**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **IN RE:** | § | |
| | § | |
| **RAAM GLOBAL ENERGY COMPANY,** | § | **CASE NO. 15-35615** |
| ***et al.*** | § | |
| | § | **(Chapter 11)** |
| | § | **(Joint Administration Requested)** |
| **DEBTORS.** | § | **(Emergency Hearing Requested)** |

**EMERGENCY MOTION FOR AUTHORITY TO PAY OR HONOR**
**PRE-PETITION OBLIGATIONS TO CERTAIN CRITICAL VENDORS**

**THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.**

**EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.**

**REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.**

**TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:**

The above-captioned debtors and debtors in possession (collectively, the "Debtors")[1] file this *Emergency Motion for Authority to Pay or Honor Pre-Petition Obligations to Certain Critical Vendors* (the "Motion"), and in support respectfully state as follows:

## JURISDICTION AND PROCEDURAL BACKGROUND

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

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

3. On October 26, 2015 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), thereby commencing the above-captioned bankruptcy cases (the "Cases").

4. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

5. As of the date hereof, an official committee of unsecured creditors has not been appointed in the Cases.

## EMERGENCY CONSIDERATION

6. The Debtors request emergency consideration of this Motion. The Debtors believe an immediate and orderly transition into chapter 11 is critical to the viability of their operations. The Critical Vendors (as defined below) proposed to be paid pursuant to this Motion are vital to the Debtors' ongoing operations, any delay in granting the relief requested could hinder the Debtors' operations and cause irreparable harm, and no legal or practical alternative exists with respect to the relief requested in this Motion. As such, the Debtors believe that

[1] The Debtors are RAAM Global Energy Company [2973], Century Exploration New Orleans, LLC [4948], Century Exploration Houston, LLC [9624], and Century Exploration Resources, LLC [7252].

emergency consideration is necessary and request that this Motion be heard at the Debtors' First Day Hearings.

## STATEMENT OF FACTS

### A. Business Overview

7. RAAM Global Energy Company ("RAAM") is an independent oil and natural gas exploration and production company engaged in the exploration, development, production, exploitation, and acquisition of oil and natural gas properties. The other Debtors are wholly-owned subsidiaries of RAAM, and RAAM provides administrative, technical, financial, and strategic planning support to their subsidiaries.

8. The Debtors' producing assets are located offshore in the Gulf of Mexico and onshore in Louisiana, Texas, Oklahoma, and California, and the Debtors maintain offices in Lexington, Kentucky and New Orleans, Louisiana. The Debtors own an office building in Houston, Texas. As of September 30, 2015, the Debtors had estimated total proved oil and natural gas reserves of 8,570 MMBoe (26% oil). For the six months ended June 30, 2015, the Debtors' net daily production averaged 7,116 barrels of oil equivalent per day (BOEPD), which generated revenue of approximately $33.4 million.

9. The Debtors have traditionally focused on acquiring assets in and around the United States Gulf Coast. Over the last decade the Debtors have worked to diversify their asset base through the acquisition and development of both conventional onshore assets and long-lived unconventional resource plays that are capable of supporting sustainable growth. The Debtors' projects during 2014 and the first half of 2015 were focused on three main areas: shallow waters offshore, onshore conventional assets in Texas, and conventional and unconventional assets in California and the Mid-Continent area. In recent years, the Debtors have invested close to $100

million on large 3-D seismic surveys in the Gulf of Mexico and onshore in Louisiana and Texas in order to enhance their prospect generation capabilities, and the Debtors have invested over $1.5 billion in developing oil and gas assets since their inception.

10. The Debtors' current drilling program focuses on their core area in Breton Sound located offshore in State of Louisiana waters. This has historically been a very successful field for the Debtors, and the Debtors recently completed a successful well that is currently in production. The Debtors presently have an ongoing development portfolio of prospects that it desires to drill.

11. Additional information concerning the Debtors and their financial condition and results of operations, on a consolidated basis, can be found in RAAM's annual, quarterly, and current reports filed with the Securities and Exchange Commission ("SEC") through May 5, 2015, which can be accessed at www.sec.gov and at RAAM's website, http://www.raamglobal.com/.[2]

**B. Common Stock**

12. RAAM is a privately held company, and as of September 30, 2015, RAAM had 61,433 outstanding shares of common stock. Howard Settle, RAAM's Chairman, and former Chief Executive Officer and President, holds approximately 48% of RAAM's outstanding common stock. As of that date, RAAM's directors and executive officers as a group (eight persons that include Mr. Settle) held approximately 66% of RAAM's common stock.

**C. Secured Debt**

13. On September 12, 2014, Century Exploration New Orleans, LLC, Century Exploration Houston, LLC, and Century Exploration Resources, LLC entered into a Fifth

[2] On May 5, 2015, RAAM filed Form 15 with the SEC to notify the Commission of its desire to terminate the filing of registration statements and related reports required under the Securities Exchange Act of 1934. Prior to that time, RAAM was a voluntary filer with the SEC.

Amended and Restated Credit Agreement with Wilmington Trust, National Association, as administrative agent and the lenders party thereto (the "Fifth Amended and Restated Credit Agreement"), and RAAM entered into the Fourth Amended and Restated Guaranty in connection therewith. The Fifth Amended and Restated Credit Agreement provides the Debtors with an $85.0 million term loan facility (the "Term Loan Facility") that is secured by a first lien on substantially all of the Debtors' real and personal property (with certain exceptions). As of September 30, 2015, approximately $63.8 million was outstanding under the Term Loan Facility.

14. On September 24, 2010, RAAM completed an offering of $150.0 million senior secured notes at a coupon rate of 12.5% (the "Original Notes"). On July 15, 2011, RAAM completed the issuance and sale of $50.0 million aggregate principal amount of additional 12.5% Senior Notes (the "Additional Notes"). The Additional Notes have identical terms, other than the issue date and issue price, and constitute part of the same series as the Original Notes.

15. On April 11, 2013, RAAM successfully completed the issuance and sale of $50.0 million aggregate principal amount of additional 12.5% senior secured notes due 2015 (the "New Additional Notes," and together with the Original and Additional Notes, the "Notes"). The New Additional Notes are additional notes issued pursuant to the indenture dated as of September 24, 2010 (the "Base Indenture"), pursuant to which RAAM issued the Original and Additional Notes, as supplemented by the First Supplemental Indenture dated as of July 15, 2011 (the "First Supplemental Indenture"), the Second Supplemental Indenture dated as of April 11, 2013 (the "Second Supplemental Indenture"), and the Third Supplemental Indenture dated as of April 11, 2013 (the "Third Supplemental Indenture," and together with the Base Indenture, First Supplemental Indenture and the Second Supplemental Indenture, the "Indenture"). The New Additional Notes have identical terms, other than the issue date and issue price, and constitute

part of the same series as the Original and Additional Notes. As of September 30, 2015, a total of $238.0 million notional amount of the Notes was outstanding.

16. The Notes are guaranteed on a senior secured basis by Century Exploration New Orleans, LLC, Century Exploration Houston, LLC, and Century Exploration Resources, LLC. The Notes and the guarantees are secured by a security interest in substantially all of the Debtors' assets to the extent they constitute collateral under the Term Loan Facility, subject to certain exceptions. Pursuant to an Intercreditor Agreement, the lien securing the Notes is subordinated and junior to liens securing the Term Loan Facility.

17. The Debtors did not make the scheduled interest payment to the holders of the Notes that was due on April 1, 2015 which was a default under the Indenture. This non-payment also constituted a default under the Fifth Amended and Restated Credit Agreement. Total unpaid and accrued interest at July 31, 2015 was $25.4 million.

18. On April 30, 2015, the Debtors entered into the *Forbearance Agreement to 12.50% Senior Secured Notes Indenture* with holders of approximately 94% of the face value of the Notes and the *Forbearance Agreement and Second Amendment to the Fifth Amended and Restated Credit Agreement* with Wilmington Trust, National Association, as administrative agent, and the lenders under the Term Loan Facility (collectively, and as amended, the "Forbearance Agreements"). The Forbearance Agreements expired on September 14, 2015.

**D. Other Significant Obligations**

19. The Debtors have a promissory note dated August 8, 2005 with GE Commercial Finance Business Property Corporation ("GECF") related to the construction of their Houston office building. On October 1, 2012, EverBank purchased GECF and is now known as Business Property Lending, Inc. The balance owed to EverBank was $2.3 million at September 30, 2015.

The note requires monthly installments of principal and interest in the amount of approximately $27,000 until September 1, 2025.

20. Century Exploration New Orleans, LLC and the Bureau of Ocean Energy Management ("BOEM") entered into various leasing agreements for specific exploration and production activity. Century Exploration New Orleans, LLC is required to obtain one or more surety bonds in order to secure Century Exploration New Orleans, LLC's performance under the obligations relating to such leasing agreements. Ace American Insurance Company ("ACE") agreed to issue certain of such bonds in the estimated aggregate amount of $39,630,000 in favor of BOEM and as required by BOEM under the leasing agreements. In connection with its issuance of such bonds, ACE and Century Exploration New Orleans, LLC entered into the Funds Disbursing Agreement dated October 23, 2014, and a related Escrow Agreement with Bank of America as escrow agent (collectively, the "ACE Bonding Agreement"), that requires Century Exploration New Orleans, LLC to provide funds for the escrow as security for ACE. The ACE Bonding Agreement contemplates the Debtors funding $750,000 per month until March 31, 2017 into an escrow account for the benefit of ACE, and the balance of such escrow account is approximately $9.9 million as of September 30, 2015. As of the Petition Date, the Debtors believe they are fully in compliance with the applicable regulatory requirements.

21. In the ordinary course of business, the Debtors utilize an assortment of vendors, including drilling contractors, labor and repair contractors, parts and equipment suppliers, pipeline companies, heavy machinery and equipment lessors, hydrocarbon transporters, laborers, professionals, and employee benefits providers. As of the Petition Date, unsecured trade and vendor claims aggregate approximately $3.3 million for all of the Debtors, which amount excludes deficiency claims for any secured creditors, if any.

**E. Events Leading to Chapter 11**

22. A confluence of factors in 2014 and 2015 led to the Debtors' need to pursue a financial restructuring.

23. First, there has been a historic decline in the prices of crude oil and natural gas since the summer of 2014. These declines have adversely affected the Debtors' revenues and cash flows from operations. The Debtors' realized pricing is primarily driven by market prices for crude oil and natural gas. The Debtors historically engaged in derivative activities that primarily included the use of floors, costless collars, and futures transactions in order to minimize the downside risk from adverse price movements but allow for the realization of upside profits if available. The Debtors' derivative counterparties were limited to their secured lenders, which helped to minimize any potential non-performance risk. On April 20, 2015, the Company liquidated its hedge positions for $10.8 million and used those funds to reduce the outstanding amount owed under the Term Loan Facility.

24. Second, although the Debtors have actively worked with investment banking advisors to refinance the Notes, due to the current economic environment the Debtors have been unable to raise cash or identify capital resources from other sources such as bank funding, private investment, or the public debt and equity markets.

25. Third, during September 2013, the Debtors determined that they could not meet the financial certifications required to obtain permits to develop its offshore Ewing Banks 920 (EB 920) Project in the Gulf of Mexico, due in large part to the substantially increased Worst Case Discharge assumptions imposed by BOEM. As a result, the proved undeveloped reserves associated with the EB 920 Project no longer met the requirements of reasonable certainty to remain booked as proved reserves at the end of the third quarter of 2013 which adversely

impacted the Debtors' reserves and impacted the Debtors' ability to refinance the Notes. This resulted in a write-off of 8.4 million barrels of oil and largely contributed to a ceiling test write-down of $277 million and an after-tax loss of $186 million for the nine months ended September 30, 2013.

26. Fourth, in May of 2013, the Flipper Field in Texas suffered a catastrophic collapse. In December 2012, this field was producing 1,960 BOEPD and in May 2013, after all four wells were severely damaged, the Field was producing 166 BOEPD – a loss of 1,794 BOEPD. Furthermore, the Company was forced to direct much of its technical efforts and drilling capital in 2013 and 2014 to drilling new wells to reestablish production, hold the leases, and maintain the reserves.

27. The combination of these factors has impaired the Debtors' liquidity and compelled the Debtors to seek a restructuring of their liabilities in order to maximize the value of their assets for the benefit of their creditors and other constituencies.

28. The Debtors previously sought to restructure their liabilities pursuant to an exchange offer and consent solicitation that was initiated on June 4, 2015 (the "Exchange Offer"). The Exchange Offer contemplated, among other terms, that if holders of all Notes tendered their Notes in the Exchange Offer, such holders of Notes would receive their pro rata share of $50,000,000 in the aggregate principal amount of new notes maturing on June 30, 2019 and an aggregate amount of 1.17 million shares of RAAM's common stock, which would represent 95% of the outstanding shares of RAAM's common stock following the Exchange Offer, subject to dilution pursuant to the exercise of certain warrants. The closing of the Exchange Offer was conditioned, among other things, on at least 99% of the aggregate principal

amount of outstanding Notes having been validly tendered and not validly withdrawn in the Exchange Offer (the "Minimum Tender Condition").

29. The Exchange Offer terminated on August 20, 2015. Holders of approximately 94.77% of the principal amount of outstanding Notes tendered their Notes to be exchanged; however, this was insufficient to meet the Minimum Tender Condition.

30. The combination of the factors noted above and the failure of a sufficient number of holders of Notes to tender their Notes in the Exchange Offer to meet the Minimum Tender Condition compelled the Debtors to negotiate with their creditors regarding chapter 11 proceedings in order to address liquidity concerns and maximize the value of their assets for the benefit of their creditors and other constituencies.

31. For the last several months, the Debtors and their investment bankers have undertaken a thorough marketing process seeking third party stalking horse bidders. The Debtors were at one point close to finalizing a purchase agreement with a stalking horse bidder for a portion of its assets, but the potential agreement fell through due to market conditions. While there remains interest in the Debtors' assets by third parties, the Debtors have been unable to secure an acceptable third party stalking horse bid at this time after a significant marketing process.

32. The Debtors are presently negotiating a credit bid stalking horse purchase agreement with the holders of approximately 99% of the outstanding debt under the Term Loan Facility, and the Debtors are seeking to present a credit bid stalking horse purchase agreement and bid procedures to the Court before November 6, 2015. Such credit bid stalking horse purchase agreement and bid procedures will create a defined sale process, and the Debtors hope that interested parties will bid on its assets in such process to maximize the value of their estates.

## RELIEF REQUESTED

33. The Debtors seek entry of an order authorizing them to pay, in the reasonable exercise of their business judgment and in accordance with any order authorizing the use of the Debtors' cash collateral, amounts owed to certain vendors that are essential to the Debtors' business operations (as listed on **Exhibit A**, the "Critical Vendors"). Each of the Critical Vendors provides critical and necessary goods and services to the Debtors, including, *inter alia*, salt water removal services critical to the Debtors' drilling operations, waste disposal services, oil field services, drilling supplies and materials, and information technology and other computer-related services (collectively, the "Critical Goods and Services"). A vendor is considered critical only if the goods and services provided by such vendor cannot be easily and efficiently replaced, which is often the case in remote locations where the pool of available vendors is limited or when a highly-skilled work force is involved, or in the Gulf of Mexico where alternatives are typically limited and interruption of services or supplies is especially critical.

34. The Debtors have analyzed the list of Critical Vendors and submit that the list reflects only those vendors whose goods and services (a) are of great necessity on a go-forward basis and (b) cannot be easily and efficiently replaced. In each instance, failure to pay the Critical Vendors for the Critical Goods and Services would likely result in a severe disruption or cessation of certain of the Debtors' operations, and, thus, would undermine various ongoing projects and the revenues derived therefrom. Further, failure to pay many of the Critical Vendor claims would give rise to reclamation demands, mechanics' and materialmen's liens, or

administrative expense claims under Bankruptcy Code § 503(b)(9), which amounts would likely be entitled to payment priority under a plan of reorganization.[3] *See* 11 U.S.C. § 503(b)(9).

35. Even if the Debtors were able to convince the Critical Vendors to continue to supply the Critical Goods and Services to the Debtors absent payment of their pre-petition claims, the Critical Vendors will likely agree to do so only on trade terms much less favorable than customary. If the Debtors can benefit from maintaining lower costs of the Critical Goods and Services purchased during the post-petition period and avoid the severe disruption that might be caused by a cessation of the Critical Goods and Services, prudence dictates that the Debtors should have the authority to pay selected Critical Vendors some or all of their pre-petition claims.

36. The Debtors are mindful of their fiduciary obligations to seek to preserve and maximize the value of their bankruptcy estates. The preservation of key business relationships and minimization of the effects of the chapter 11 process on the end users of the Debtors' oil and gas activities are among management's primary goals as the Debtors transition into chapter 11. For these reasons, the Debtors seek to minimize the adverse business effects, as well as the cash flow impact, on their chapter 11 filing and possible irreparable harm to the fullest extent possible by obtaining authority from this Court to pay certain Critical Vendors that (a) are not subject to written contracts with the Debtors or (b) may have trade liens and that are so essential to the Debtors' operations that the loss of the Critical Goods and Services would cause immediate and irreparable harm to the Debtors' business, goodwill, and market share.

[3] The Debtors believe that a majority of the payments that would be made to the Critical Vendors pursuant to the relief requested herein would be on account of the Critical Goods and Services provided to the Debtors within the 20-day period prior to the Petition Date, and, therefore, would be entitled to administrative expense priority under Bankruptcy Code § 503(b)(9). *See* 11 U.S.C. § 503(b)(9).

**A. Payment of Pre-Petition Debt is Allowed in Certain Circumstances**

37. Bankruptcy Code § 363(b) provides for the use of property of the estate outside the ordinary course of a debtor's business, after notice and a hearing, and Bankruptcy Code § 503(b) provides for administrative expense claims for "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §§ 363(b) & 503(b). Under Bankruptcy Code § 1107(a), a debtor in possession is given the same rights and powers as a trustee appointed in a bankruptcy case, including the "implied duty of the debtor-in-possession to 'protect and preserve the estate, including an operating business' going-concern value.'" *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)). Further, courts have found that payment of certain "critical" vendors may be allowable through application of Bankruptcy Code § 362(d), allowing a party in interest, including a debtor, to move for relief from the stay for "cause." *See In re CEI Roofing, Inc.*, 315 B.R. at 59.

38. None of the Bankruptcy Code provisions listed above expressly prohibits the post-petition payment of pre-petition critical vendor claims. Indeed, where the payment of trade creditors deemed to be critical preserves the going-concern value of the estate, which is the case here, the above-referenced sections of the Bankruptcy Code would authorize such payment. As "the Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code, th[e] Court has the inherent authority, through Section 105(a) of the Bankruptcy Code to grant this Motion, in the interest of preservation of Debtors' bankruptcy estate." 11 U.S.C. § 105(a); *In re CoServ, L.L.C.*, 273 B.R. at 497; *In re CEI Roofing, Inc.*, 315 B.R. at 56; *In re Mirant Corp.*, 296 B.R. 427 (Bankr. N.D. Tex. 2003).

39. In a long and well-established line of cases, courts have consistently authorized debtors to pay certain creditors' pre-petition claims where necessary or appropriate to preserve or

enhance the value of a debtor's estate for the benefit of all creditors. *See, e.g., Mich. Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279 (S.D.N.Y. 1987) (approving lower court order authorizing debtor prior to plan stage of case to pay pre-petition wages, salaries, business expenses, and benefits); *In re CoServ*, 273 B.R. at 497 (noting that "it is only logical that the bankruptcy court be able to use section 105(a) of the Code to authorize satisfaction of the pre-petition claim in aid of preservation or enhancement of the estate"); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989) (authorizing payment of pre-petition wages, benefits, and expenses to "safeguard against loss of going-concern values"); *see also In re ASARCO LLC*, No. 05-21207, Docket No. 21 (Bankr. S.D. Tex. Aug. 10, 2005); *In re ATP Oil & Gas Corp.*, No. 12-36187, Docket No. 136 (Bankr. S.D. Tex. Aug. 21, 2012); *In re Univ. Gen. Health Sys., Inc., et al.*, No. 15-31086, Docket No. 35 (Bankr. S.D. Tex. Mar. 2, 2015).

40. Additionally, courts have long recognized that paying some categories of pre-petition obligations outside the plan of reorganization is often necessary to realize the paramount purpose of chapter 11, which is to prevent the forced liquidation of the debtor and preserve its potential for financial rehabilitation. *See In re Lehigh & New England Ry.*, 657 F.2d 570, 581 (3d Cir. 1981) (noting that the doctrine of necessity 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 shall have been paid"); *In re Boston & ME. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtor's continued operation); *In re CoServ*, 273 B.R. at 497 (applying a form of the doctrine of necessity in noting that payment of unsecured pre-petition claims is appropriate where such payment is the

"only means to effect a substantial enhancement of the estate"). As one court noted, "a per se rule proscribing the payment of pre-petition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *In re Structurlite Plastics Corp.*, 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988).

41. This Court has authorized payment of critical vendors where necessary for the debtor's reorganization or survival. *See, e.g., In re ATP Oil and Gas Corp.*, No. 12-36187, Docket No. 139 (Bankr. S.D. Tex. Aug. 21, 2012); *In re Scotia Dev. LLC*, No. 07-20027, Docket No. 208 (Bankr. S.D. Tex. Feb. 6, 2007); *In re Doctors Hospital 1997, L.P.*, No. 05-35291, Docket No. 131 (Bankr. S.D. Tex. May 25, 2005); *In re ASARCO LLC*, No. 05-21207, Docket No. 425 (Bankr. S.D. Tex. Sept. 20, 2005); *In re Pioneer Co., Inc.*, No. 01-38259, Docket No. 78 (Bankr. S.D. Tex. Aug. 17, 2001).

**B. The Critical Vendors are Essential to the Continuation of the Debtors' Businesses**

42. Courts in the Fifth Circuit, including the Southern District of Texas pursuant to Rule 8 of the Procedures for Complex Chapter 11 Bankruptcy Cases, have set out a three-part test to determine whether a pre-petition claim of a "critical vendor" may be paid outside of the plan process on a post-petition basis:

> First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's pre-petition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

*In re CoServ, L.L.P.*, 273 B.R. at 498; *see also In re Mirant Corp.*, 296 B.R. at 429-30.

43. The creditors listed on **Exhibit A** as "critical" fall within the categories discussed in *CoServ* and *Mirant*. The ability of the Debtors to procure alternate providers would be very difficult, if not impossible. Should any of the Critical Vendors delay or cease providing the

Critical Goods and Services, even on a temporary basis, the Debtors' operations would be greatly disrupted and critically impaired. Aside from allowing payment to the Critical Vendors, no practical alternative exists by which the Debtors can protect the value of their bankruptcy estates. Therefore, the Debtors must immediately and proactively provide payment to all Critical Vendors to avoid economic harm and allow the Debtors to proceed efficiently in chapter 11.

44. It is indisputable that the Critical Vendors are essential to the continuation of Debtors' businesses. Indeed, without the provision of the Critical Goods and Services, the Debtors' ability to generate revenue in chapter 11 would be materially diminished. This potential loss of economic value to the Debtors' estates is highly disproportionate to the limited pre-petition amounts to be paid on account of the Critical Goods and Services. Moreover, it would be very difficult, if not impossible, for the Debtors to select alternative vendors, and doing so would cost the Debtors valuable time trying to retain new vendors to provide the Critical Goods and Services to their operations. To the extent the Debtors would be required to seek new vendors, the Debtors would be unable to operate for some time, causing a material decline in revenue and cash flow. The time and expense inherent in obtaining alternative vendors would, of course, be in addition to the increased costs and fees likely associated with doing business with alternate vendors on a post-petition basis.

45. Regardless of the rationale adopted by this Court, the Debtors do not seek through this Motion to pay all creditors the amounts owed for pre-petition services rendered and goods sold. Rather, the Debtors seek authority to pay only those creditors that are truly critical to the Debtors' operations.

46. While the list compiled by the Debtors on **Exhibit A** is, upon information and belief, a complete list of all estimated amounts that may need to be paid to Critical Vendors, the

Debtors reserve the right to identify additional Critical Vendors or amend the list of Critical Vendors in the ordinary course of business as circumstances may warrant. As the Debtors identify any additional amounts that, in the reasonable exercise of their business judgment, they believe should be paid to Critical Vendors, the Debtors will (a) obtain the consent of Highbridge Principal Strategies, LLC to pay such additional amounts and (b) file a notice with this Court listing: (i) the Critical Vendor sought to be paid; (ii) the services provided by such Critical Vendor; (iii) the amount sought to be paid to such Critical Vendor; (iv) the risk of harm from non-payment or the economic benefit to the Debtors' estates from payment of such Critical Vendor; and (v) the absence of a legal or practical alternative to payment of such Critical Vendor. The Debtors also seek authority to pay such additional Critical Vendors absent a timely objection from a party in interest to such payment.[4]

**C. Immediate and Irreparable Harm**

47. Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") precludes the Court from authorizing certain relief until 21 days after the petition is filed, except to the extent necessary to prevent "immediate and irreparable harm." Specifically, Bankruptcy Rule 6003 provides:

> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding the following:
>
> (a) an application under Rule 2014;
>
> (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and

[4] The Debtors propose a 14-day objection period to future requests to pay Critical Vendors.

(c) a motion to assume, assign, or reject an executory contract or unexpired lease in accordance with § 365.

FED. R. BANKR. P. 6003. The Debtors believe that the relief sought in this Motion is critical to achieving a smooth transition to their operations in chapter 11 and will help preserve their going concern values. Accordingly, the Debtors seek first day approval of this Motion.

48. The relief sought herein is essential to the Debtors' business operations, and without such relief, the Debtors will suffer immediate and irreparable harm. Indeed, the Debtors' business operations will likely be disrupted by Critical Vendors ceasing to provide them with Critical Goods and Services necessary for the continued operation of their businesses. If this occurs, regardless of whether the Court may eventually be able to provide sanctions against the offending Critical Vendors, the value of the Debtors' bankruptcy estates will be drastically reduced. As recognized by other courts, if the Critical Vendors cease providing Critical Goods and Services, "[n]o one will benefit from the process." *In re CEI Roofing, Inc.*, 315 B.R. at 61. The Debtors seek the relief requested in this Motion because to do otherwise would leave their estates and operations vulnerable to a rapid decline in value.

49. In light of the foregoing, the Debtors respectfully submit that the relief requested is critical for the Debtors' operations, represents an exercise of the Debtors' sound business judgment, is in the best interests of the Debtors' estates, creditors, and all parties in interest, and is necessary to prevent immediate and irreparable harm to the Debtors' estates.

50. Relief similar to the relief requested herein has been granted by courts in the Fifth Circuit, including courts in the Southern District of Texas, and elsewhere in other chapter 11 cases. *See, e.g., In re Edge Petroleum Corp., et al.*, No. 09-20644, Docket No. 148 (Bankr. S.D. Tex. Oct. 27, 2009); *In re ATP Oil & Gas Corp.*, No. 12-36187, Docket No. 139 (Bankr. S.D. Tex. Aug. 21, 2012); *In re Bosque Power Co., LLC, et al.*, No. 10-60348, Docket No. 149

(Bankr. W.D. Tex. Apr. 26, 2010); *In re Colt Holding Co. LLC, et al.*, No. 15-11296, Docket No. 197 (Bankr. D. Del. July 10, 2015). The Debtors submit that because they meet the standards required by Rule 6003, the above-listed cases serve as persuasive authority in this instance.

## RESERVATION OF RIGHTS

51. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Bankruptcy Code § 365. 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 of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

## NOTICE

52. Notice of this Motion has been provided by e-mail, facsimile, or overnight delivery to: (a) the Office of the United States Trustee for the Southern District of Texas; (b) the Debtors; (c) counsel to the Debtors; (d) counsel to the lenders under the Term Loan Facility; (e) counsel to ACE; (f) counsel to certain holders of the Notes; (g) counsel to the administrative agent under the Term Loan Facility; (h) counsel to the indenture trustee and collateral agent under the Notes; (i) the Debtors' 50 largest unsecured creditors (on a consolidated basis); (j) those persons who have formally appeared in the Cases and requested service pursuant to Bankruptcy Rule 2002; (k) the Critical Vendors; (l) the Securities and Exchange Commission; (m) the Internal Revenue Service; and (n) all other applicable government agencies to the extent required by the Bankruptcy Rules and the Bankruptcy Local Rules.

## PRAYER

The Debtors respectfully request that the Court enter an Interim Order, and subsequently a Final Order, (a) authorizing the payment of pre-petition amounts owed to the Critical Vendors, under the terms set forth herein and subject to any order authorizing the use of the Debtors' cash collateral and (b) granting such other and further relief to which the Debtors may be justly entitled.

Dated: October 26, 2015

Respectfully submitted,

**VINSON & ELKINS LLP**

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**PROPOSED ATTORNEYS FOR THE DEBTORS**

## CERTIFICATE OF SERVICE

I certify that on October 26, 2015, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

*/s/ Bradley R. Foxman*
One of Counsel