximately 3,120 employees to just over 406 worldwide. This includes the most recent reduction in the Debtors' workforce by 25 employees immediately before the Petition Date.

5. Prior to filing these chapter 11 cases, the Debtors did not have a severance policy known to employees that was consistently applied throughout the organization. Given the lack of an official severance policy, the commencement of these chapter 11 cases and management's ongoing efforts to control costs, many employees perceive a lack of job security. This perception is expected to reduce the employees' incentives to perform at maximum levels, lower morale in the workforce, distract employees from their duties and cause some employees to seek alternative employment.

6. Recognizing the negative impact of such uncertainty and the importance of maintaining positive morale among their workforce, the Debtors' senior management worked with their advisors and the Debtors' secured lender (the "*Prepetition Secured Lender*") to develop a severance program (the "*Severance Program*"). The Debtors believe that the Severance Program will help alleviate concerns of the Debtors' workforce by increasing job security and ensuring operational stability. In formulating the terms of the Severance Program, the Debtors balanced the importance of maintaining a stable and productive workforce with the financial constraints under which the Debtors now operate as a chapter 11 debtor.

7. Despite facing a significant deficiency claim, the Prepetition Secured Lender, believing in the Debtors' going-concern potential and in agreement with the Debtors' concerns over workforce stability, support the Severance Program. The Severance Program provides terminated employees severance payments ranging from two to four weeks of pay depending on their length of employment in addition to certain Consolidated Omnibus Budget Reconciliation Act ("**COBRA**") benefits. The Severance Program applies only to the Debtors' non-insider employees, including those terminated immediately before to the Petition Date, who meet the criteria set forth in the Severance Program.

8. The Debtors believe that it is essential that the Severance Program is approved and the Debtors be permitted to make severance payments, including COBRA benefits, to the 25 recently terminated employees (the "**Severance Obligations**"). Increased instability in the Debtors' workforce will only undermine the Debtors' ability to strengthen their financial and operational foundation, to generate growth, and to be positions for long-term success. Permitting the Debtors to pay the Severance Obligations will help minimize the adverse effects of the commencement of the chapter 11 cases on their ongoing business operations.

Relief Requested

9. By this motion, the Debtors request entry of an order, substantially in the form attached hereto as **Exhibit A** (the "**Order**"), (a) authorizing, but not directing, the Debtors to (i) implement the Severance Program and (ii) pay the Severance Obligations to non-insider employees terminated before the Petition Date in accordance with the terms set forth in the Severance Program.

10. Specifically, the Debtors seek authority to pay approximately \$235,000 to the 25 recently terminated employees on account of the Severance Obligations. The Debtors believe that honoring the Severance Obligations, and confirming to the remainder of the Debtors'

workforce the efficacy and importance of the Severance Program to the Debtors' estates mandates approval of the relief requested herein on a final basis. The Debtors must maintain the morale of the Debtors' current workforce, particularly at this juncture when the employees' support for the Debtors' reorganization efforts is critical to the success of these chapter 11 cases. A detailed description of the facts and circumstances supporting this motion are set forth in greater detail in the *Declaration of Sailesh Chittipeddi in Support of the Severance Program* (the "*Chittipeddi Declaration*"), attached hereto as **Exhibit B**.

Basis for Relief

11. Employee support for the Debtors' reorganization efforts is critical to the success and viability of the Debtors' businesses and these chapter 11 cases. The Debtors operate in a highly competitive marketplace. In the fast-evolving technology industry, particularly where employees hold institutional knowledge, the Debtors' employees are the lifeline of their operations. Maintaining an innovative and dependable workforce ensures that the Debtors are able to keep pace with competitors, continually upgrade existing products and develop new products. The Debtors' success is inextricably tied to their ability to maintain their valuable workforce. A stable severance program lowers the risk that employees will terminate their employment. (Severance Decl. at ¶ 7).

12. Moreover, the Debtors' reputation as a cutting-edge developer amongst their customers and in the general marketplace is based in large part on the achievements and capabilities of their workforce. The Debtors are actively engaged in marketing several products in the early development stage to key customers. Any risk to such development resulting from workforce instability could drastically impact the Debtors' reputation and sales efforts. At this early stage of these chapter 11 cases, the Debtors cannot risk the substantial damage to their

business that would likely attend any decline in their employees' morale or risk of employee departures attributable to the Debtors' failure to pay severance. (Severance Decl. at ¶ 8).

13. Implementing such a program is not without tangible benefits. As a condition to receiving a severance payment, each employee must execute a release agreement, whereby the employee releases any claims held against the Debtors and agrees, among other things, to not disclose confidential information, solicit the Debtors' employees for a certain period of time or disparage the Debtors. The Debtors believe that the Severance Program will help reduce the time and expense that could arise in the absence of a severance program to defend the assertion of claims by employees. (Severance Decl. at ¶ 12).

I. The Severance Program

14. The terms of Severance Program include:

1. Eligibility: Benefits under the Severance Program will be provided only to those employees of the Debtors (each, an "**Eligible Employee**"): (i) who are not directors, officers or senior executives of the Debtors with the ability to exert control over corporate policy or decision making, (ii) who work on a full time basis and (iii) whose employment is terminated involuntarily by the Debtors. Employees who are terminated for cause are not eligible for payments under the Severance Program.
2. Severance Pay: An Eligible Employee will receive a one-time lump-sum payment and certain COBRA benefits based upon the service time and the base wage paid to the Eligible Employee at the time of termination; benefits under the Severance Program do not include, bonus, commissions or other similar reimbursements.
3. Release: Severance payments are contingent on the Eligible Employee's execution of a release agreement and waiver of all claims against the Debtors.
4. Severance Mitigation: Any payments of Severance Obligations will be reduced, dollar for dollar, by any amounts paid to such employee under any applicable law (such as the WARN Act (as such term is defined below)) related to the termination of such employee's employment or notice thereof.

II. The Severance Obligations

15. The Debtors are seeking authority to pay the 25 employees who were terminated immediately before the Petition Date, Severance Obligations in the aggregate amount of approximately \$235,000, including COBRA benefits, pursuant to the terms of Severance Program. A summary of the proposed payment schedule and outplacement services under the Severance Program is as follows:

Years of Employment	Severance Amount	COBRA Benefits
Less than One	2 weeks pay	20.5% of Severance Amount
Less than Two	3 weeks pay	20.5% of Severance Amount
Greater than Two	4 weeks pay	20.5% of Severance Amount

16. None of the Eligible Employees that the Debtors seek to pay Severance Obligation are "insiders," as that term is defined in section 101(31) of the Bankruptcy Code. Nor are any of the Eligible Employee officers, directors or senior executives of the Debtors with a control position. Instead, the Eligible Employees are "rank and file" employees. (Severance Decl. at ¶ 14).

Supporting Authority

I. Implementing the Severance Program is a Sound Exercise of the Debtors' Business Judgment

17. The Court may authorize the Debtors to implement the Severance Program under section 363(b)(1) of the Bankruptcy Code. Section 363(b)(1) 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). The use, sale or lease of property of the estate, other than in the ordinary course of business, is authorized when a "sound business purpose"

justifies such action. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee's judgment concerning use of property under §363(b) when there is a legitimate business justification); *In re Delaware & Hudson R.R. Co.*, 124 B.R. 169, 176 (D Del. 1991) (explaining that the Third Circuit has adopted the "sound business purpose" test to evaluate motions brought pursuant to section 363(b)).

18. Historically, courts have approved employee compensation programs that are outside of the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code. *See, e.g., Dai-Ichi Kangyo Bank Ltd v. Montgomery Ward Holding Corp., (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program; stating that "in determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions"); *In re Global Home Prods., LLC*, 369 B.R. 778, 784 (Bankr. D. Del. 2007) ("The reasonable use of incentives and performance bonuses are considered the proper exercise of a debtor's business judgment."); *In re Nobex Corp.*, Case No. 05-20050 (MFW), 2006 Bankr. LEXIS 417 (Bankr. D. Del. Jan 19, 2006) (approving incentive pay outside of ordinary course where it was "an appropriate exercise of the Debtor's business judgment"); *In re America West Airlines, Inc.*, 171 B.R. 674,678 (Bankr. D. Ariz. 1994) (it is the proper use of a debtor's business judgment to propose bonuses for employees who helped propel the debtor successfully through the bankruptcy process); *In re Interco Inc.*, 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991) ("debtors' business judgment" was controlling in the approval of a "performance/retention program"). *See also, In re Riverstone Networks, Inc.*, Case No. 0610110 (CSS) (Bankr. D. Del. March 28, 2006); *In re Pliant Corp.*, Case No. 06-10001 (MFW) (Bankr. D. Del. March 14, 2004).

19. The Debtors submit that implementing the Severance Program is in the best interests of the Debtors and their estates. As stated above, the Debtors' Eligible Employees are experienced and talented, and their skills and expertise are necessary to the Debtors' successful operational consolidation and the Debtors' ability to maximize value during the chapter 11 cases. The Debtors submit that the absence of an official severance policy increases Eligible Employees' anxiety about the outcome of the chapter 11 cases as they face the possibility of being terminated without a safety net in the form of severance benefits. (Severance Decl. at ¶ 17).

20. The Debtors believe that the implementation of the Severance Program will ensure current Eligible Employees' focus, morale and loyalty during this critical stage of the Debtors' chapter 11 cases. If the Debtors are not permitted to implement the Severance Program and make severance payments to involuntarily terminated Eligible Employees, the workforce will be jeopardized. Moreover, given the Debtors' status as a chapter 11 debtor, there is no guarantee that the Debtors could attract new employees of comparable quality and character should existing Eligible Employees leave the company. And, even if otherwise available, a new employee would lack the unique knowledge and historical perspective held by the Debtors' Eligible Employees. (Severance Decl. at ¶ 17).

21. The Severance Program and Severance Obligations were carefully structured to avoid unnecessary or excessive benefits while focusing and aligning the goals of the Debtors' workforce with those of the Debtors, *i.e.*, to preserve and maximize enterprise value for the benefit of the Debtors' stakeholders. Given the expected benefits from the Severance Program in the form of employee motivation and enhanced enterprise value, the Debtors submit that the cost of the Severance Program is more than reasonable. The Debtors therefore submit that the

Severance Program is a reasonable and efficient means of maximizing value for the estates. (Severance Decl. at ¶ 16).

22. To maintain a motivated workforce during bankruptcy, debtors frequently seek to implement compensation or severance programs to incentivize and reassure their employees. Recognizing the value of such programs, courts in this and other districts have granted relief similar to the relief requested herein. *See, e.g., In re Flying J, Inc.*, No. 08-13384 (MFW) (Bankr. D. Del. Feb. 18, 2009) (approval of severance payments ranging from two to five weeks of salary plus one additional week of salary for each year of service over one year); *In re Ascendia Brands, Inc.*, No. 08-11787 (BLS) (Bankr. D. Del. Nov. 20, 2008) (approval of severance and incentive compensation to wind-down personnel); *In re Linens Holding Co.*, No. 08-10832 (CSS) (Bankr. D. Del. Aug. 28, 2008) (approval of severance payments ranging from one to twenty-six weeks salary for all hourly and salaried employees); *In re Mervyn's Holdings, LLC*, No. 08-11586 (KG) (Bankr. D. Del. Aug. 26, 2008) (approval of severance payments ranging from two to twenty-six weeks of salary); *In re Aegis Mortgage Corp.*, No. 07-11119 (BLS) (Bankr. D. Del. Apr. 15, 2008).

23. The Debtors believe that implementing the Severance Program and paying the Severance Obligations is necessary to motivate and focus the Debtors' existing employees on their responsibilities and, in turn, maximize the value of these estates. (Severance Decl. at ¶ 16). Accordingly, the Debtors submit that implementing the Severance Program is a valid exercise of the Debtors' business judgment and that approval of the Severance Program is in the best interests of the Debtors' estates.

II. The Severance Program Satisfies the Requirements of Section 503(c) of the Bankruptcy Code

24. Section 503(c) of the Bankruptcy Code restricts severance and incentive payments to insiders of a debtor. Section 101(31) of the Bankruptcy Code defines an "insider" of a corporation as a director, officer, person in control of the debtor, partnership in which the debtor is a partner, general partner of the debtor, or a relative of a general partner, director, officer, or person in control of the debtor. *See* 11 U.S.C. § 101(31)(B). Courts, however, have "uniformly held that the Bankruptcy Code's definition is merely illustrative and that the term 'insider' must be flexibly applied on a case-by-case basis." *In re Oakwood Homes Corp.*, 389 B.R. 357, 365-66 (Bankr. D. Del. 2008).

25. Courts generally look to legislative history to determine whether an entity or person qualifies as a non-statutory insider, which states, "[A]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." *See* S. Rep. No. 989, 95th Cong., 2d Sess. reprinted in 1978 U.S.C.C.A.N. 5787, 5810 (1978); *Oakwood Homes Corp.*, 389 B.R. at 366. Specifically, courts consider factors such as an employee's level of control over corporate policy in general and the terms of incentive compensation programs in particular in determining if an employee is an "insider." *See In re CEP Holdings, LLC*, No. 06-51847, 2006 WL 3422665 (Bankr. N.D. Ohio Nov. 28, 2006) ("[T]he appropriate test for whether [the employee] was an officer is whether [the employee] occupied a high position within the corporation making him active in setting overall corporate policy or performing other important executive duties of such a character that it is likely that he would be accorded less than arms-length treatment in the payment of his antecedent claim against the debtor. . . . [It] includes, for example, those in the collective group exercising overall authority regarding the debtor's corporation decisions who, as

members of that insider group are in a position to exert undue influence over corporation decisions regarding payment of their claims in tight financial times."). Thus, Employees that hold nominal director and officer titles for clerical and administrative purposes only, and do not otherwise bear the hallmark of "insiders" as intended under the Bankruptcy Code, are not "insiders." Accordingly, the Debtors' have conducted an analysis of the day-to-day functioning, tasks and responsibilities of the Eligible Employees. Based upon this analysis, the Debtors' submit that none of the Eligible Employees are an "insider" of the Debtors.

26. Moreover, none of the Eligible Employees are a director, officer or person in control of the Debtors. In this regard, although certain Eligible Employees have the title of "Vice President," or "Director", they are not corporate officers of the Debtors with a position of control. Courts have found that the mere fact that an employee has the title of vice president does not mean that the person is an officer and has insider status. *See, e.g., In re Global Aviation Holdings Inc.*, 478 B.R. 142, 148 (Bankr. E.D.N.Y. 2012) (holding that employees were neither statutory nor non-statutory insiders, despite fact that employees held title of "director" or "vice president"); *In re L.G. Philips Displays USA, Inc.*, Case No. 06-10245 (BLS), Hr'g Tr., at 69 (Bankr. D. Del. Apr. 13, 2006) ("insider status typically goes to those who control governance and strategic direction of a corporate enterprise"); *In re Refco Inc.*, Case No. 05-60006 (RDD), Hr'g Tr., at 29-30 (Bankr. S.D.N.Y. Jan. 10, 2006) (finding that employees were not insiders, where these employees were not directors or officers of the debtor nor persons in control of the debtor). Thus, the restrictions on insider compensation and severance set forth in section 503(c)(2) of the Bankruptcy Code are inapplicable to the proposed Severance Program.

27. Similarly, section 503(c)(3) of the Bankruptcy Code also does not preclude the Severance Program. This "catch all" provision of the 2005 amendments to compensation

procedures in chapter 11 cases applies to transfers made to officers, managers, consultants and others that are both outside the ordinary course of business and not justified by the facts and circumstances of the case. 4 COLLIER ON BANKR. ¶ 503.17 (15th ed. 1981). Courts that have analyzed the prohibition on “other transfers” to certain categories of employees set forth in section 503(c)(3) of the Bankruptcy Code have applied the same standard under this section as they do under section 363(b) of the Bankruptcy Code: whether the decision to use estate property outside of the ordinary course of business is based on the debtor’s business judgment. *See In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) (citing *In re Nobex Corp.*, 2006 WL 4063024; 2006 Bankr. LEXIS 417 (Bankr. D. Del. Jan. 19, 2006) (section 503(c)(3) of the Bankruptcy Code is nothing more than a reiteration of the standard under section 363 of the Bankruptcy Code)). As set forth above, implementing the Severance Program has a sound business purpose—to motivate the Eligible Employees to remain with the Debtors during this critical period, to perform at optimal levels of productivity and to remain focused on preserving and improving the Debtors’ enterprise value.

III. Cause Exists to Authorize the Debtors’ Financial Institutions to Honor Checks and Electronic Fund Transfers

28. The Debtors have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to cash collateral. Also, under the Debtors’ existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment made to employee terminated prepetition. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and that this Court should authorize all applicable financial institutions,

when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

Waiver of Bankruptcy Rules Regarding Notice and Stay of an Order

29. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of an order granting the relief requested herein pursuant to Bankruptcy Rule 6004(h), 7062, 9014 or otherwise.

Motion Practice

30. This motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated, and a discussion of their application to this motion. Moreover, in addition to all entities otherwise entitled to receive notice, the Debtors have given notice of this motion to all entities believed to have or be claiming an interest in the subject matter of the proposed order or who, it is believed, otherwise would be affected by the proposed order. Accordingly, the Debtors submit that this motion satisfies Local Rule 9013-1.

The Debtors' Reservation of Rights

31. Nothing contained herein is intended or should be construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim or an approval or assumption of any agreement, agreement, contract or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any claim. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity or priority of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

Notice

32. The Debtors have provided notice of this motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities listed on the Consolidated List of

Creditors Holding the 30 Largest Unsecured Claims filed pursuant to Bankruptcy Rule 1007(d); (c) counsel to the Debtors' prepetition secured lender and debtor in possession lender; (d) the agent for the Debtors' prepetition secured notes; (e) counsel to each of the prepetition equity holders; (f) the Delaware Secretary of State; (g) the Delaware Secretary of Treasury; (h) the Delaware State Attorney General; (i) the Office of the United States Attorney General for the State of Delaware; (j) the Internal Revenue Service; and (k) the Securities and Exchange Commission. In light of the nature of the relief requested in this motion, the Debtors respectfully submit that no further notice is necessary.

No Prior Request

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

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WHEREFORE, for the reasons set forth herein and the First Day Declaration, the Debtors respectfully request entry of the Order granting the relief requested herein and such other relief as may be appropriate under the circumstances.

Dated: February 28, 2013
Wilmington, Delaware

/s/ Domenic E. Pacitti

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