

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11
  
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EXIDE TECHNOLOGIES, : Case No. 13-11482
  
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Debtor.<sup>1</sup> :
  
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**DEBTOR’S MOTION FOR ORDER (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS AND SERVICE PROVIDERS, AND (II) AUTHORIZING PROVISIONAL PAYMENT TO CERTAIN CONTRACT COUNTERPARTIES AND RELATED PROCEDURES THERETO**

Exide Technologies (“Exide” or “Debtor”) hereby moves (the “Motion”) this Court for entry of an interim order (the “Interim Order”) and a final order (the “Final Order”), under sections 105(a), 363(b), 364, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing, but not directing, the Debtor to pay, in the ordinary course of business, (i) the prepetition fixed, liquidated, and undisputed claims of certain critical vendors and service providers, subject to the conditions described herein and (ii) on a provisional basis, certain suppliers that may seek to discontinue supplying products or providing services in breach of their agreements with the Debtor, and approving procedures related thereto. The Debtor also requests that this Court authorize, but not direct, all applicable banks and financial institutions to honor all related checks and electronic payment requests authorized pursuant to this Motion

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

provided that sufficient funds are available in the applicable accounts to make the payments. In support of the Motion, the Debtor relies upon and incorporates by reference the Declaration of Phillip A. Damaska in Support of Chapter 11 Petitions and First Day Pleadings (the “First Day Declaration”), filed with the Court concurrently herewith. In further support of the Motion, the Debtor, by and through its proposed undersigned counsel, respectfully represents:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of the case and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105(a), 363(b), 363(c), 364, 503(b)(1)(A), 1107(a), and 1108, and Bankruptcy Rules 6003 and 6004.

3. Pursuant to Rule 9013-1(f) of the Local Rules for the United States Bankruptcy Court for the District of Delaware, the Debtor consents to the entry of a final judgment or order with respect to the Motion if it is determined that this Court would lack Article III jurisdiction to enter such final order or judgment absent the consent of the parties.

### **BACKGROUND**

#### **A. The Chapter 11 Case**

4. On the date hereof (the “Petition Date”), the Debtor commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”).<sup>2</sup>

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<sup>2</sup> The Debtor’s predecessor has a chapter 11 case currently pending in this District (Case No. 02-11125) (the “Previous Chapter 11 Case”). The Previous Chapter 11 Case was filed on April 15, 2002, and the Debtor and certain of its U.S. subsidiaries emerged from chapter 11 on May 5, 2004. There is one claim remaining open in the Previous Chapter 11 Case. In addition, there is a pending adversary proceeding in which a settlement agreement to allow a general unsecured, non-priority claim has been approved by this Court, but is awaiting

5. The Debtor continues to operate its business and manage its property as debtor and debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. To date, no creditors' committee has been appointed by the United States Trustee. No trustee or examiner has been appointed in the Chapter 11 Case.

**B. The Debtor's Business**

7. The Debtor, Exide, which together with its direct and indirect subsidiaries (collectively, the "Company"), has operations in more than 80 countries, is a global leader in stored electrical energy solutions and one of the world's largest producers and recyclers of lead-acid batteries.

8. The Company's four global business groups—Transportation Americas, Transportation Europe and Rest of World ("ROW"), Industrial Energy Americas, and Industrial Energy Europe and ROW—provide a comprehensive range of stored electrical energy products and services for industrial and transportation applications. The Company manufactures and distributes transportation and industrial batteries in North America, Europe, Asia, the Middle East, India, Australia, and New Zealand. In the transportation segments, the Company distributes and markets transportation batteries, which include starting, lighting, and ignition batteries for cars, trucks, off-road vehicles, agricultural and construction vehicles, motorcycles, recreational vehicles, marine, and other applications to a broad range of retailers, distributors of replacement or after-market batteries, and automotive original equipment manufacturers ("OEM"). The Company's industrial batteries consist of motive power batteries and network power applications. Motive power batteries are used in the material handling industry for

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final approval from the state chancery court to become effective. The Debtor will confer with this Court regarding the disposition of the Previous Chapter 11 Case at the appropriate time.

equipment such as electric fork-lift trucks as well as in other machinery, including floor cleaning machinery, powered wheelchairs, railroad locomotives, mining equipment, and electric road vehicles. Network power batteries provide energy storage solutions for critical systems that require uninterrupted power supply and are used to power, among other things, telecommunications systems, computer installations and data centers, hospitals, air traffic control systems, security systems, electric utilities, railways, and various military applications. The Company has a diverse customer base that includes a number of major end-user customers, retail and OEM, and includes market winners and industry leaders.

9. The Debtor, headquartered in Milton, Georgia, operates 13 manufacturing facilities in the United States. The Debtor also operates approximately 74 branches<sup>3</sup> throughout North America, which sell and distribute batteries and other products to customers, battery specialists, retail stores, and OEM dealers. In addition, branch locations collect spent batteries for the Debtor's recycling facilities. Exide has five smelters, three of which are currently active battery collection and recycling facilities.<sup>4</sup> These facilities reclaim lead by recycling spent lead-acid batteries, which are obtained for recycling from Exide's customers and outside spent-battery collectors. In fiscal year 2013, approximately 530,575 tons of batteries, plant scrap, and range lead were recycled at Exide's smelters or by a third party at Exide's request, which efforts enabled Exide to better control the cost of the principal raw

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<sup>3</sup> On average, branch locations are approximately 20,000 square feet in size and are generally leased for periods of 29 to 42 months.

<sup>4</sup> The smelter furnaces melt lead from spent (i.e., expired) batteries to extract the lead so that it can be re-used to make new batteries.

material—lead—used in making its products. In the United States, the Debtor historically has obtained the vast majority of its lead requirements from its recycling operations.<sup>5</sup>

10. Additional factual background information about the Debtor, including its business operations, its corporate and capital structures, its restructuring efforts, and the events leading to the filing of the Chapter 11 Case, is set forth in detail in the First Day Declaration.<sup>6</sup>

### **PRELIMINARY STATEMENT**

11. In the ordinary course of its operations, the Debtor relies on numerous suppliers, service providers, and vendors (the “Vendors”) for the delivery of goods and/or services. Critical Vendors (as defined below) supply those essential goods and services without which the Debtor’s business would suffer serious disruption (the “Critical Goods and Services”).

12. Anticipating this situation, the Debtor took painstaking efforts to ensure the stability of its supply chain prior to commencing the Chapter 11 Case—including establishing parameters for a narrowly-tailored critical vendor program to ensure the continued supply of Critical Goods and Services and preservation of its liquidity during the Chapter 11 Case.<sup>7</sup> The development process involved a highly deliberative effort to design, structure, and

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<sup>5</sup> In contrast, the Company obtains the majority of its lead requirements for its ROW operations on the open market from third-party suppliers.

<sup>6</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

<sup>7</sup> As part of this program the Debtor conducted a thorough analysis of critical vendors, critical foreign vendors, shippers, warehousemen, mechanics, and materialmen. Concurrently filed herewith, the Debtor has filed its (i) Motion For Order Pursuant To 11 U.S.C. §§ 105, 363, 1107 And 1108 And Fed. R. Bankr. P. 6003 And 6004 Authorizing Debtor To Pay Prepetition Claims Of Certain Foreign Vendors And Service Providers, (ii) Debtor’s Motion For Order Pursuant To 11 U.S.C. §§ 105(a) 363(b), 503(b), 506, 1107, And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of Certain Prepetition Shipping And Delivery Charges, and (iii) Motion For Order Under 11 U.S.C. §§ 105(a), 363(b), And 506(b) Authorizing The Debtor To Pay Certain Prepetition Claims Of Mechanics And Materialmen In Satisfaction Of Perfected Or Potential Mechanics’, Materialmen’s Or Similar Liens Or Interests. By this Motion, the Debtor only seeks to pay those domestic critical vendors that met the narrowly-tailored criteria described herein.

execute a mechanism under which a core, centralized team—guided by turnaround professionals—will authorize payment only to those suppliers critical to the Debtor’s operations and subject to such Vendor’s own obligations to provide Customary Trade Terms (as defined herein). This process was developed through numerous meetings and dialogue between the Debtor’s senior procurement team, Alvarez & Marsal, and counsel.

13. The Debtor focused on the following primary criteria to develop the parameters for its proposed critical vendor program.

- First, the Debtor and its professionals rigorously scrutinized more than 3900 open accounts and approximately \$104 million in outstanding prepetition trade payables. Areas of focus included:
  - types of goods or services (e.g. raw materials, parts, specialized components) and the Debtor’s ability to find alternative sources of supply;
  - the potential disruption or lost revenues while a supplier was re-sourced; and
  - the Debtor’s ability to compel contractual performance.
- Second, the Debtor designated a centralized, high-level team, with the guidance and supervision of its professionals, to review, assess, and potentially authorize payment to a Critical Vendor after obtaining an acceptable *quid pro quo* (i.e., provision of acceptable trade terms).

Through this analysis, the Debtor used a narrowly-tailored protocol identifying those goods and services absolutely essential to the Debtor’s continued operations. Based on this exercise, the Debtor estimates that having authority to pay up to \$10 million in prepetition critical trade claims (at least one-third of which, based on the Debtor’s best estimates would likely qualify for administrative expense priority under Bankruptcy Code section 503(b)(9)) will ensure that it can perform on its customer commitments and keep its supply chain intact.

14. The Debtor believes this deliberative process justifies the relief requested herein. To ensure that the Debtor’s liquidity is preserved as it transitions into chapter 11, the

*quid pro quo* for the Debtor's payment of a Critical Vendor Claim will be the applicable Critical Vendor's commitment to provide trade credit consistent with historical practices. Except in rare exigent circumstances, the Debtor will not pay any prepetition obligation pursuant to the relief requested herein without such Vendor's agreement to provide goods or services on terms consistent with their past practice. Accordingly, the Debtor seeks to pay Critical Vendor Claims up to an aggregate amount of \$10 million.<sup>8</sup> In addition, as described more fully below, the Debtor proposes establishing a procedure to pay, on a provisional basis, the prepetition claims of those vendors who have contractual obligations to continue supplying the Debtor notwithstanding an outstanding prepetition balance, that threaten to or stop shipment of or supply of critical goods or services (collectively, the "Contract Counterparties").

### **RELIEF REQUESTED**

15. By the Motion, the Debtor seeks entry of interim and final orders, pursuant to sections 105(a), 363(b), 1107(a), and 1108 of the Bankruptcy Code, and Bankruptcy Rules 6003 and 6004, authorizing, but not directing, the Debtor (i) to pay prepetition claims (collectively, the "Critical Vendor Claims") held by vendors essential to the Debtor's ongoing business operations (collectively, the "Critical Vendors")<sup>9</sup> and (ii) provisionally pay, pursuant to the protocol described herein, certain prepetition claims (collectively, the "Contract Counterparty Claims") held by Contract Counterparties that the Debtor deems, in the exercise of its business judgment, to be essential to maintaining the value of the Debtor's assets.

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<sup>8</sup> The Debtor also seeks confirmation that goods delivered postpetition are entitled to administrative expense priority to help ensure that Outstanding Orders (as defined below) continue to be satisfied without disruption.

<sup>9</sup> The Debtor only seeks authority to pay prepetition claims of the Critical Vendors who are third-party creditors of the Debtor. Claimants of the Company's non-debtor foreign subsidiaries will continue to be paid in the ordinary course of business.

16. As set forth below, and to the extent possible, the Debtor proposes to condition the payment of individual Critical Vendor Claims on (i) the most favorable trade terms, practices, and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability, and other applicable terms and programs), in effect between the Critical Vendor and the Debtor during the 180 days preceding the Petition Date or (ii) such other trade terms as the Debtor and the Critical Vendor may mutually agree upon. The Debtor further proposes to limit the aggregate amount of payments to be made on account of Critical Vendor Claims to \$10 million unless further authorization is obtained from this Court.

17. Additionally, as of the Petition Date, the Debtor had outstanding prepetition purchase orders (collectively, the “Outstanding Orders”) with many suppliers (collectively, the “Suppliers”) for essential goods and component parts in the ordinary course of business for which delivery will not occur until after the Petition Date. As a result of the commencement of the chapter 11 cases, the Suppliers may be concerned that amounts owed for goods ordered prior to the Petition Date, but delivered after the Petition Date, will be treated as general unsecured claims against the Debtor’s estate. Suppliers may refuse to ship or transport such goods (or recall shipments of such goods) with respect to Outstanding Orders unless the Debtor issues substitute purchase orders postpetition or obtain an order of the Court clarifying the administrative expense priority of payments for such goods. The Debtor therefore seeks confirmation that goods delivered postpetition are entitled to administrative expense priority to help ensure that Outstanding Orders continue to be satisfied without disruption.

18. In addition, the Debtor requests entry of an order authorizing, but not directing, the applicable banks and other financial institutions (collectively, the “Banks”) to rely

on the Debtor's direction to pay amounts authorized under this Motion provided that sufficient funds are available in the applicable accounts to make the payments.

19. For the reasons set forth herein, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate, its creditors, and other parties in interest, and therefore, should be granted.

### **BASIS FOR RELIEF**

#### **A. The Critical Vendors**

20. With the assistance of its advisors, the Debtor has spent significant time reviewing and analyzing its books and records, consulting operations management and purchasing personnel, reviewing contracts and supply agreements, and analyzing applicable laws, regulations, and historical practice to identify certain critical business relationships and/or suppliers of goods and services—the loss of which could materially harm its businesses, reduce its market share and its enterprise value, and/or impair its going-concern viability. In this process, the Debtor examined stringent criteria, including:

- whether a vendor is a sole- or limited-source or high-volume supplier of materials, parts, or services for production or delivery of critical inventory;
- whether alternative vendors are available that can provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtor would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including, pricing, transition expenses, professional fees, and lost sales or future revenue) exceed the amount of a vendor's prepetition claim;
- whether an agreement exists by which the Debtor could compel a vendor to continue performing on prepetition terms; and
- whether certain specifications or other customer preferences prevent the Debtor from obtaining goods or services from alternative sources.

21. Following this analysis, the Debtor identified the following types of goods and service providers as critical to the Debtor's continued operation: (a) raw material providers; (b) parts suppliers; (c) suppliers of manufacturing tools, (d) transportation providers; (e) regulatory compliance service providers, and (f) packaging companies. Most of the Critical Vendors likely will be sole source suppliers without whom the Debtor could not operate or could not be replaced within a reasonable time on terms as beneficial to the Debtor as those already in place. All of the Critical Vendors would cause future revenues or profits of the Debtor to suffer if the Critical Vendors did not continue to supply their goods or services. Because the Critical Vendors provide their goods or services at favorable costs and at beneficial payment terms, replacing the Critical Vendors would result in higher costs for the Debtor in terms of cost of goods purchased and the cost of funds used to purchase such goods. If the Debtor can benefit from maintaining lower costs of goods purchased during the postpetition period, it is prudent for the Debtor to pay selected Critical Vendors some or all of their prepetition claims, provided that such vendors continue generally to sell their goods at the same reduced prices and on at least as favorable terms on a going forward basis as were in effect during the prepetition period.

**B. The Critical Vendor Claims**

22. Based on its books and records and past experience, the Debtor estimates that it has outstanding prepetition trade claims totaling approximately \$104 million, which represents actual trade accounts payable as of the Petition Date. The Debtor's estimate of outstanding prepetition claims also includes projected liabilities for certain goods and services which are not reflected in its accounts payable because they have not yet been invoiced for goods already received.

23. The Debtor seeks authority, in its sole discretion, to pay the Critical Vendor Claims, in the aggregate amount of \$7 million on an interim basis, and in the aggregate

amount of approximately \$10 million on a final basis (the “Trade Claims Cap”). In determining the amount of the Trade Claims Cap, the Debtor carefully reviewed all of its Vendors to determine which types of Vendors could potentially meet the stringent criteria used to identify a universe of potential Critical Vendors. After analyzing this information, the Debtor estimated the amount that it would be required to pay to ensure the continued supply of Critical Goods and Services. Put another way, the Trade Claims Cap represents the Debtor’s best estimate of how much in prepetition trade claims can be paid to creditors to ensure continued supply of critical goods and services and maintenance of favorable trade terms. Of the \$10 million Trade Claims Cap, based on an in-depth review of its outstanding accounts payable, the Debtor estimates that approximately 35% would be entitled to priority treatment under Bankruptcy Code section 503(b)(9).

24. The Trade Claims Cap represents less than 10% of the Debtor’s estimate of aggregate prepetition trade claims, which total approximately \$104 million. Given the nature of the Debtor’s business, the demonstrated benefits of paying the Critical Vendor Claim, the detailed protocol described herein for determining whether to make a critical vendor payment, and the risks associated with non-payment, the Debtor submits that this is a reasonable and appropriate cap on the expenditure of estate funds to satisfy certain prepetition claims.

**C. Proposed Conditions To Payment Of Critical Vendor Claims**

25. As a *quid pro quo*, the Debtor proposes that Critical Vendors whose claims are paid under the authority requested herein, also continue providing goods and services to the Debtor on customary trade terms for at least one year following the date of the agreement (the “Customary Trade Terms”). Customary Trade Terms means (i) the most favorable trade terms, practices, and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix

and availability, and other applicable terms and programs), in effect between the Critical Vendor and the Debtor during the 180 days preceding the Petition Date or (ii) such other favorable trade terms as the Debtor and the Critical Vendor may mutually agree upon. To ensure that the Critical Vendors deal with the Debtor on Customary Trade Terms, the Debtor proposes that a letter substantially in the form annexed hereto as Exhibit A be sent to the Critical Vendors along with a copy of the order granting the Motion.

26. The Debtor proposes that the letter (once executed, a "Trade Agreement") sent to Critical Vendors include, without limitation, the following terms:

(a) The amount of each Critical Vendor's estimated Critical Vendor Claim, accounting for any setoffs, other credits, and discounts thereto, will be as mutually determined in good faith by the Critical Vendor and the Debtor (but such amount will be used only for the purposes of determining such Critical Vendor's claim under the order and will not be deemed a claim allowed by the Court, and all rights of all interested persons to object to such claim shall be fully preserved until further order of the Court, unless such claim is waived by the Critical Vendor pursuant to the terms of the letter);

(b) The Customary Trade Terms between such Critical Vendor and the Debtor, or such other favorable terms as the Critical Vendor and the Debtor may agree, and the Critical Vendor's agreement to provide goods and services in accordance with such terms;

(c) The Critical Vendor's agreement not to file or otherwise assert against the Debtor, its estate, or any other person or entity or any of its respective assets or property any lien (a "Lien"), regardless of the statute or other legal authority upon which such Lien is asserted, related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtor, and, to the extent the Critical Vendor has already obtained or otherwise asserted such a Lien, the Critical Vendor must take whatever actions are necessary to remove such Lien;

(d) The Critical Vendor's acknowledgment that it has reviewed the terms and provisions of the Order and consents to be bound thereby; and

(e) The Critical Vendor's agreement that it will not separately seek payment for reclamation claims or claims pursuant to section 503(b)(9) of the Bankruptcy Code outside the terms of the order unless the Critical Vendor's participation in the program to pay Critical Vendor Claims pursuant to the order is terminated; provided, however, that such reclamation and/or section 503(b)(9) claims will, if thereafter raised by the Critical Vendor as permitted by the order, be treated as though raised on the later of (i) the date of the order and (ii) the date on which the agreement between the Critical Vendor and the Debtor is executed by both parties.

27. If a Critical Vendor refuses to supply goods or services to the Debtor on Customary Trade Terms following receipt of payment on its Critical Vendor Claim, or fails to comply the any Trade Agreement, the Debtor seeks authorization, but not direction, to, without further order of the Court, declare (i) that the Trade Agreement is terminated and (ii) that any payments made to the Critical Vendor on account of its Critical Vendor Claim be deemed to have been made on account of then-outstanding postpetition claims of such Critical Vendor. In such event, the Debtor proposes that a Critical Vendor be required immediately to repay to the Debtor any payment made to it on account of its Critical Vendor Claim to the extent that payments on account of such Critical Vendor Claim exceeds the then-outstanding postpetition claims of such Critical Vendor without giving effect to any rights of setoff, claims, provision for payment of reclamation or section 503(b)(9) claims, or otherwise.

28. The Debtor further proposes that any Trade Agreement terminated as a result of a Critical Vendor's refusal to comply with the terms thereof may be reinstated if:

- (i) such determination is subsequently reversed by this Court after notice and a hearing following a motion by the Critical Vendor, for good cause shown, on the grounds that the determination was materially incorrect;
- (ii) the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor that a default had occurred;
- or (iii) the Debtor, in its discretion, reaches a favorable alternative agreement with the Critical Vendor.

29. The Debtor also seeks authority, to use its discretion when circumstances are appropriate, to pay Critical Vendor Claims in the event that no Trade Agreement has been executed if the Debtor determines, in its business judgment, that a formal Trade Agreement is unnecessary to ensure such Critical Vendor's continued performance on Customary Trade

Terms, provided, however, if any party accepts payment pursuant to the Motion and thereafter does not continue to provide goods or services on Customary Trade Terms (regardless of whether or not a Trade Agreement has been executed), then: (a) such payment may be deemed to be an improper postpetition transfer, and therefore, immediately recoverable by the Debtor in cash upon written request and (b) upon recovery of the payment by the Debtor, the Critical Vendor Claim shall be reinstated as if the payment has not been made. If there exists an outstanding postpetition balance due from the Debtor to such party, the Debtor may elect to recharacterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance, and such Critical Vendor will be required to repay the Debtor such paid amounts that exceed the postpetition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

#### **D. Contract Counterparty Claims and Procedures**

30. Although the Bankruptcy Code prohibits those suppliers under executory contracts from ceasing performance or modifying the terms of their obligations,<sup>10</sup> the Debtor anticipates that some Contract Counterparties could take aggressive positions and refuse to perform unless the Debtor first satisfies their prepetition claims. To the extent these suppliers threaten to disrupt the Debtor's supply chain, the Debtor seeks the authority to provisionally pay certain Contract Counterparty Claims; provided, however, that the Debtor may request that such

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<sup>10</sup> See 11 U.S.C. § 362 (enjoining the commencement or continuation of substantially all acts or actions against the debtor and property of the estate); U.S. Postal Servo V. Dewey Freight Sys., Inc., 31 F.3d 620, 624 (8th Cir. 1994) (“After a debtor commences a Chapter 11 proceeding, but before executory contracts are assumed or rejected under § 365(a), those contracts remain in existence, enforceable by the debtor but not against the debtor.”); In re Broadstripe, LLC, 2009 WL 774401, \*3 (D. Del. Mar. 26, 2009) (same); In re Nat’l Steel Corp., 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004) (“The non-debtor party must continue to perform under the contract prior to assumption or rejection ... “); In re Pittsburgh-Canfield Corp., 283 B.R. 231 (Bankr. N.D. Ohio 2002) (non-debtor party cannot unilaterally elect to withhold performance and must continue to perform under executory contract); see also NLRB V. Bildisco & Bildisco, 465 U.S. 513, 532 (1984) (a non-debtor may not enforce the terms of an executory contract against a debtor).

Contract Counterparties subsequently justify the payment to the Court. In addition, given that the Debtor would expect to use the Contract Counterparty procedures in rare, exigent circumstances, the Debtor requests that any such amounts provisionally paid to a Contract Counterparty does not count against the Critical Trade Cap.

31. The Debtor proposes the following procedures for payments to Contract Counterparties:

(a) In the event that the Debtor makes a provisional payment to a Contract Counterparty, the Debtor will file a Notice of Provisional Payment, substantially the form attached hereto as Exhibit B (the “Notice of Provisional Payment”), and a proposed order to show cause, in substantially the form attached hereto as Exhibit C (the “Show Cause Order”), with this Court within three business days of payment to such Contract Counterparty. The Debtor further proposes to serve any such Notice of Provisional Payment and Show Cause Order on: (a) the Contract Counterparty; (b) the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”); (c) counsel for the official committee of unsecured creditors appointed in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code (the “Creditors’ Committee”); (d) counsel to the agent under the Debtor’s proposed postpetition senior secured credit facilities; (e) counsel to the agent for the Debtor’s prepetition secured lenders; (f) the indenture trustee for each of the Debtor’s secured and unsecured outstanding bond issuances; (g) counsel to the unofficial committee of senior secured noteholders; and (h) those persons who have requested notice pursuant to Bankruptcy Rule 2002.

(b) If the Debtor files a Show Cause Order, then the Debtor proposes that at the first regularly-scheduled hearing occurring at least five business days following entry of the Show Cause Order by this Court, the Contract Counterparty be required to appear before this Court and explain how such Contract Counterparty did not violate the automatic stay.

(c) Should the Court determine that, by its conduct, the Contract Counterparty has violated the automatic stay, the Debtor respectfully requests that this Court either (i) require the Contract Counterparty to disgorge the payments made by the Debtor on account of any prepetition claim, plus attorneys’ fees and interest accrued on such amount at the federal judgment rate or such other higher rate as this Court specifies, within three business days of entry of the order holding such Contract Counterparty in violation or (ii) authorize the Debtor to setoff the amount of the payments made by the Debtor on account of any prepetition claim against any future payments to be paid to such Contract Counterparty.

32. The Debtor further proposes to maintain a matrix summarizing the provisional amounts paid to each Contract Counterparty on account of its prepetition claims and the goods and services provided by each such Contract Counterparty. The Debtor will provide

the matrix to the U.S. Trustee, counsel for the Creditors' Committee, and the agent for the Debtor's proposed postpetition financing; provided that these parties agree to keep the matrix confidential. The Debtor also expressly reserve its right to file any motions, adversary complaints, or other pleadings that it determines, in its sole and absolute discretion, are necessary or appropriate to pursue other remedies including, without limitation, injunctive relief compelling the Contract Counterparties to ship pursuant to their executory contract with the Debtor.<sup>11</sup>

### **APPLICABLE AUTHORITY**

#### **A. The Court Should Authorize Payment of Critical Vendor Claims Entitled to Priority Pursuant to Bankruptcy Code Section 503(b)(9) as Provided Herein**

33. As noted above, the Debtor estimates that approximately one-third of the Critical Vendor Claims are priority claims under Bankruptcy Code section 503(b)(9). The Court may authorize the Debtor to pay prepetition claims of certain critical vendors under section 503(b)(9) or the body of case law that allows debtors to pay prepetition obligations in appropriate circumstances. For instance, under section 503(b)(9), claims for the value of goods received by the Debtor in the ordinary course of its business during the 20-day period prior to the Petition Date are entitled to priority status. As priority claims, the Debtor is required to pay these claims in full to confirm a plan of reorganization. See 11 U.S.C. § 1129(a)(9)(A) (requiring payment in full of claims entitled to priority prior to the effective date). Consequently, payment of the portion of Critical Vendor Claims entitled to priority under section 503(b)(9) will

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<sup>11</sup> Bankruptcy courts in this and other districts have granted relief similar to that requested herein with respect to such threatening and recalcitrant vendors. See, e.g. In re Visteon Corp., Case No. 09-11786 (CSS) (Bankr. D. Del. June 19, 2009); In re Dura Auto. Sys. Inc., No. 06-11202 (KJC) (Bankr. D. Del. Nov. 20, 2006); In re Dana Corp., No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006); In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005).

only accelerate the timing of payment to which these parties are otherwise entitled under the Bankruptcy Code. Conversely, the Debtor's failure to pay these claims could raise significant concerns among the Debtor's vendors regarding the Debtor's prospects as a going-concern, perpetuating the reactionary, "run on the bank" mentality gripping key business partners.

34. The Bankruptcy Code does not prohibit a debtor from paying such claims prior to confirmation. As administrative claims incurred in the ordinary course of business, the Debtor believes it may pay such claims in accordance with its business judgment pursuant to section 363(c)(1) of the Bankruptcy Code.<sup>12</sup> In re Dura Auto. Sys. Inc., Case No. 06-11202 (KJC)(Bankr. D. Del. Oct. 31, 2006) Hr'g Tr. 49:22 ("I think arguably the [D]ebtor could pay its 503(b)(9) claimants without court approval."). The timing of such payments also lies squarely within the Court's discretion. See In re Global Home Prods., LLC, No. 06-10340, 2006 WL 3791955, at \*3 (Bankr. D. Del. Dec. 21, 2006).

35. The Debtor's ongoing ability to obtain goods as provided herein is key to its survival and necessary to preserve the value of its estate. Absent payment of these claims—which process is subject to oversight and approval by the Debtor's senior procurement team, professionals, and advisors—the Debtor could be unable to maintain sufficient levels of inventory required by its customers. Consequently, the Debtor's authority to honor the section 503(b)(9) portion of the Critical Vendor Claims as provided herein is both consistent with the priorities established by the Bankruptcy Code and necessary to preserve the value of its business.

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<sup>12</sup> As administrative claims incurred in the ordinary course of the Debtor's business prepetition, the Debtor believes that it is authorized to pay the priority claims pursuant to section 363(c)(1) of the Bankruptcy Code, regardless of whether the claimant is a Critical Vendor; however, as prepetition claims, the Debtor also believes that it is not required to pay the 503(b)(9) claims prior to the conclusion of these cases. To be clear, the Debtor does not intend to pay most claims asserted against them pursuant to 503(b)(9) until confirmation of its plan of reorganization.

38. In addition, courts in this district and others have regularly authorized the payment of claims arising under Bankruptcy Code section 503(b)(9) in the ordinary course of business. See, e.g., In re A123 Sys., Inc., Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012) (authorizing debtor to pay approximately 15% of total prepetition trade claims and additionally pay section 503(b)(9) claims); In re S. Air Holdings, Inc., Case No. 12-12690 (CSS) (Bankr. D. Del. Sept. 28, 2012) (interim order); In re Digital Domain Media Grp., Inc., Case No. 12-12568 (BLS) (Bankr. D. Del. Sept. 12, 2012); In re WP Steel Venture, LLC, Case No. 12-11661 (KJC) (Bankr. D. Del. June 1, 2012) (interim order); The Great Atlantic & Pacific Tea Co., Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Feb. 7, 2011) (interim order); In re Constar Int'l Inc., Case No. 11-10109 (CSS); see also In re Visteon Corp., Case No. 09-11786 (CSS) (Bankr. D. Del. June 19, 2009) (authorizing debtor to pay \$33.9 million in critical vendor claims, including \$12.1 million in claims entitled to priority treatment under section 503(b)(9) of the Bankruptcy Code); In re Dura Auto. Sys. Inc., Case No. 06-11202 (KJC)(Bankr. D. Del. Nov. 21, 2006) (authorizing debtor to pay \$29 million in critical vendor claims and an additional \$25 million in claims entitled to priority treatment under section 503(b)(9) of the Bankruptcy Code).

**B. Paying Critical Vendor Claims Is In Furtherance Of The Debtor's Duties Under Bankruptcy Code Sections 1107(A) And 1108**

36. As a debtor in possession under Bankruptcy Code sections 1107(a) and 1108, the Debtor has duties to protect and preserve its estate, including maintaining the going-concern value of its business. See, e.g., In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). At least one court has acknowledged that there are circumstances under which a debtor in possession can only fulfill such duties “by the preplan satisfaction of a prepetition claim.” Id.

37. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” Id. The CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate,” id. at 479, and also when the payment was to “sole suppliers of a given product.” Id. at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

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 prepetition 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.

Id.

38. Payment of the Critical Vendor Claims undeniably meets each element of the CoServ court’s standard. First, as described in the protocol above, the Debtor has narrowly-tailored the definition of “Critical Vendors” to encompass only those suppliers that are the sole source of a particular good or service without which the Debtor would be severely impacted, or those suppliers or service providers who are critical because the time and expense that would be involved in transitioning to a new supplier would be prohibitive and would significantly disrupt the Debtor’s business. Second, because of the essential nature of the Critical Goods and Services provided by the Critical Vendors and the difficulty associated with finding alternate sources for those goods and services, the potential harm and economic disadvantage that would stem from the failure of any of the Critical Vendors to perform, as further described above, is grossly disproportionate to the amount of any Critical Vendor Claim sought to be paid. Third, with respect to each of the Critical Vendor Claims, the Debtor has examined other legal options short

of payment of such Critical Vendor Claims and have determined that there exists no practical or legal alternative to payment of the Critical Vendor Claims.

39. Courts in this District and others have granted similar critical vendor relief in other bankruptcy cases. See, e.g., In re A123 Sys., Inc., Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012); In re WP Steel Venture LLC, Case No. 12-11661 (KJC) (Bankr. D. Del. June 1, 2012); In re Appleseed's Intermediate Holdings LLC, Case No. 11-10160 (KG) (Bankr. D. Del. Jan. 20, 2011); In re Constar Int'l, Inc., Case No. 11- 10109 (CSS) (Bankr. D. Del. Jan. 13,2011); In re Am. Safety Razor Co., LLC, Case No. 10-12351 (MFW) (Bankr. D. Del. July 30, 2010); In re Middlebrook Pharma., Inc., Case No. 10-11485 (MFW) (Bankr. D. Del. May 4, 2010); In re Gems T.V. (USA) Limited, Case No. 10-11158 (PJW) (Bankr. D. Del. Apr. 6, 2010); In re SP Wind Down, Inc., Case No. 10-10352 (KG) (Bankr. D. Del. Feb. 4, 2010).

**C. Payment of the Critical Vendor Claims Is Appropriate Under Bankruptcy Code Section 363(b).**

40. Section 363(b) of the Bankruptcy Code permits a debtor to use estate property “other than in the ordinary course of business” after notice and a hearing. 11 U.S.C. § 363(b)(1). Courts have authorized relief under section 363(b) where a debtor demonstrates a sound business justification for such relief. See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (“The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.”); Ionosphere Clubs, Inc., 98 B.R. at 175 (“[T]he debtor must articulate some business justification, other than mere appeasement of major creditors.”)

41. Once a debtor has articulated a valid business justification, “[t]he 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.’” Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

42. The business judgment rule applies in chapter 11 cases. See Integrated Res., 147 B.R. at 656 (noting that “Delaware business judgment rule principles have ‘vitality by analogy’ in Chapter 11”); see also Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor’s management decisions.”).

43. As discussed above, the Debtor has determined, in the sound exercise of its business judgment, that the materials, products, and services provided by the Critical Vendors are vital to the Debtor’s continuing business operations. As such, the failure to honor its prepetition obligations to the Critical Vendors could have a material adverse impact on the Debtor’s continued operation and, thus, its efforts to pursue restructuring alternatives. Accordingly, the preservation and protection of the Debtor’s business through ongoing relationships with the Critical Vendors provides a sufficient business justification for payment of Critical Vendor Claims, even if such payment were deemed to be outside the ordinary course of business. See Ionosphere Clubs, Inc., 98 B.R. at 175.

44. The Debtor therefore seeks authorization under section 363(b) of the Bankruptcy Code to pay the Critical Vendor Claims.<sup>13</sup>

45. This and other courts have granted similar critical vendor relief in other cases. See, e.g., In re A123 Sys., Inc., Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012); In re WP Steel Venture LLC, Case No. 12-11661 (KJC) (Bankr. D. Del. June 1, 2012); In re Trident Microsystems, Inc., Case No. 12-10069 (CSS) (Bankr. D. Del. Jan. 5, 2012); In re Delta Petroleum Corp., Case No. 11-14006 (KJC) (Bankr. D. Del. Dec. 19, 2011); In re Solyndra LLC, Case No. 11-12799 (PJW) (Bankr. D. Del. Sept. 7, 2011); In re DSI Holdings, Inc., Case No. 11-11941 (KJC) (Bankr. D. Del. June 28, 2011); The Great Atlantic & Pacific Tea Co., Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Feb. 7, 2011); see also In re Chemtura Corp., Case No. 09-11233 (REG) (Bankr. S.D.N.Y. April 13, 2009) (granting the debtors authority to pay up to \$10,000,000 in critical vendor claims, representing approximately 10% of the Debtor's total trade-related liabilities as of the petition date); In re Lyondell Chem. Co., Case No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 23, 2009) (granting the debtor authority to pay \$30,000,000 in critical vendor claims); In re UAL Corp., Case No. 02-48191 (ERW) (Bankr. N.D. Ill. Dec. 9, 2002) (approving similar motion seeking to pay up to approximately \$34,900,000 or 13.7% of the total trade debt); In re U.S. Airways Grp., Case No. 02-83984 (SSM) (Bankr. E.D. Va. Aug. 12, 2002) (approving \$10,000,000 in critical vendor claims for the 14th largest carrier in the world).

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<sup>13</sup> Additionally, where, as here, the relief at issue involves a request impacting the trade terms between the Debtor and the vendor, the relief may, where the appropriate showing has been made, be approved pursuant to Bankruptcy Code section 364. See In re UAL Corp., Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002) (essential trade motion relying upon Bankruptcy Code Section 363 is "completely consistent with the Bankruptcy Code;" payments to critical trade vendors have further support when debtor seeks "the extension of credit under section 364 on different than usual terms, terms that might include the payment of a prepetition obligation").

**D. The Doctrine of Necessity And Bankruptcy Code Section 105(a) Further Support Payment of Critical Vendor Claims**

46. The Debtor's proposed payment of prepetition Critical Vendor Claims should be authorized pursuant to Bankruptcy Code section 105 and under the "doctrine of necessity." Bankruptcy Code section 105(a) of the authorizes a bankruptcy court to enter any order "necessary or appropriate" to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). For the reasons set forth herein, and in light of the critical need for the Debtor to preserve the going concern value of its businesses in order to effect a successful reorganization through, among other things, continuing the orderly day-to-day performance of the Debtor's customer service contracts, payment of the Critical Vendor Claims as requested herein is proper in accordance with section 105 of the Bankruptcy Code.

47. Payment of the Critical Vendor Claims is further supported by the doctrine of necessity. The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. See In re Just for Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor "cannot survive" absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); see also In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) ("[T]he court can permit the pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor."); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify payment of a prepetition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the chapter 11 process.").

48. The United States Supreme Court first articulated the doctrine of necessity over a century ago in Miltenberger v. Logansport Railway, 106 U.S. 286 (1882), in

affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. See id. at 309-14. The doctrine, largely unchanged from the Court's reasoning in Miltenberger, is a widely accepted component of modern bankruptcy jurisprudence. See Just For Feet, 242 B.R. at 826 (approving payment of key inventory suppliers' prepetition claims when such suppliers could destroy debtor's business by refusing to deliver new inventory on eve of debtor's key sales season); In re Payless Cashways, Inc., 268 B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers' claims when such suppliers agree to provide postpetition trade credit); see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

For the reasons discussed herein, payment of the Critical Vendor Claims is necessary to the Debtor's effective restructuring.<sup>14</sup> In particular, and as further set forth above, without payment of the Critical Vendor Claims, the Debtor's businesses and operations will be detrimentally impacted because the Debtor will not be able to obtain the Critical Goods and Services provided by the Critical Vendors. As a result, the Debtor likely will be forced to incur exorbitant costs in order to find alternative sources of the Critical Goods and Services or may lose favorable trade terms which are essential to its operations, may lose customers due to interruptions in service, and may even be forced to cease operation of certain revenue-generating facilities. Therefore, payment of the Critical Vendor Claims should be authorized pursuant to section 105(a) of the Bankruptcy Code and the doctrine of necessity.

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<sup>14</sup> As set forth in the DIP Motion, the DIP facility has been sized for these payments and the DIP Lenders have acknowledged the value of paying the claims described herein.

**IMMEDIATE RELIEF IS NECESSARY TO AVOID  
IMMEDIATE AND IRREPARABLE HARM**

49. Bankruptcy Rule 6003 provides that the relief requested in the Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003; see also In re First NLC Fin. Servs., LLC, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid irreparable harm). The Third Circuit has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court has instructed that irreparable harm is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh, 235 F. App’x 907, 910 (3d Cir. 2007) (citing Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. See, e.g., Acierno v. New Castle Cnty., 40 F.3d 645, 653-55 (3d Cir. 1994). The Debtor submits that (i) to ensure the continued supply of essential goods and services as it enters chapter 11, (ii) to maintain favorable trade terms at the critical juncture of the case commencement, and (iii) for the additional reasons already set forth herein, the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtor.

**WAIVER OF ANY APPLICABLE STAY**

50. The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtor seeks in the Motion is necessary for the Debtor to operate without

interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

### **RESERVATION OF RIGHTS**

51. Nothing contained herein is or should be construed as: (a) an admission as to the validity of any claim against the Debtor; (b) a waiver of the Debtor's rights to dispute any claim on any grounds; (c) a promise to pay any claim; (d) an assumption or rejection of any executory contract or unexpired lease pursuant to Bankruptcy Code section 365; or (e) otherwise affecting the Debtor's rights under Bankruptcy Code section 365 to assume or reject any executory contract with any party subject to the Motion.

### **NOTICE**

52. Notice of the Motion will be given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Office of the United States Attorney for the District of Delaware; (iii) counsel to the agent under the proposed debtor in possession financing; (iv) counsel to the agent for the Debtor's prepetition secured lenders; (v) the indenture trustee for each of the Debtor's secured and unsecured outstanding bond issuances; (vi) counsel to the unofficial committee of senior secured noteholders; (vii) the Internal Revenue Service; (viii) the Securities and Exchange Commission; (ix) the Banks; (x) the parties included on the Debtor's list of twenty (20) largest unsecured creditors; and (xi) all parties entitled to notice pursuant to Local Bankruptcy Rule 9013-1(m) (collectively, the "Notice Parties"). The Debtor submits that no other or further notice need be provided.

**NO PRIOR REQUEST**

53. No previous request for the relief sought herein has been made to this Court or any other court.

**CONCLUSION**

WHEREFORE, the Debtor respectfully requests that the Court enter orders, substantially in the forms annexed hereto, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: Wilmington, Delaware  
June 10, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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*Proposed Counsel for Debtor and Debtor in Possession*

**EXHIBIT A**

**FORM OF TRADE AGREEMENT**

\_\_\_\_\_, 2013

TO: **[Critical Vendor/Service Provider]**  
**[Name]**  
**[Address]**

Dear Valued Supplier/Service Provider:

As you are aware, Exide Technologies (the "Company") filed a voluntary petition (the "Chapter 11 Case") for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") on June 10, 2013 (the "Petition Date"). On the Petition Date, in recognition of the importance of its relationship with vendors and suppliers and its desire that the Chapter 11 Case has as little effect on such parties as possible, the Company requested the Bankruptcy Court's approval to pay the prepetition claims of certain critical vendors and suppliers. On [●], 2013, the Bankruptcy Court entered an interim order (the "Order") authorizing the Company, under certain conditions, to pay the prepetition claims, in accordance with the terms of the Order, of certain trade creditors that agree to the terms set forth below and agree to be bound by the terms of the Order. A copy of the Order is enclosed for your reference. The Company has asked the Bankruptcy Court to schedule a final hearing and thereafter grant the relief provided in the Order on a final basis.

Under the Order, in order to receive payment of its prepetition claim, each selected trade creditor must agree to continue to supply goods and/or services to the Company based on "Customary Trade Terms." In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), which were most favorable to the Company and in effect between such trade creditor and the Company on a historical basis for the period within one-hundred eighty (180) days of the Petition Date, or such other trade terms as mutually agreed to by the Company and such trade creditor.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Order, the Company and **[Name of Trade Vendor]** agree as follows (the "Agreement"):

- (a) The balance of the prepetition trade claim (net of any setoffs, credits or discounts) (the "Trade Claim") that the Company will pay to **[Name of Trade Vendor]** is \$\_\_\_\_\_. Your Trade Claim does not constitute a claim allowed by the Bankruptcy Court in the Bankruptcy Cases, and signing this Trade Agreement does not excuse you from any requirement of filing a proof of claim in the Bankruptcy Cases.
- (b) The Company shall pay \$\_\_\_\_\_ towards the Trade Claim (the "Payment").
- (c) **[Name of Trade Vendor]** agrees to supply goods/services to the Company in accordance with the Customary Trade Terms, and the

Company agrees to pay [**Name of Trade Vendor**] in accordance with such Customary Trade Terms.

- (d) The open trade balance or credit line that [**Name of Trade Vendor**] will extend to the Company for shipment of postpetition goods/services is \$\_\_\_\_\_.
- (e) In consideration for the Payment, you agree not to file or otherwise assert against the Debtor, its estate or any other person or entity or any of its respective assets or property (real or personal) any lien (a "Lien") or claim for reclamation ("Reclamation Claim") or claim under Bankruptcy Code section 503(b)(9) (a "503(b)(9) Claim"), regardless of the statute or other legal authority upon which such Lien or Reclamation Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtor arising from agreements or other arrangements entered into prior to the Petition Date and, to the extent you have already obtained or otherwise asserted such a Lien, Reclamation Claim or 503(b)(9) Claim, you shall take (at your own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless your participation in the trade payment program authorized by the Order (the "Trade Payment Program") is terminated.

Your execution of this Agreement and return of the same to the Company constitutes an agreement by [**Name of Trade Vendor**] and the Company:

1. to be bound by the Customary Trade Terms (as modified herein) and, subject to the reservations set forth in the Order, to the amount of the Trade Claim set forth above;
2. that [**Name of Trade Vendor**] will continue to supply the Company with goods and/or services pursuant to the Customary Trade Terms (as modified herein) and that the Company will pay for such goods and/or services in accordance with the Customary Trade Terms (as modified herein);
3. that [**Name of Trade Vendor**] has reviewed the terms and provisions of the Order and that it consents to be bound by such terms, except as modified herein;
4. that [**Name of Trade Vendor**] will not separately seek payment for Reclamation Claims, 503(b)(9) Claims and similar claims outside of the terms of the Order unless its participation in the trade payment program authorized by the Order (the "Trade Payment Program") is terminated;
5. that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Trade Claim will be deemed to have been in payment of postpetition obligations owed to you and you will immediately repay to the Debtor any payments made to you on account of your Trade Claim to the extent that the aggregate amount of such payments exceeds such postpetition obligations,

without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or other defense;

6. that the Company will agree to pay **[Name of Trade Vendor]** on net thirty (30) day terms in accordance with paragraph (c), hereinabove; and

7. that if the Company shall be in default under this Agreement, **[Name of Trade Vendor]** shall have no obligation to supply goods and/or services to the Company on Customary Trade Terms (as modified herein) until the Company cures such default and **[Name of Trade Vendor]** shall have the right to terminate this Agreement upon written notice to the Company detailing the Company's defaults hereunder (which the Company shall have the right to dispute) and the Company's failure to cure such default within five (5) business days of such notice, in which event **[Name of Trade Vendor]** may retain all sums paid to it hereunder on account of its Trade Claim.

The Company and **[Name of Trade Vendor]** also hereby agree that any dispute with respect to this Agreement, the Order and/or **[Name of Trade Vendor]**'s participation in the Trade Payment Program shall be determined by the Bankruptcy Court.

If you have any questions about this Agreement or our financial restructuring, please do not hesitate to call **[Contact Person]** at (\_\_\_\_) \_\_\_\_-\_\_\_\_:

Very truly yours,

Exide Technologies

By: \_\_\_\_\_

Name: [●]

Title: [●]

Agreed and Accepted by:

**[Name of Trade Vendor]**

By: \_\_\_\_\_

Name: **[Name]**

Title: **[Title]**

Dated: \_\_\_\_\_, 2013

**EXHIBIT B**

NOTICE OF PROVISIONAL PAYMENT

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

----- X  
:
  
In re: : Chapter 11
  
:
  
EXIDE TECHNOLOGIES, : Case No. 13-11482
  
:
  
Debtor.<sup>1</sup> :
  
:
  
----- X

**NOTICE OF PROVISIONAL PAYMENT**

PLEASE TAKE NOTICE that on June 10, 2013, Exide Technologies (“Exide” or “Debtor”) filed a motion for entry of interim and a final orders authorizing the Debtor to pay, in its sole discretion, (i) the prepetition fixed, liquidated, and undisputed claims of certain critical vendors and service providers, subject to the conditions described herein, (ii) the undisputed obligations for the postpetition delivery of goods and provision of services of critical vendors and service providers, which arose under Bankruptcy Code sections 105, 363(c), and 503(b)(1)(A), subject to the conditions described herein, and (iii) on a provisional basis, certain suppliers that may seek to discontinue supplying products or providing services in breach of their agreements with the Debtor, and approving procedures related thereto (the “Motion”).

PLEASE TAKE FURTHER NOTICE that on [\_\_\_\_], the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) entered an interim order granting the relief requested in the Motion (the “Order”).

PLEASE TAKE FURTHER NOTICE that, pursuant to the authority granted to the Debtor pursuant to paragraph [ ] of the Order, the Debtor determined to pay, on a provisional

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

basis, the prepetition claim of [INSERT NAME OF SUPPLIER] (“Supplier”) and conditionally paid \$[\_\_\_] of the prepetition claim of Supplier on [DATE].

PLEASE TAKE FURTHER NOTICE that contemporaneously herewith the Debtor is filing a proposed Show Cause Order requesting that the Bankruptcy Court order Supplier to appear before the Bankruptcy Court at a hearing to be held at , 2013 at \_:\_ a.m./p.m. prevailing Eastern Time before the Honorable [ ], United States Bankruptcy Judge, in the Bankruptcy Court for the District of Delaware, Courtroom [ ], 824 North Market Street, Wilmington, Delaware 19801-3024 and explain how Supplier did not violate the automatic stay provision of section 362 of the Bankruptcy Code.

*Remainder of Page Intentionally Left Blank*

Dated: Wilmington, Delaware  
[●], 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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*Proposed Counsel for Debtor and Debtor in Possession*

EXHIBIT C

SHOW CAUSE ORDER

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

----- X  
:
  
In re: : Chapter 11  
:
  
EXIDE TECHNOLOGIES, : Case No. 13-11482  
:
  
Debtor.<sup>1</sup> :  
:
  
----- X

**ORDER TO SHOW CAUSE**

Upon the motion, of Exide Technologies (“Exide” or “Debtor”) for entry of an order authorizing the Debtor to pay, in its sole discretion, (i) the prepetition fixed, liquidated, and undisputed claims of certain critical vendors and service providers, subject to the conditions described herein, (ii) the undisputed obligations for the postpetition delivery of goods and provision of services of critical vendors and service providers, which arose under Bankruptcy Code sections 105, 363(c), and 503(b)(1)(A), subject to the conditions described herein, and (iii) on a provisional basis, certain suppliers that may seek to discontinue supplying products or providing services in breach of their agreements with the Debtor, and approving procedures related thereto; and upon the order of this court, entered [\_\_\_\_], 2013 (the “Order”), granting the relief requested in the Motion; and upon the Debtor’s notice of provisional payment, dated [\_\_\_\_], 2013, with respect to [NAME OF SUPPLIER] (“Supplier”); and the Debtor having provided appropriate notice of the Debtor’s request for entry of this Order to Show Cause (the “Show Cause”

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

Order”) and no other or further notice is necessary; and after due deliberation and sufficient cause appearing therefor, it is

**ORDERED, ADJUDGED AND DECREED that:**

1. The Debtor has complied with the procedures provided in paragraph [ ] of the Order in determining to pay, on a provisional basis, the prepetition claim of Supplier and conditionally paying \$[ ] of the prepetition claim of Supplier on [DATE].

2. Supplier is hereby ordered to appear before this Court at a hearing to be held at \_\_\_\_\_, 2013 at \_:\_ a.m./p.m. prevailing Eastern Time before the Honorable [\_\_\_\_], United States Bankruptcy Judge, in the Bankruptcy Court for the District of Delaware, Courtroom [ ], 824 North Market Street, Wilmington, Delaware 19801-3024 and explain how Supplier did not violate the automatic stay provision of section 362 of the Bankruptcy Code for willfully threatening to withhold essential goods from the Debtor under one or more contracts between the Debtor and Supplier, which action was automatically stayed by the Debtor’s filing of voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

3. Service of this Show Cause Order is to be made by service upon (a) Supplier, (b) the Office of the United States Trustee for the District of Delaware; (c) counsel for the official committee of unsecured creditors appointed in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code; (d) counsel to the agent under the Debtor’s proposed postpetition senior secured credit facilities; (e) counsel to the agent for the Debtor’s prepetition secured lenders; (f) the indenture trustee for each of the Debtor’s secured and unsecured outstanding bond issuances; (g) counsel to the unofficial committee of senior secured noteholders; and (h) those persons who have requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, no further notice is necessary.

4. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Show Cause Order.

Dated: Wilmington, Delaware  
\_\_\_\_\_, 2013

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UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11
  
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EXIDE TECHNOLOGIES, : Case No. 13-11482
  
:
  
Debtor.<sup>1</sup> : **Related Docket No.** \_\_\_\_\_
  
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**INTERIM ORDER GRANTING DEBTOR’S MOTION FOR ORDER  
PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363(b), 1107(a), AND 1108  
AND BANKRUPTCY RULES 6003 AND 6004 AUTHORIZING  
PAYMENT OF CRITICAL VENDORS**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtor for interim and final orders, pursuant to sections 105(a), 363(b), 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (i) authorizing, but not directing, the Debtor to pay, in the ordinary course of business, the prepetition claims of certain critical vendors and (ii) authorizing, but not directing, the applicable banks and financial institutions to honor all related checks and electronic payment requests; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors, its stakeholders, and other parties in interest; and after due deliberation thereon, and sufficient cause appearing therefor, it is hereby

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

**ORDERED, ADJUDGED AND DECREED that:**

1. The Motion is GRANTED as set forth herein on an interim basis.

2. The Debtor is hereby authorized but not required to pay, in its sole discretion, without further order of the Court, the Critical Vendor Claims. Notwithstanding the foregoing, payments on account of Critical Vendor Claims shall not exceed \$7 million without further order of this Court.

3. The Debtor shall undertake appropriate efforts to cause the Critical Vendors to enter into Trade Agreements with the Debtor substantially in the form of the letter annexed as Exhibit A to the Motion as a condition to payment of its Critical Vendor Claims.

4. The Debtor is authorized, in its sole discretion, to make payment on account of Critical Vendor Claims in the absence of a Trade Agreement after the Debtor has undertaken appropriate efforts to cause the Critical Vendor to execute a Trade Agreement and if the Debtor determines, in its sole discretion, that failure to pay the Critical Vendor Claim presents a material risk of irreparable harm to the Debtor's business.

5. If a Critical Vendor refuses to supply goods and/or services to the Debtor on Customary Trade Terms following receipt of payment on its Critical Vendor Claim or fails to comply with any Trade Agreement entered into by such Critical Vendor and the Debtor, the Debtor may, in its sole discretion, and without further order of the Court, (i) declare that any Trade Agreement between the Critical Vendor and the Debtor is terminated and (ii) declare that payments made to the Critical Vendor on account of its Critical Vendor Claim be deemed to have been made in payment of then-outstanding postpetition claims of such Critical Vendor without further order of this Court or action by any person or entity. In the event that such events occur, a Critical Vendor shall then immediately repay to the Debtor any payment made to it on account of its Critical Vendor Claim to the extent that payments on account of such Critical

Vendor Claim exceed the postpetition claims of such Critical Vendor then outstanding without giving effect to any rights of setoff, claims, provision for payment of reclamation or section 503(b)(9) claims, or otherwise. In the event that a Trade Agreement is terminated or a Critical Vendor refuses to supply goods or services to the Debtor following receipt of payment on its Critical Vendor Claim (regardless of whether such Critical Vendor has entered into a Trade Agreement), it is the explicit intention of this Court to return the parties to their position immediately prior to the entry of this order with respect to all prepetition claims.

6. The Debtor may, in its sole discretion, reinstate a terminated Trade Agreement if (i) such determination is subsequently reversed by this Court after notice and a hearing following a motion by the Critical Vendor, for good cause shown, that the determination was materially incorrect; (ii) the underlying default under the Trade Agreement was fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor that a default had occurred; or (iii) the Debtor, in its discretion, reach a favorable alternative agreement with the Critical Vendor.

7. The Debtor's undisputed obligations to the Suppliers under Outstanding Orders arising from (a) shipments of goods delivered to and accepted by the Debtor on and after the Petition Date and (b) provision of services to the Debtor on and after the Petition Date at the Debtor's request are hereby granted administrative expense priority status pursuant to Bankruptcy Code Section 503(b)(1)(A), and the Debtor is authorized to pay such obligations in the ordinary course of business; provided, however, that the foregoing does not constitute authorization for the Debtor to pay any amount to the Suppliers for goods received or services performed where title to the underlying goods was transferred to the Debtor prior to the Petition Date.

8. The Debtor is authorized to pay, on a provisional basis, prepetition claims of vendors who have contractual obligations to the Debtor, but who nevertheless may refuse to honor such obligations on a postpetition basis (collectively, the “Contract Counterparties”).

9. In the event that the Debtor makes a provisional payment to a Contract Counterparty, the Debtor may, at its option, file a Notice of Provisional Payment and a proposed order to show cause (the “Show Cause Order”) with this Court within three business days of payment to such Contract Counterparty. The Debtor shall serve any such Notice of Provisional Payment and Show Cause Order on: (a) the Contract Counterparty; (b) the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”); (c) counsel for the official committee of unsecured creditors appointed in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code (the “Creditors’ Committee”); (d) counsel to the agent under the Debtor’s proposed postpetition senior secured credit facilities; (e) counsel to the agent for the Debtor’s prepetition secured lenders; (f) the indenture trustee for each of the Debtor’s secured and unsecured outstanding bond issuances; (g) counsel to the unofficial committee of senior secured noteholders; and (h) those persons who have requested notice pursuant to Bankruptcy Rule 2002. At the first regularly scheduled hearing occurring at least five business days following entry of the Show Cause Order by this Court, the Contract Counterparty will be required to appear before this Court and explain how such Contract Counterparty did not violate the automatic stay.

10. Should this Court determine that, by its conduct, the Contract Counterparty has violated the automatic stay, either (a) the payments made by the Debtor on account of any prepetition claim will be disgorged, plus attorneys’ fees and interest accrued on such amount at the federal judgment rate or such other higher rate as this Court specifies, within three business days of entry of the order holding such Contract Counterparty in violation or (b)

the Debtor will setoff the amount of the payments made by the Debtor on account of any prepetition claim against any future payments to be paid to such Contract Counterparty.

11. The form of Notice of Provisional Payment attached to the Motion as Exhibit B and the form of Show Cause Order attached to the Motion as Exhibit C are hereby approved by this Court in all respects for use in accordance with the provisions of the foregoing paragraph.

12. The Debtor will maintain a matrix summarizing the provisional amounts paid to each Contract Counterparty on account of its prepetition claims and the goods and services provided by each such Contract Counterparty. The Debtor will provide the matrix to the U.S. Trustee and counsel for the Creditors' Committee; provided that these parties shall keep the matrix confidential.

13. All applicable banks and other financial institutions are authorized, but not directed, to rely on the Debtor's direction to pay amounts in accordance with this Order provided that sufficient funds are available in the applicable accounts to make the payments.

14. The Debtor shall provide, on a confidential basis, to the agent for the Debtor's proposed postpetition financing (the "DIP Agent") bi-weekly written reports of all payments made hereunder, which reports shall specify any payments made to contract counterparties, and reasonable and timely access to information sufficient to enable such parties to monitor payments made, obligations satisfied, and other actions taken pursuant to this Order; *provided* that the DIP Agent may share such information with its professionals and any private-side lenders under the proposed postpetition financing facility.

15. To the extent there is any inconsistency between the terms of the interim or final order approving the Debtor's proposed postpetition financing, if and when entered, and

this Order, the terms of the interim or final order approving the proposed postpetition financing, as applicable, shall govern.

16. The Debtor shall serve notice of the Motion (to the extent not already provided) and entry of this Order on the Notice Parties in accordance with Local Rule 9013-1(m). The notice shall provide that any objections to the relief granted in this Order must be filed with the Court and served on counsel for the Debtor no later than seven days prior to the final hearing with respect to the Motion (the "Objection Deadline"). In the event that no objections to this Order are received by the Objection Deadline, the Debtor's counsel shall file a certification of counsel to that effect attaching a final form of order. The final hearing with respect to the Motion shall be held on \_\_\_\_\_, 2013, at \_\_:\_\_\_\_ \_\_m

17. If no Objections are filed to the Motion, the Court may enter the Final Order without further notice or hearing.

18. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, including any Critical Vendor Claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payments made by the Debtor pursuant to this order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

19. Nothing in this order or the Motion shall be deemed to constitute postpetition assumption or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

20. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

21. Notwithstanding Bankruptcy Rule 6004(h), this order shall be effective and enforceable immediately upon entry hereof.

22. This Order, and all acts taken in furtherance of or reliance upon this Order, shall be effective notwithstanding the filing of an objection, pending the entry of the Final Order by this Court.

23. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this order.

Dated: Wilmington, Delaware  
\_\_\_\_\_, 2013

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UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11  
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EXIDE TECHNOLOGIES, : Case No. 13-11482  
:
  
Debtor.<sup>1</sup> : **Related Docket Nos.** \_\_\_\_\_  
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**FINAL ORDER GRANTING DEBTOR’S MOTION FOR ORDER  
PURSUANT TO BANKRUPTCY CODE SECTION 105(a), 363(b), 1107(a), AND 1108  
AND BANKRUPTCY RULES 6003 AND 6004 AUTHORIZING  
PAYMENT OF CRITICAL VENDORS**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtor for interim and final orders, pursuant to sections 105(a), 363(b), 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (i) authorizing, but not directing, the Debtor to pay, in the ordinary course of business, the prepetition claims of certain critical vendors and (ii) authorizing, but not directing, the applicable banks and financial institutions to honor all related checks and electronic payment requests; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors, its stakeholders, and other parties in interest; and after due deliberation thereon, and sufficient cause appearing therefor, it is hereby

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

**ORDERED, ADJUDGED AND DECREED that:**

1. The Motion is GRANTED as set forth herein.
2. The Debtor is hereby authorized, but not required, to pay, in its sole discretion, without further order of the Court, the Critical Vendor Claims in an amount not to exceed, in the aggregate, \$10 million (inclusive of any amounts paid pursuant to the Interim Order) without further order of this Court.
3. The Debtor shall undertake appropriate efforts to cause the Critical Vendors to enter into Trade Agreements with the Debtor substantially in the form of the letter annexed as Exhibit A to the Motion as a condition to payment of its Critical Vendor Claims.
4. The Debtor is authorized, in its sole discretion, to make payment on account of Critical Vendor Claims in the absence of a Trade Agreement after the Debtor has undertaken appropriate efforts to cause the Critical Vendor to execute a Trade Agreement and if the Debtor determines, in its sole discretion, that failure to pay the Critical Vendor Claim presents a material risk of irreparable harm to the Debtor's business.
5. If a Critical Vendor refuses to supply goods and/or services to the Debtor on Customary Trade Terms following receipt of payment on its Critical Vendor Claim or fails to comply with any Trade Agreement entered into by such Critical Vendor and the Debtor, the Debtor may, in its sole discretion, and without further order of the Court, (i) declare that any Trade Agreement between the Critical Vendor and the Debtor is terminated and (ii) declare that payments made to the Critical Vendor on account of its Critical Vendor Claim be deemed to have been made in payment of then-outstanding postpetition claims of such Critical Vendor without further order of this Court or action by any person or entity. In the event that such events occur, a Critical Vendor shall then immediately repay to the Debtor any payment made to it on account of its Critical Vendor Claim to the extent that payments on account of such Critical

Vendor Claim exceed the postpetition claims of such Critical Vendor then outstanding without giving effect to any rights of setoff, claims, provision for payment of reclamation or section 503(b)(9) claims, or otherwise. In the event that a Trade Agreement is terminated or a Critical Vendor refuses to supply goods or services to the Debtor following receipt of payment on its Critical Vendor Claim (regardless of whether such Critical Vendor has entered into a Trade Agreement), it is the explicit intention of this Court to return the parties to their position immediately prior to the entry of this order with respect to all prepetition claims.

6. The Debtor may, in its sole discretion, reinstate a terminated Trade Agreement if (i) such determination is subsequently reversed by this Court after notice and a hearing following a motion by the Critical Vendor, for good cause shown, that the determination was materially incorrect; (ii) the underlying default under the Trade Agreement was fully cured by the Critical Vendor not later than five (5) business days following the Debtor's notification to the Critical Vendor that a default had occurred; or (iii) the Debtor, in its discretion, reach a favorable alternative agreement with the Critical Vendor.

7. The Debtor's undisputed obligations to the Suppliers under Outstanding Orders arising from (a) shipments of goods delivered to and accepted by the Debtor on and after the Petition Date and (b) provision of services to the Debtor on and after the Petition Date at the Debtor's request are hereby granted administrative expense priority status pursuant to Bankruptcy Code Section 503(b)(1)(A), and the Debtor is authorized to pay such obligations in the ordinary course of business; provided, however, that the foregoing does not constitute authorization for the Debtor to pay any amount to the Suppliers for goods received or services performed where title to the underlying goods was transferred to the Debtor prior to the Petition Date.

8. The Debtor is authorized to pay, on a provisional basis, prepetition claims of vendors who have contractual obligations to the Debtor, but who nevertheless may refuse to honor such obligations on a postpetition basis (collectively, the "Contract Counterparties").

9. In the event that the Debtor makes a provisional payment to a Contract Counterparty, the Debtor may, at its option, file a Notice of Provisional Payment and a proposed order to show cause (the "Show Cause Order") with this Court within three business days of payment to such Contract Counterparty. The Debtor shall serve any such Notice of Provisional Payment and Show Cause Order on: (a) the Contract Counterparty; (b) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee"); (c) counsel for the official committee of unsecured creditors appointed in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code (the "Creditors' Committee"); (d) counsel to the agent under the Debtor's proposed postpetition senior secured credit facilities; (e) counsel to the agent for the Debtor's prepetition secured lenders; (f) the indenture trustee for each of the Debtor's secured and unsecured outstanding bond issuances; (g) counsel to the unofficial committee of senior secured noteholders; and (h) those persons who have requested notice pursuant to Bankruptcy Rule 2002. At the first regularly scheduled hearing occurring at least five business days following entry of the Show Cause Order by this Court, the Contract Counterparty will be required to appear before this Court and explain how such Contract Counterparty did not violate the automatic stay.

10. Should this Court determine that, but its conduct, the Contract Counterparty has violated the automatic stay, either (a) the payments made by the Debtor on account of any prepetition claim will be disgorged, plus attorneys' fees and interest accrued on such amount at the federal judgment rate or such other higher rate as this Court specifies, within three business days of entry of the order holding such Contract Counterparty in violation or (b)

the Debtor will setoff the amount of the payments made by the Debtor on account of any prepetition claim against any future payments to be paid to such Contract Counterparty.

11. The form of Notice of Provisional Payment attached to the Motion as Exhibit B and the form of Show Cause Order attached to the Motion as Exhibit C are hereby approved by this Court in all respects for use in accordance with the provisions of the foregoing paragraph.

12. The Debtor will maintain a matrix summarizing the provisional amounts paid to each Contract Counterparty on account of its prepetition claims and the goods and services provided by each such Contract Counterparty. The Debtor will provide the matrix to the U.S. Trustee and counsel for the Creditors' Committee; provided that these parties shall keep the matrix confidential.

13. All applicable banks and other financial institutions are authorized, but not directed, to rely on the Debtor's direction to pay amounts in accordance with this Order provided that sufficient funds are available in the applicable accounts to make the payments.

14. The Debtor shall provide, on a confidential basis, to the agent for the Debtor's proposed postpetition financing (the "DIP Agent") bi-weekly written reports of all payments made hereunder, which reports shall specify any payments made to contract counterparties, and reasonable and timely access to information sufficient to enable such parties to monitor payments made, obligations satisfied, and other actions taken pursuant to this Order; *provided* that the DIP Agent may share such information with its professionals and any private-side lenders under the proposed postpetition financing facility.

15. To the extent there is any inconsistency between the terms of the interim or final order approving the Debtor's proposed postpetition financing, if and when entered, and

this Order, the terms of the interim or final order approving the proposed postpetition financing, as applicable, shall govern.

16. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, including any Critical Vendor Claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payments made by the Debtor pursuant to this order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any grounds that applicable law permits.

17. Nothing in this order or the Motion shall be deemed to constitute postpetition assumption or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

18. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

19. Notwithstanding Bankruptcy Rule 6004(h), this order shall be effective and enforceable immediately upon entry hereof.

20. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this order.

Dated: Wilmington, Delaware  
\_\_\_\_\_, 2013

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UNITED STATES BANKRUPTCY JUDGE