UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
GULF PACKAGING, INC.,[1]	)	Case No. 15-15249
Debtor.	)	Honorable Pamela S. Hollis
	)	**Hearing Date:** **May 12, 2015**
	)	**Hearing Time:** **10:00 a.m.**
	)	**Courtroom:** **644**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Tuesday, May 12, 2015 at 10:00 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Pamela S. Hollis in the courtroom usually occupied by her, No. 644, in the Dirksen Federal Building at 219 South Dearborn Street, Chicago, Illinois, or whomever may be sitting in her place and stead, and then and there present the **Debtor's Motion (I) For Interim and Final Orders (A) Authorizing the Debtor to Pay Certain Prepetition (1) Wages, Salaries, and Other Compensation, (2) Reimbursable Employee Expenses, and (3) Obligations Relating To Benefits Programs, (B) In the Alternative, Authorizing the Debtor To Pay Certain Prepetition Claims For Compensation and Commissions Related to Affiliate Employees and ADP As Critical Vendors, (C) Granting Related Relief, and (II) Scheduling A Final Hearing**, a copy of which is attached hereto and hereby served upon you, at which time and place you may appear.

[1] The last four digits of the Debtor's tax identification number are 5030.

GULF PACKAGING, INC.

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PROPOSED COUNSEL TO THE DEBTOR

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
GULF PACKAGING, INC.,[1]	)	Case No. 15-15249 (PSH)
Debtor.	)	

DEBTOR'S MOTION (I) FOR INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTOR TO PAY CERTAIN PREPETITION (1) WAGES, SALARIES, AND OTHER COMPENSATION, (2) REIMBURSABLE EMPLOYEE EXPENSES, AND (3) OBLIGATIONS RELATING TO BENEFITS PROGRAMS, (B) IN THE ALTERNATIVE, AUTHORIZING THE DEBTOR TO PAY CERTAIN PREPETITION CLAIMS FOR COMPENSATION AND COMMISSIONS RELATED TO AFFILIATE EMPLOYEES AND ADP AS CRITICAL VENDORS, (C) GRANTING RELATED RELIEF, AND (II) SCHEDULING A FINAL HEARING

Gulf Packaging, Inc., the above-captioned debtor and debtor in possession (the "Debtor," "GPI" or the "Company"), for its Motion (the "Motion") (I) for Interim and Final Orders (A) Authorizing the Debtor to Pay Certain Prepetition (1) Wages, Salaries, and other Compensation, (2) Reimbursable Employee Expenses, and (3) Obligations Relating to Benefits Programs, (B) in the Alternative, Authorizing the Debtor to Pay Certain Prepetition Claims for Compensation and Commissions related to Affiliate Employees and ADP as Critical Vendors, (C) Granting Related Relief, and (II) Scheduling a Final Hearing, respectfully represents:

[1] The last four digits of the Debtor's tax identification number are 5030.

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Northern District of Illinois (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 363(b), 363(c), 507(a)(4), 507(a)(5), 541(b), 1107(a) and 1108 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 5005-3(D) of the Local Rules for the United States Bankruptcy Court for the Northern District of Illinois (the "Local Rules").

INTRODUCTION

4. On this date (the "Petition Date"), the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No request has been made for the appointment of a trustee or examiner, and no statutory committee has yet been appointed.

BACKGROUND

6. GPI is a national distributor of packaging equipment and supplies, which sells its product by and through several independent entities ("Affiliates").[2] The Affiliates are Gulf Arizona Packaging Corporation, Carolina-Gulf Packaging, LLC, Florida Gulf Properties, LLC,

[2] As used herein, "Affiliate" means a company that has a relationship – formal or informal – to the Debtor, and sells packaging products under a variation of the Gulf name. Unless otherwise set forth, use of the term "Affiliate" is not intended to have the same meaning as the "affiliate" term of art defined in section 101(2) of the Bankruptcy Code. All rights with respect to this issue are reserved.

Gulf Packaging-Sacramento, LLC, Gulf Systems, Inc. ("GSI"), Gulf-Pacific Packaging Corporation, and Gulf-Great Lakes Packaging Corporation. Each of these Affiliates is also a guarantor under GPI's credit facility with FCC, LLC d/b/a First Capital ("FCC"). When GPI is combined with the Affiliates, there are over twenty (20) warehousing locations to better serve GPI's customer base.

7. For the majority of GPI's business,[3] either ADP Total Source ("ADP") or the Affiliates employ the salespersons who generate sales to customers. Customers issue purchase orders to GPI through one of the Affiliates, and GPI then issues a purchase order to its own trade vendors, thereby creating an account payable for GPI. GPI has the obligation to pay for the purchase and delivery of the goods in question, which are delivered to the customers. GPI creates an account receivable with the customer in the name of GPI with remittance by the customer to be made for the benefit of GPI to a Key Bank lock box account owned and controlled by FCC. On occasion, a customer may pay an Affiliate other than GPI. In those instances, the funds are sent to the Affiliate to the lock box account at Key Bank.

8. Generally speaking, there is a 20% gross profit margin on each sale made by GPI. Typically, GPI and the Affiliates split that margin evenly, to enable the Affiliates to cover direct selling costs and commissions owed to salespeople. The Affiliates receive their share of the gross profit through expense reimbursement by GPI for operating costs relative to their sales and marketing operations, and GPI's share of the gross profit goes to pay GPI's operating costs. The

[3] In addition to the standard sale of packaging products and supplies as described herein, GPI sells packaging equipment (that is, equipment used to package products). On occasion GPI may lease equipment to a customer with a buyout option at the end of the term. In other instances, GPI may provide a piece of equipment free of charge in exchange for the customer purchasing consumable products, with which the equipment is used, from GPI. In this scenario, the equipment remains the property of GPI. Finally, GPI also has consignment arrangements with certain of its customers. In these instances, GPI keeps its inventory on the customer's floor and reconciles once per month. GPI bills the customer for the monthly usage and then replenishes the stock back to appropriate levels.

costs reimbursed to the Affiliates as their sales commission include payroll, freight, utilities, warehousing and other routine operating costs. The costs borne by GPI include payroll and employee benefits, rent and other facilities costs, and infrastructure-related costs, such as I.T. services.

9. In addition, Merchants and Manufacturers Bank ("MMB") is lender to GPI for various equipment financings. These loans are secured by first-priority liens on the underlying equipment or machinery being financed. Some of this equipment is situated at GPI's facilities, while some has been provided to GPI's customers. In some cases, a portion of the customer's accounts payable to GPI includes payments for the financed equipment on their premises, which funds are remitted to MMB upon receipt. Otherwise, GPI pays MMB for these financings in the ordinary course of business. Both MMB and FCC are parties to an inter-creditor agreement that sets out the rights and obligations of each to the other.

10. Additional information about the Debtor, its business and corporate and capital structures is set forth in the *Declaration of Edward T. Gavin, In Support of Chapter 11 Petition and First Day Pleadings* (the "Gavin Declaration"), filed on the Petition Date.

RELIEF REQUESTED

11. By this Motion, the Debtor respectfully requests entry of (i) an interim order (the "Interim Order") and a final order (the "Final Order," and together with the Interim Order, the "Compensation Orders"), substantially in the forms attached hereto, (A) authorizing, but not directing, the Debtor to pay in the ordinary course of business certain prepetition (1) wages, salaries, Commissions (defined below) and other compensation described below, including related payroll taxes, (2) reimbursable employee expenses and *de minimis* Obligations, and (3) obligations relating to benefits programs, including PTO, (B) in the alternative, authorizing the Debtor to pay

certain prepetition claims for compensation and commissions related to employees of Affiliates and ADP as critical vendors, and (C) granting related relief; and (ii) scheduling a final hearing. In addition, the Debtor requests that the Court schedule a final hearing to consider approval of this Motion on a final basis.

I. The Debtor's Workforce.

12. The Debtor's and Affiliates' employee numbers have been significantly declining in the past several weeks and are contemplated to continue to decline on an almost weekly basis moving forward due to the winding up of Debtor's operations. Therefore, the employee and related payroll numbers contained herein are estimates. As of the Petition Date, the Debtor employed two (2) employees directly ("Direct Employees"). Additionally, as of the Petition Date, the Affiliates employ approximately fifty (50) to sixty-five (65) employees ("Affiliate Employees"). Generally, the Direct Employees and Affiliate Employees are either paid a salary (on a draw and commissions basis), or on an hourly basis. Additionally, one of the Affiliates, GSI, leases all of its personnel from ADP Total Source ("ADP"). Such persons are employees of ADP, but perform services for GSI (the "ADP Employees"). The Direct Employees, Affiliate Employees and ADP Employees still employed by such respective entities as of the Petition Date are collectively referred to as (the "Personnel"). The services provided by the Personnel are beneficial to the Debtor and are crucial to the Debtor's ongoing efforts to maintain and maximize value in this chapter 11 case.

13. The Personnel perform a variety of critical functions, including sales, management and operation of the Debtor's various business locations, sales offices and warehouses, as well as accounting, administration, finance, human resources, marketing, maintenance, information technology, security, and other tasks. The Personnel's skills, training, and knowledge and understanding of the Debtor's operations are essential to continuing operations and, ultimately, the maximization of the value of the Debtor's assets.

14. Debtor pays its two (2) employees payroll and related Personnel Compensation and Benefits (as hereinafter defined). As more fully discussed below, the Debtor pays the gross amount of the ADP Employee payroll and related costs and expenses to GSI and GSI in turn pays such sums to ADP. Pursuant to the terms of certain Authorized Sales Representative Agreements by and between Debtor and the Affiliates, the Debtor reimburses the Affiliates for their payroll and related cost and expenses.

15. On information and belief, the Personnel rely exclusively on their compensation and benefits to pay their daily living expenses and provide for their households. The Personnel (and their families) would be exposed to significant financial harm if the payment of compensation (including obligations related to benefits) and other programs benefiting the Personnel were interrupted.

16. To minimize the personal hardship that the Personnel would suffer if prepetition compensation-related obligations were not paid when due or as expected, and to maintain morale and stability in the workforce during this critical time, the Debtor seeks authority, but not direction, to pay and honor certain prepetition claims for Personnel still employed by either the Debtor, an Affiliate or ADP and performing services relating to Debtor's operations as of the Petition Date relating to, among other things, wages, salaries, Commissions (as hereinafter defined) and other compensation, payroll services, federal and state withholding taxes and any other amounts withheld and owing (including garnishments, employees' share of insurance premiums, taxes, and 401(k) contributions), health insurance, retirement health and related benefits, workers' compensation benefits, life insurance, short- and long-term disability coverage, PTO (as hereinafter defined) and all other benefits that the Debtor has historically provided in the ordinary

course of business (collectively the "Personnel Compensation and Benefits") and to pay all costs incident to the foregoing.

II. Personnel Compensation and Obligations.

A. Debtor's Funding of Payroll and Related Expenses for its Employees, the Affiliate Employees and the ADP Employees.

17. The Debtor has inventory located in warehouses and other places throughout the country, with customers located throughout the country and out of the country. All of the sales personnel that actually sell the Debtor's inventory are employees of either ADP or the Affiliates. These sales people are the ones who have contacts with customers that purchase the Debtor's inventory for the benefit of the Debtor and all of the Debtor's creditors and parties-in-interest. Therefore, without the ongoing assistance of the Affiliate Employees and the ADP Employees, the Debtor cannot continue with its operations to maximize the value of its assets. Paying the Personnel for the relatively small amounts of prepetition wages and related expenses is critical to Debtor's attempts to wind down its operations in an orderly fashion for the benefit of its constituency groups.

18. The Debtor has no practical alternative than to pay the Personnel that are still employed by either the Debtor, an Affiliate or ADP as of the Petition Date for the prepetition services rendered and related benefits and expenses, because such Personnel have extensive knowledge of the Debtor's inventory and other assets, and are the only parties with the requisite skill, knowledge, and customer contacts to efficiently assist Debtor in maximizing value. Prior to the Petition Date, many key personnel left the employ of either Debtor, an Affiliate or ADP and went to work for competitors. The Debtor submits that granting the relief requested in this Motion is key to preventing the remaining Personnel from immediately ceasing to perform services that benefit the Debtor and this estate.

19. Prior to the Petition Date, and in the ordinary course of business, the Debtor

reimbursed the Affiliates for the Affiliates' payroll costs, warehousing and other administrative expenses incurred providing services to the Debtor including the assistance in selling Debtor's inventory. Therefore, through this Motion, Debtor is merely seeking to continue this prepetition practice of reimbursing the Affiliates for their actual payroll expense.

B. Unpaid Compensation.

20. In the ordinary course of business, the Debtor incurs payroll and compensation related obligations for all of the Personnel. With respect to Debtor's two (2) Direct Employees, such obligations generally consist of salaries and related payroll expenses and benefits. With respect to Affiliate Employees, the Debtor reimburses the Affiliates for their actual payroll and payroll related obligations owing to Affiliate Employees pursuant to the terms of certain Authorized Sales Representative Agreements by and between the Debtor and the Affiliates and/or other agreements.

21. Except as more fully discussed below, prior to the Petition Date, the Debtor paid the payroll and all payroll related expenses for its two (2) Direct Employees and nearly all of the payroll and payroll related expenses for the Affiliate Employees, excluding PTO and Commissions (as hereinafter defined). The Debtor regularly pays to ADP (or funds to an Affiliate's payroll bank account) a gross amount prior to each payroll cycle for the ADP Employees to cover the gross payroll of the ADP Employees including related benefits, taxes and the fees and charges of ADP. ADP in turn pays its employees and related payroll expenses.

Direct Employees

22. As of the Petition Date, Debtor believes that all of its prepetition Personnel Compensation and Benefits have been paid, except for accrued PTO (as hereinafter defined).

Affiliate Employees

23. As of the Petition Date, the Debtor believes that all prepetition Personnel Compensation and Benefits associated with Affiliate Employees still employed by the Affiliates as of the Petition Date have been already been paid, except for accrued PTO and certain Commissions as more fully described below.

ADP Employees

24. The Debtor estimates that, except with respect to accrued PTO and certain Commissions (as more fully described below), less than $10,000 is owing to ADP for prepetition Personnel Compensation and Benefits associated with ADP Employees still employed by ADP as of the Petition Date. All of the amounts remaining due relate to the period of April 25, 2015 through the Petition Date. The Debtor believes that such sums will become due and owing on ADP's next payroll date of approximately May 15, 2015.

25. With the exception of certain Commissions that may be owing to certain sales people as more fully described below, the Debtor does not owe any prepetition amounts to any particular Personnel employed by either the Debtor, Affiliates or ADP in excess of the $12,475 cap imposed by section 507(a)(4) of the Bankruptcy Code. Accordingly, the Debtor is not seeking authority on an interim basis to pay any prepetition wages, Commissions, salaries, benefits or PTO that exceeds $12,475.00 to any of the Personnel. However, after notice and a final hearing, the Debtor does seek authority to pay certain Commissions to sales people that may exceed the priority cap pursuant to § 507(a)(4) of the Bankruptcy Code, as more fully discussed below.

A. Reimbursable Expenses.

26. In the ordinary course of its business, the Debtor reimburses Personnel for certain reasonable and customary expenses (the "Reimbursable Expenses") incurred on behalf of the Debtor and its Affiliates in the scope of their employment. The Reimbursable Expenses include expenses for travel, meals, parking, automobile mileage, and other business-related expenses paid directly by Personnel. Personnel submit their expense reports and accompanying receipts to their respective Affiliate employer, Debtor then reimburses the Affiliate. While Employees typically submit expense reports for Reimbursable Expenses on a rolling basis, all expense reports for each monthly billing period are due by the end of each month.

27. As of the Petition Date, the aggregate pending and anticipated requests for reimbursement of Reimbursable Expenses owing by the Debtor to Personnel totals slightly less than $50,000.00.

28. Failure to pay the Reimbursable Expenses will disrupt the Debtor's business operations and cause Personnel to be concerned about personal liability for business related charges, thereby distracting the Personnel from devoting full attention to their day-to-day responsibilities. Accordingly, the Debtor seeks authority, but not direction, to (a) continue paying Reimbursable Expenses in accordance with prepetition practices, (b) modify prepetition policies relating to the Reimbursable Expenses program as the Debtor deems appropriate, and (c) pay all Reimbursable Expenses obligations that relate to the prepetition period and are submitted to the Debtor postpetition for Personnel still employed by either Debtor, an Affiliate or ADP as of the Petition Date.

B. Paid Time Off.

29. To ensure ample time for the Direct Employees to rest and rejuvenate, the Debtor provides its employees the ability to work with their supervisor to schedule paid time off for vacations, special days off, illness/wellness, or alternative dates for celebrating holidays (the "PTO"). PTO is available to all Direct Employees and is awarded to each employee on his or her employment anniversary date.

30. When PTO is used, employees are paid at their regular salaried or hourly rates. PTO obligations of the Debtor generally are satisfied by Direct Employees using such time during the course of their employment.

31. Similarly, the Affiliate Employees and the ADP Employees have PTO under their respective company's policies. Pursuant to the terms of agreements between the Debtor, on the one hand, and ADP and the Affiliates, on the other hand, any cost of the PTO for such employees is passed through to the Debtor.

32. In some states, state law requires that employees must be able to cash out their unused PTO upon the termination of their employment. As of the Petition Date, the Debtor estimates that it owes approximately $10,000.00 in unused but accrued PTO for Direct Employees, approximately $58,000.00 in unused but accrued PTO relating to Affiliate Employees and approximately $30,000.00 in unused but accrued PTO for ADP Employees.

C. Commissions.

33. Pursuant to certain agreements by and between the Debtor, on the one hand, and the Affiliates and ADP, on the other hand, in the ordinary course of business certain of the Affiliate Employees and ADP Employees are paid based upon a monthly draw and receive commissions based upon sales of Debtor's inventory made by such sales persons (the

"Commissions"). The Debtor keeps a detailed accounting of draws paid to the sales people and Commissions earned. As of the Petition Date, the Debtor's policy was to not accrue (and therefore not be obligated to pay) any Commissions to a sales person until the Debtor's customer ultimately pays the Debtor for the product purchased. Therefore, in the ordinary course of business, certain sales people have accrued and are owed Commissions as of the Petition Date, and additional Commissions would ordinarily be owing subsequent to the Petition Date as the Debtor collects on the accounts receivable relating to goods sold prepetition. As of the Petition Date, Debtor estimates that approximately $175,000.00 in Commissions have accrued and are owing to approximately eight (8) sales people that were either ADP Employees or Affiliate Employees as of the Petition Date and are still assisting the Debtor in selling inventory. Additionally, based upon the Debtor's estimate of likely postpetition collections from its customers for prepetition sales, the Debtor estimates that an approximate additional $100,000.00 in Commissions will be owing in the future to approximately eight (8) sales people that were Affiliate Employees or ADP Employees as of the Petition Date.

34. As indicated above, the Debtor has no sales staff of its own and is not capable of selling its inventory without the assistance of the Affiliate and ADP sales Personnel. Such sales people have the direct relationships with the Debtor's customers to sell the Debtor's significant remaining inventory at the best prices possible in the ordinary course of business to maximize value. Without the assistance of the sales staff, the Debtor would not have the ability to sell its inventory for the highest price and may be forced to liquidate its remaining inventory through a liquidator at significantly lower sale prices.

BASIS FOR RELIEF

35. It is imperative that the Debtor be authorized, but not directed, to continue to honor the Personnel Compensation and Benefits obligations to ensure the uninterrupted operation of the Debtor's business, prevent undue harm to the Personnel, and maximize the value of the Debtor's estate. As detailed herein, in accordance with section 363(c) and section 1108 of the Bankruptcy Code, the Debtor may honor the Personnel Compensation and Benefits postpetition in the ordinary course of business. Furthermore, even if honoring the Personnel Compensation and Benefits obligations were outside the ordinary course of business, doing so would be a sound exercise of the Debtor's business judgment under section 363(b) of the Bankruptcy Code.

36. In addition, certain of the Personnel Compensation and Benefits are entitled to priority treatment pursuant to sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, the Debtor is required by applicable state and federal law to maintain certain Personnel Compensation and Benefits, and honoring the Personnel Compensation and Benefits does not violate section 503 of the Bankruptcy Code.

37. The "necessity of payment" doctrine further authorizes the relief requested in this Motion because the Personnel are indispensable to the Debtor's operations and are equally necessary for a successful reorganization or orderly liquidation by the Debtor. Several courts in this district, as well as other districts, have permitted debtors to pay prepetition claims for employees' wages, salaries, expenses and benefits because debtors would not have been able to successfully reorganize (or liquidate) without making such payments. Without the continued support and services of the Debtor's Direct Employees, Affiliate Employees and ADP Employees, the Debtor's ability to successfully reorganize will be severely thwarted at the very start. Furthermore, the Affiliate Employees and ADP are critical vendors, which further supports

granting of the relief requested authorizing payment of prepetition claims for the Debtor's compensation related obligations.

38. For all of these reasons, discussed in detail below, this Motion should be granted.

I. The Debtors May Honor Employee Compensation and Benefits Obligations in the Ordinary Course of Business.

39. The ability to compensate employees in the ordinary course of business is critical to the Debtor's reorganization efforts and consistent with sections 363(c) and 1108 of the Bankruptcy Code which, together, authorize the continued operation of a business in the ordinary course by chapter 11 debtors. *See* 11 U.S.C. § 363(c)(1) (providing that, so long as "the business of the debtor is authorized to be operated under [section 1108 of the Bankruptcy Code] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business, without notice or a hearing"); 11 U.S.C. § 1108 (debtor in possession, as trustee, may operate the debtor's business unless a court orders otherwise). Accordingly, sufficient cause exists to allow the Debtor to continue honoring Personnel Compensation and Benefits in the ordinary course of business.

40. As set forth above, most of Debtor's prepetition Personnel Compensation and Benefits were paid prior to the Petition Date. However, the Debtor may have additional *de minimis* prepetition obligations related to Personnel Compensation and Benefits that have not been identified expressly in this Motion or may not be discovered by Debtor until after the filing of this Motion ("*de minimis* Obligations"). Accordingly, the Debtor requests authority to pay any such additional obligations up to an aggregate amount of $15,000.00 for any Personnel that was an Employee of either Debtor, an Affiliate or ADP as of the Petition Date. The Debtor reserves its right to seek permission from this Court to pay obligations in excess of the requested

$15,000.00 cap, through a subsequent motion.

II. Payment of the Personnel Compensation and Benefits Is a Sound Exercise of the Debtor's Business Judgment and in the Best Interest of the Debtor's Estate.

41. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession are fiduciaries "holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Consistent with a debtor's fiduciary duties, courts have also authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (noting that a debtor may sell property outside the ordinary course of business if it can provide "articulated business justification") (internal citations omitted); *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). Specifically, once a debtor articulates a valid business justification for a particular form of relief, courts review a debtor's request under the business judgment rule. *See In re Commercial Mortg. and Fin. Co.*, 414 B.R. 389, 394 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession "has the discretionary authority to exercise his business judgment in operating the debtor's business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation."). 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 taken was in the best interests of the company. *See In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 807 (7th Cir. 2003). Consequently, a debtor's

business decision "should be approved by the court unless it is shown to be 'so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, whim, or caprice.'" *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001) (quoting *In re Logical Software, Inc.*, 66 B.R. 683, 686 (Bankr. D. Mass. 1986) (citations omitted)).

42. Indeed, where debtors have shown that the payment of prepetition claims is critical to the success of their chapter 11 cases, courts in this District and others have authorized debtors to pay prepetition employee obligations. *See, e.g., In re ITR Concession Co.*, No. 14-34284 (PSH) (Bankr. N.D. Ill. Oct. 28, 2014) [Docket No. 175] (authorizing debtors to pay prepetition wages under section 363(b)); *In re Edison Mission Energy*, No. 12-49219 (JPC) (Bankr. N.D. Ill. Feb. 5, 2013) [Docket No. 401] (same); *In re Corus Bankshares, Inc.*, No. 10-26881 (PSH) (Bankr. N.D. Ill. June 16, 2010) [Docket No. 19] (same); *In re Kimball Hill, Inc.*, No. 08-10095 (SPS) (Bankr. N.D. Ill. Apr. 25, 2008) [Docket No. 52] (same); *In re Neumann Homes, Inc.*, No. 07-20412 (ERW) (Bankr. N.D. Ill. Nov. 21, 2007) [Docket No. 163] (same).

43. The importance of the relief sought in this Motion cannot be overstated. The Debtor relies on the Personnel, including the Direct Employees, Affiliate Employees and ADP Employees, to run its business and sell its products. In turn, the Personnel rely on their compensation, benefits, and reimbursement of their expenses to pay their daily living expenses. Thus, these Personnel (and their families) will be exposed to significant hardship if the Debtor is not permitted to honor obligations for the Personnel Compensation and Benefits. Failure to honor such obligations will not only jeopardize Personnel morale and loyalty, but will also likely cause certain Personnel to seek alternate employment at a time when their support is crucial. As further evidence of the likelihood that Personnel will cease performing services for the benefit of Debtor unless prepetition compensation is paid as requested, over the past few weeks, a significant

number of sales staff and other employees of the Affiliates and ADP have resigned and gone to work for competitors of the Debtor. Granting the relief requested in this Motion will assist Debtor in retaining the Personnel to assist Debtor in liquidating orderly its inventory and other assets for the benefit of creditors.

44. For all of these reasons, honoring prepetition obligations for Personnel Compensation will benefit the Debtor's estate and its creditors by allowing the Debtor's business operations to continue without interruption. Indeed, were there to be a loss of institutional knowledge due to employee defections, the need to identify and recruit new employees would be distracting at this critical time when stabilizing operations and transitioning in chapter 11 is essential. It is therefore a sound business decision to continue to pay these obligations in the ordinary course. Moreover, as further detailed below, prepetition claims against Debtor for wages, salaries, vacation, and sick leave, as well as contributions to employee benefit plans are entitled to priority status under the Bankruptcy Code, so payment of these prepetition claims does not constitute preferential treatment. Accordingly, it is in the best interest of the Debtor's estate, and a reasonable exercise of the Debtor's business judgment, to pay such claims in the ordinary course of business during this chapter 11 case.

III. Certain of the Employee Compensation and Benefits Obligations are Entitled to Priority Treatment.

45. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code accord priority status to claims for up to $12,475 per individual for prepetition wages, salaries, vacation, and sick leave, as well as claims for contributions to employee benefit plans. Because such claims are priority claims, the Debtor is required to pay them in full to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for wages, salaries, and commissions for contributions to an employee benefit plan). Indeed, the Debtor believes the

significant majority of the prepetition wages and other employee claims for the Direct Employees it seeks to pay are entitled to priority treatment to the extent of $12,475 for each individual Direct Employee under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. Thus, granting the relief sought herein would affect only the timing of these payments, would not result in the Direct Employees receiving amounts to which they will not be ultimately entitled, and will not negatively affect recoveries for general unsecured creditors.

46. Moreover, the Debtor submits that payment of Personnel Compensation and Benefits obligations, at this time, enhances value for the benefit of all interested parties. Finding, attracting, and training new qualified employee talent would be extremely difficult and would distract the Debtor from its primary focus of maximizing value for creditors in this bankruptcy case.

IV. Alternatively, the Debtor Requests Authority to Pay Certain Prepetition Claims for Compensation and Commissions Related to Affiliate Employees and ADP as Critical Vendors.

47. As set forth above, the services and support of Affiliate Employees and ADP Employees are necessary to the Debtor's operations and business. Without the Affiliate Employees and ADP Employees, the Debtor's ability to maximize value will be irretrievably hampered. If the Personnel's salaries, wages, benefits, reimbursements, and commissions go unpaid, they will almost certainly seek alternative employment, leaving the Debtor unable to operate its business. And, if the Debtor is not allowed to pay ADP (and reimburse its Affiliates, including Gulf Systems), then the Affiliates and ADP will cease to "do business" with the Debtor because Affiliate Employees will quit and it will become impossible for third parties to do business with the Debtor. Similarly, if the Debtor is unable to pay Affiliate Employees for prepetition Commissions earned as requested herein, then the Affiliate Employees who earn

commissions for selling inventory will cease to work (and sell inventory) for the Debtor. Thus, the Debtor seeks authority, but not direction, to pay in its business judgment prepetition Commissions owing to certain Affiliate Employees as of the Petition Date and compensation owing to ADP to the extent Debtor determines that such payments are critical and necessary to the success of this chapter 11 case and in the best interest of this bankruptcy estate. Only Personnel employed by an Affiliate or ADP as of the Petition Date will be eligible to potentially receive a Commission postpetition pursuant to the relief requested in this Motion.

48. The Seventh Circuit's seminal case, *In re Kmart Corp*., disallowed payment for prepetition claims because the Debtor had failed to satisfy the necessary requirements to prove that the vendors were indeed critical vendors. 359 F.3d 866, 868 (7th Cir. 2004). In *Kmart*, the court made it clear that the doctrine of necessity in and of itself is insufficient to support a court order authorizing payment of critical vendor claims. *Id*. at 871. However, the *Kmart* court recognized that under certain circumstances such a court order is appropriate, pursuant to section 363(b)(1) of the Bankruptcy Code. Subsequently, courts in the Seventh Circuit have authorized the payment (or special treatment) of prepetition obligations to critical vendors in certain circumstances. *See, e.g.*, *In re Caesars Entm't Operating Company, et al*., No. 15-01145 (ABG) (Bankr. N.D. Ill. Jan. 15, 2015) [Docket No. 57] (authorizing payments to critical vendors); *In re Edison Mission Energy*, No. 12-49219 (JPC) (Bankr. N.D. Ill. Jan. 17, 2013) [Docket No. 318] (same); *In re Ryan Int'l Airlines, Inc*., No. 12-80802 (TML) (Bankr. N.D. Ill. Mar. 7, 2012) [Docket No. 47] (same); *In re Grede Foundries, Inc*., No. 09-14337 (RDM) (Bankr. W.D. Wis. Aug. 31, 2009) [Docket No. 439] (same); *see also In re Trump Entm't Resorts, Inc.*, No. 14-12103 (KG) (Bankr. D. Del. Oct. 6, 2014) [Docket No. 218] (same); *In re Revel AC, Inc*., No. 14-22654 (GMB) (Bankr. D. N.J. July 14, 2014) [Docket No. 230] (same); *In re Station Casinos, Inc.*, No. 09-52477 (GWZ) (Bankr. D. Nev. Aug. 7, 2009) [Docket No. 57] (same).

49. Bankruptcy courts have approved the payment of critical vendor claims in similar circumstances where the payments are necessary to protect a debtor's business operations from substantial disruption. *In re News Publishing Company*, 488 B.R. 241, 245-46 (Bankr. N.D. Ga. 2013); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 20-21 (Bankr. M.D. Fla. 2005). Indeed, in *In re News Publishing Company*, the bankruptcy court authorized payment of a prepetition staffing agency's claim that represented amounts owing to employees that were "not actual employees of the [d]ebtor" but "were the functional equivalent of [d]ebtor's employees." 488 B.R. 241, 245 (Bankr. N.D. Ga. 2013). After addressing the standard set forth in *Kmart*, the bankruptcy court denied the relief sought as to several alleged critical vendors but granted relief as to the staffing agency. *Id*. at 245-246 (general unsecured creditors would not be disadvantaged because the employees would have been entitled to priority status pursuant to 11 U.S.C. § 507(a)(4)(A) if they had been actual employees of the debtor).

50. Moreover, with respect to any Commissions due to Affiliate Employees and ADP Employees for postpetition accounts receivable collections, the Debtor, at least arguably, does not need Court authority to satisfy its obligations. Specifically, pursuant to various Authorized Sales Representatives' Agreements between the Debtor and its Affiliates and the Debtor's policy as of the Petition Date, sales Commissions are arguably not due and not payable until the Debtor collects receivables from its customers for associated and related sales transactions. A significant portion of the Debtor's accounts receivable remain outstanding and unpaid. Thus, the sales Commissions earned based upon postpetition collection of accounts receivable are arguably ordinary course postpetition transactions which the Debtor is permitted to pay without Court authority. Out of an abundance of caution, however, the Debtor, in its business judgment, seeks such authority, but not direction, to pay sales Commissions in the ordinary course of business whether (a) earned prepetition and due and payable as of the Petition Date, or (b) earned

postpetition due to the postpetition collection of related accounts receivable. Therefore, the Debtor further seeks the authority, but not direction, to pay certain Affiliate Employees and ADP Employees as of the Petition Date the full amount of any prepetition Commissions owing to such Affiliate Employees or ADP Employees, notwithstanding the statutory cap imposed by section 507(a)(4) of the Bankruptcy Code. Unless the Court grants the Debtor such authority and relief, the Debtor will likely be forced to sell its inventory in a fire sale.

51. For these reasons the Court should find that the Affiliates and ADP are critical vendors respecting the Personnel Compensation and Benefits and that payment of such compensation related obligations is appropriate pursuant to section 363(b)(1).

52. Through this Motion, the Debtor is not seeking to assume any prepetition Authorized Sales Representative Agreement with any Affiliate, compensation contracts, employment agreements, programs, benefits or policy.

V. Cause Exists to Authorize the Debtor's Financial Institutions to Honor Checks and Electronic Fund Transfers.

53. The Debtor has 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. In addition, under the Debtor's existing cash management system, the Debtor can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the relief requested hereunder. Accordingly, the Debtor believes that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently. Therefore, the Debtor respectfully requests that the Court authorize and direct all applicable financial institutions, when requested by the Debtor, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested in this Motion.

THE REQUIREMENTS OF BANKRUPTCY RULE 6003 ARE SATISFIED

54. Bankruptcy Rule 6003 empowers a court to grant relief within the first 21 days after the Petition Date "to the extent that relief is necessary to avoid immediate and irreparable harm." For reasons discussed above, the relief requested herein is necessary to allow the Debtor to transition its business into this chapter 11 case while continuing to operate them in the ordinary course, thus preserving the ongoing value of the Debtor's operations and maximizing the value of its estate for the benefit of all stakeholders. Failure to receive such authorization and other relief during the first 21 days of this chapter 11 case would jeopardize the loyalty and trust of the Personnel, severely disrupting the Debtor's operations at this critical juncture. Moreover, most of the Personnel depend on the Personnel Compensation and Benefits and would be exposed to significant financial difficulties if the Debtor cannot continue the Personnel Compensation and Benefits in the ordinary course. Accordingly, the Debtor submits that it has satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 to support granting the relief requested herein. However, the Debtor is only seeking authority, but not direction, to pay any Commissions that may be owing as of the Petition Date or thereafter to Affiliate Employees or ADP Employees in excess of the $12,475.00 priority cap pursuant to §507(a)(4) and (a)(5) of the Bankruptcy Code after notice and a final hearing on this Motion.

RESERVATION OF RIGHTS

55. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtor expressly reserves its right to contest any claim related to the relief sought herein. Likewise, if the Court grants the relief sought herein, any payment made pursuant to an order of the Court is not intended to be nor should it be construed as an admission

as to the validity of any claim or a waiver of the Debtor's rights to subsequently dispute such claim.

WAIVER OF BANKRUPTCY RULE 6004(A) AND 6004(H)

56. To implement the foregoing successfully, the Debtor requests that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtor has established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

NOTICE

57. The Debtor has provided notice of this Motion to: (a) the Office of the United States Trustee for the Northern District of Illinois; (b) the holders of the 20 largest unsecured claims against the Debtor; (c) counsel to FCC and MMB; and (d) all other parties requesting notice in this chapter 11 case. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WAIVER OF PAGE LIMIT RESTRICTIONS

58. Given the complexity of issues addressed herein, the Debtor respectfully requests that the fifteen page limit established by Local Rule 5005-3(D) be waived for this Motion.

NO PRIOR REQUEST

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

CONCLUSION

WHEREFORE, the Debtor respectfully requests this Court (i) grant relief requested herein (ii) enter the interim order attached hereto as **Exhibit A** after an expedited hearing, (iii) enter the final order attached hereto as **Exhibit B** after a final hearing, and (iv) grant such other and further relief as may be just and proper.

Respectfully submitted this 4th day of May, 2015.

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