

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.¹ :

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**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**

Exide Technologies, the debtor and debtor in possession in the above-captioned case (the “Debtor” and, together with the non-debtor affiliates and subsidiaries of Exide Technologies, “Exide” or the “Company”) hereby moves (the “Motion”) for entry of an order (the “Order”), pursuant to sections 105(a), 363(b), 503(b), 506, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing, but not directing, the Debtor to pay (i) certain prepetition shipping, warehousing and related charges and (ii) certain prepetition import and export obligations. In support of the Motion, the Debtor relies upon and incorporates by reference the Declaration of Phillip A. Damaska in Support of Chapter 11 Petition and First Day Pleadings (the “First Day Declaration”), filed with this Court concurrently herewith. In further support of the Motion, the Debtor, by and through its undersigned proposed counsel, respectfully represents:

¹ 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.

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 this case and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The legal predicates for the relief requested herein are Bankruptcy Code sections 105(a), 363(b), 506(b), 1107(a), 1108, and Bankruptcy Rule 6003.

2. 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

3. 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").²

4. 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.

5. 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.

² 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 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.

B. The Debtor's Business

6. 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.

7. 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 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.

8. The Debtor, headquartered in Milton, Georgia, operates 13 manufacturing facilities in the United States. The Debtor also operates approximately 74 branches³ 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.⁴ 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 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.⁵

9. 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.⁶

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

⁴ 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.

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

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

RELIEF REQUESTED

10. By the Motion, the Debtor seeks entry of an order authorizing, but not directing, the payment of prepetition shipping, warehousing and related charges (all such charges, the “Shipping Charges”) that are owed, either directly or indirectly, to certain third party shippers, haulers, common carriers, truckers, other transporters, freight forwarders, shipping auditing services, and logistics management companies (collectively, the “Shippers”), and to certain third party warehousemen (the “Warehousemen,” and collectively with the Shippers, the “Distribution Vendors”),⁷ to the extent that the Debtor determines, in the exercise of its business judgment, are necessary and appropriate to (i) secure the delivery, distribution, and sale of the Debtor’s goods to customers throughout the United States and abroad, (ii) ensure the delivery of goods and raw materials to the Debtor’s facilities or (iii) satisfy the liens, if any, in respect of amounts owed to such parties. The Debtor seeks authority, in its sole discretion, to pay the prepetition Shipping Charges in the aggregate amount of approximately \$9.2 million.

11. By the Motion, the Debtor also seeks authority to pay, either directly or through a third party administrator, all or part of the prepetition U.S. customs duties, detention and demurrage fees, tariffs and excise taxes, freight forwarding, or consolidation charges and other similar obligations (the “Import/Export Charges” and together with the Shipping Charges, the “Subject Charges”) to (i) the applicable governmental agencies and authorities (the “Import/Export Providers,” and together with the Distribution Vendors, the “Subject Vendors”), to the extent the Debtor determines, in the exercise of its business judgment, that such payment is

⁷ Due the location of the Debtor’s facilities, distribution centers, and customers, the Debtor utilizes numerous different Distribution Vendors to ensure the timely delivery of its products throughout the United States and abroad. In addition, the Debtor has very favorable payment terms with the Distribution Vendors (e.g. most payments are not due until sixty (60) days after invoices are submitted), which results in large open accounts payable owed to the Distribution Vendors.

necessary or appropriate to secure the import or export of such goods. The Debtor seeks authority, in its sole discretion, to pay the prepetition Import/Export Charges in the aggregate amount of approximately \$123,000.

12. The Debtor proposes that any payments made to the Distribution Vendors pursuant to the Motion be subject to the following conditions:

- (a) The Debtor, in its sole discretion, shall determine which parties, if any, are entitled to payment under the Motion;
- (b) If a party accepts payment under the Motion, such party is deemed to have agreed to (i) release any liens it may have on the Debtor's goods or property and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtor on customary trade terms during the pendency of this Chapter 11 Case. Customary Trade Terms means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Distribution Vendor and the Debtor during the 180 days preceding the Petition Date⁸ or (ii) such other trade terms as the Debtor and the Distribution Vendor may mutually agree upon;
- (c) Subject to subparagraph (d), if a party accepts payment under the Motion and thereafter does not continue to provide goods or services to the Debtor on the Customary Terms during the pendency of this Chapter 11 Case, then (i) any payment on a prepetition claim received by such party shall be deemed to be an unauthorized voidable postpetition transfer under Bankruptcy Code Section 549 and, therefore, recoverable by the Debtor in cash upon written request and (ii) subject to subparagraph (f) below, upon recovery by the Debtor, any such prepetition claim shall be reinstated as if the payment had not been made, less the Debtor's reasonable costs in recovering such amounts;
- (d) In the event of the assertion of a possessory lien against the Debtor's property that prevents the Debtor from accessing its property without payment of the prepetition claim giving rise to the lien, the Debtor may pay the claim without regard to subparagraphs (b)(ii) and (c) above;

⁸ In the event the relationship between the party accepting payment under this Order and the Debtor does not extend to 180 days preceding the Petition Date, the Customary Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtor in the reasonable exercise of their business judgment.

- (e) Prior to making a payment to a party under the Motion, the Debtor may, in its absolute discretion, settle all or part the prepetition claims of such party for less than their face amount, without further notice or hearing. In any event, the Debtor may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to its plan of reorganization; and
- (f) If the Debtor seeks to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (the “Request”) to the Debtor to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtor received the Request, of which hearing the Debtor will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of this Court.

13. The Debtor also requests entry of an order authorizing all 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 there are sufficient good funds standing to the Debtor’s credit in the applicable accounts to make the payments.

14. 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. Payment of Shipping Charges

15. The Debtor has a reputation for reliability and dependability among its customers. Indeed, many of the Debtor’s pricing policies and marketing strategies revolve around these attributes. This reputation depends on the timely delivery of product to the Debtor’s customers. In the ordinary course of its business, the Debtor relies extensively on its vast network of Shippers, including private trucking services and rail and air services, for transportation and delivery of products (i) from the Debtor’s suppliers to the Debtor’s

manufacturing facilities, (ii) between the Debtor's manufacturing facilities, (iii) between the Debtor's manufacturing facilities and the Debtor's branches/distribution centers, and (iv) from the Debtor's factories to the Debtor's customers. The Debtor also may rely on its Shippers to return goods, merchandise, and products from the Debtor's customers and/or to the Debtor's vendors.

16. Additionally, in the ordinary course of the Debtor's business, the Debtor relies on certain Warehousemen to store goods and raw materials during the distribution process. The Debtor is dependent upon the Warehousemen to access the property held in their warehouses.

17. Prior to commencing the Chapter 11 Case, with the assistance of its advisors, the Debtor spent a significant amount of time reviewing and analyzing its books and records, consulting operations management, reviewing contracts and service agreements, and analyzing applicable laws, regulations, and historical practice to identify certain critical business relationships and/or suppliers of services—the loss of which could materially harm the Debtor's business. In this process, the Debtor rigorously scrutinized its open accounts and focused on the following primary criteria: the value of the goods or raw materials in the Distribution Vendor's possession; the Debtor's ability to replace such goods or raw materials; the Debtor's ability to find an alternative source of shipping or warehousing services; the potential disruption or lost revenues while a Distribution Vendor was or the goods and raw materials in its possession were re-sourced; and the Debtor's ability to compel contractual performance. The Debtor used a narrowly-tailored protocol, identifying those Distribution Vendor services absolutely essential to the Debtor's continued operation. The Debtor estimates that having authority to pay up to \$9.2 million in prepetition Shipping Charges will ensure that it can continue to perform its customer

commitments and keep its supply chain intact. With respect to these Shipping Charges, the Debtor and its advisors determined that the value of the goods or raw materials in the possession of the Distribution Vendor was significantly more than the prepetition Shipping Charges owed to such Distribution Vendors.

18. Additionally, the services provided by these Distribution Vendors are critical to the day-to-day operations of the Debtor's business. For example, unless the Debtor continues to receive delivery of raw materials and supplies on a timely and uninterrupted basis, its manufacturing operations may shut down immediately, thereby causing irreparable damage to the Debtor's business and the value of its estate. Similarly, if the Debtor is unable to provide finished goods to customers on a timely basis, the Debtor could suffer a significant loss of credibility and customer goodwill, thereby causing substantial harm to the Debtor's business and reorganization efforts.

19. Typically, the Debtor's agreements with the Distribution Vendors set forth agreed-upon rates for the services. The Distribution Vendors are generally not paid in advance, but rather invoice the Debtor for shipping and storing services previously rendered, providing the Debtor with viable trade terms and, consequently, liquidity. With respect to the Shippers, the Debtor uses the services of Data2Logistics ("D2L") to audit the Shippers' invoices and approve the invoices for payment on the Debtor's behalf. The Debtor pays D2L by wire transfer and D2L then pays the Shippers, typically within a week of receipt of payment from the Debtor. Importantly, however, D2L has no obligation to the applicable Shippers and is not an alternative source of payment in the event of nonpayment by the Debtor.

20. Basis for Paying Shipping Charges. The Debtor seeks to pay the prepetition Shipping Charges for several reasons. First, delays in payment of Shipping Charges

with respect to goods that are in the possession of the Distribution Vendors as of the Petition Date will likely result in the assertion, under applicable law, of possessory liens upon the Debtor's property in the possession of such parties.⁹ For instance, state statutes in which the Debtor operates its business provide that any common carrier engaged in the shipment of goods covered by a bill of lading is entitled to a lien on such goods for charges and expenses incurred thereupon. See, e.g., N.J. Stat. Ann. § 12A:7-307 (West 2004); see also, U.C.C. §§ 7-307(a) (lien of shipper), 7-209(a) (lien of warehouseman). The perfection and maintenance of liens is, in most cases, dependent upon possession, so the Distribution Vendors would likely refuse to deliver or release such goods until their claims have been satisfied and the liens released. The value of these goods generally exceed the amount of the outstanding Shipping Charges and thus, the Debtor believes that the Distribution Vendors will ultimately be entitled to be paid in full for the Shipping Charges. Indeed, as noted above, the Debtor, with Alvarez & Marsal, conducted an assessment of the value of goods and raw materials in transit through rigorous calculation and concluded that the total inventory currently being held by Shippers is valued at approximately \$12 million. Irrespective of the amount and validity of their liens, the mere assertion of possessory or other liens will delay delivery of goods both to the Debtor's factories and to its customers, thereby severely, if not irreparably, damaging the Debtor's business and prospects for a successful reorganization.

21. Second, if the prepetition Shipping Charges are not paid, many of the Distribution Vendors may refuse to perform future services for the Debtor and withhold the shipment or release of essential goods currently in transit. In such event, the Debtor will incur

⁹ The Debtor expressly reserves all rights and remedies with respect to any possessory liens asserted against its property and nothing herein shall be deemed to be an admission with respect to any aspect of any such claim.

additional expenses (such as premium shipping costs) to replace the Distribution Vendors or the goods being withheld, which amounts will likely exceed the amount of unpaid prepetition Shipping Charges that the Debtor requests permission to pay hereunder. More importantly, locating entities to replace the Distribution Vendors will be difficult, if not impossible. If the Debtor was required to switch to new Distribution Vendors, it would incur significant operational disruption and increased costs.

22. At the very least, replacing a Distribution Vendor, in most cases, will delay the transport and delivery of goods to the Debtor's facilities and customers, including certain large customers that manage their inventory on a just-in-time basis. Such delays could cause a material disruption in the Debtor's receipt of goods from suppliers and the delivery of products to customers and, thus, their ability to continue operating their business successfully.

23. Third, as noted above, the Debtor utilizes a vast network of Shippers for the transport of goods and raw materials. The Debtor relies upon the payment and auditing services provided by D2L as part of managing this vast network. Absent these services, the Debtor would be required to negotiate with, and administer separate accounts with a variety of different Shippers. Integration with D2L has allowed the Debtor to maintain leaner staffing levels and a lower cost structure, which are essential in the competitive market in which the Debtor operates. If the Debtor was required to switch to another shipping invoice auditor, it would incur significant operational disruption and increased costs.

24. Further, the Debtor proposes that if any Distribution Vendor accepts payment and thereafter does not continue to provide services to the Debtor on such Customary Terms, then any payment of the Shipping Charges made under the Motion to such Distribution Vendor would be deemed an unauthorized postpetition transfer under Bankruptcy Code Section

549 and, therefore, would be avoidable and recoverable by the Debtor in cash upon written request, subject to a Distribution Vendor's right to contest such treatment and request that the Debtor schedule a hearing on such matter. Upon any recovery by the Debtor, the Distribution Vendor's claim would be reinstated as a prepetition claim in the amount so recovered, less the Debtor's reasonable costs in recovering such amounts.

25. Notwithstanding the authority requested, the Debtor expects that it will pay prepetition claims to the Distribution Vendors only where it believes, in its business judgment, the benefits to its estate from making such payments would exceed (a) the costs that its estate would incur by bringing an action to compel the turnover of such goods and (b) the delays associated with such actions. The Debtor submits that the total amount it seeks to pay the Distribution Vendors is appropriate and reasonable in light of the importance and necessity of timely receipt of the goods in the possession of the Distribution Vendors and the losses the Debtor might suffer if its operations are disrupted.

B. Payment of Import/Export Claims

26. In the ordinary course of its business, the Debtor receives a variety of raw materials, parts, and components and finished goods from companies located abroad (collectively, the "Imported Goods"). The Debtor also exports various goods to its customers abroad (collectively, the "Exported Goods"). Timely receipt of the Imported Goods and ensuring timely receipt by the Debtor's customers of the Exported Goods is critical to the Debtor's business operations. Any disruption or delay in receipt of the Imported Goods and Exported Goods would adversely affect the Debtor's business operations.

27. In connection with the import and export of goods, the Debtor may be required to pay various Import/Export Charges, including, but not limited to, customs duties, detention and demurrage fees, tariffs and excise taxes, freight forwarding or consolidation

charges and other similar obligations. Additionally, due to the complexity of United States customs laws and regulations, it is customary for importers to use the services of professional customs brokers and freight forwarders as agents (collectively, the “Customs Brokers”). The Debtor uses the services of multiple Customs Brokers to take all actions necessary on the Debtor’s behalf to facilitate the import or export of goods. In most cases, the Import/Export Providers present invoices to a Customs Broker. The Customs Broker then presents an invoice to and is reimbursed by the Debtor. The Debtor pays approximately \$350,000 annually in Import/Export Charges. The estimated outstanding prepetition Import/Export Charges for goods currently in transit is approximately \$123,000.

28. The Debtor seeks authority to pay any and all necessary and appropriate Import/Export Charges incurred on account of prepetition transactions, including payment of the Debtor’s Customs Brokers. Payment of the Import/Export Charges is critical to ensure the uninterrupted flow of Imported Goods and Exported Goods. Absent such payment, parties to whom Import/Export Charges are owed may have the ability to interfere with the transportation of such Imported Goods or Exported Goods. If the flow of Imported Goods were to be interrupted, the Debtor would be deprived of the materials necessary to complete orders already placed by its customers, which orders are worth far more to the Debtor (both in terms of future receipts and the maintenance of valuable good will) than the aggregate amount of incurred, but unpaid, Import/Export Charges. Similarly the Debtor must continue to deliver the Exported Goods internationally in order to maintain valuable customer relationships abroad.

29. Absent prompt payment, the United States Customs Service (the “Customs Service”) may implement various sanctions against the Debtor, including fines, monetary penalties, interest charges or denial of importing privileges. Additionally, if the Imported Goods

remain in the custody of the Customs Service for, generally, five days, the Company will be charged for the storage of such Imported Goods in addition to a daily government holding fee after the five day grace period.

30. For the foregoing reasons, the Debtor submits that payment of the Import/Export Charges is necessary to preserve and enhance the value of the Debtor's business for the benefit of all parties in interest.

APPLICABLE AUTHORITY

A. **Payment of the Subject Charges Is Appropriate Under Bankruptcy Code Sections 363(b) and 364**

31. Bankruptcy Code section 363(b) provides, in relevant part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate” 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims. See In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); see also In re FV Steel and Wire Co., Case No. 04-22421 (Bankr. E.D. Wis. Feb. 26, 2004); In re UAL Corp., Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002). To do so, “the debtor must articulate some business justification, other than mere appeasement of major creditors” Ionosphere Clubs, 98 B.R. at 175.

32. Where a debtor has articulated a valid business justification for a proposed transaction, courts generally apply the business judgment rule in evaluating such transaction. Lange v. Schropp (In re Brook Valley VII, Joint Venture), 496 F.3d 892, 900 (8th Cir. 2007) (“In general, courts do not second-guess business decisions made in good faith.”); In re ALH Holdings LLC, 675 F. Supp. 462, 477 (D. Del. 2009) (“a court will not disturb the business decisions of loyal and informed directors ‘if they can be attributed to any rational business purpose.’”) (citing Sinclair Oil Corp. v. Levien, 280 A. 2d 717, 720 (Del. 1971)); In re

Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999) (“In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a ‘business judgment test’”); Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (“The business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’”) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); 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.”).

33. As discussed above, it is the Debtor’s business judgment that the failure to pay the Subject Charges could have a material adverse impact on the operations of its business and, thus, its efforts to maximize the value of its estate.

34. 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”).

B. Payment of the Subject Charges Will Allow the Debtor to Avoid the Imposition of Possessory Liens Under Bankruptcy Code Section 546(b)

35. In addition, the Debtor believes that its failure to pay the Subject Charges may result in the assertion of possessory liens by the respective Subject Vendors under applicable state law with respect to any goods in their possession (collectively, the “Liens”). Under Bankruptcy Code section 362(b)(3), the act of perfecting such Liens, to the extent consistent with Bankruptcy Code section 546(b),¹⁰ is expressly excluded from the automatic stay otherwise imposed by Bankruptcy Code section 362(a).

36. Moreover, to protect their asserted lien rights, the Subject Vendors may refuse to release goods in their possession unless and until their prepetition claims for services have been satisfied. Therefore, notwithstanding the automatic stay imposed by Bankruptcy Code section 362, many of these parties: (a) may be entitled to assert and perfect Liens against the Debtor’s property, which would entitle them to payment ahead of other general unsecured creditors in any event; and (b) may hold the property subject to the asserted Liens pending payment, to the direct detriment of the Debtor and its estate.

37. Moreover, since the amount of Subject Charges that the Debtor is seeking authority to pay is less than the value of any property securing those claims, any party holding lien rights arguably are fully secured creditors. For those Subject Charges that are deemed secured claims, Bankruptcy Code section 1129(b)(2)(A) requires that they be satisfied through deferred cash payments totaling at least the allowed amount of each such claim, of a value as of the effective date of the plan equal to the value of the collateral securing the claim, with a continuation of the Liens against the collateral; or if the collateral is to be sold, that the Lien

¹⁰ Under Bankruptcy Code section 546(b), a debtor’s lien avoidance powers “are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . .” 11 U.S.C. § 546(b)(1)(A).

securing the claim attach to the proceeds of sale; or that the holder realize the indubitable equivalent of the claim. 11 U.S.C. § 1129 (b)(2)(A). Additionally, under Bankruptcy Code section 506(b), fully secured creditors are entitled to receive: (a) payment in full of their prepetition claims under any confirmed plan; and (b) the postpetition interest accruing on such claims to the extent that such claims are oversecured. Consequently, payment of the Subject Charges will: (a) give the Subject Vendors no more than that to which they otherwise would be entitled under a plan; and (b) save the Debtor the interest costs that otherwise may accrue on the Subject Charges during the Chapter 11 Case – not to mention, keep the Debtor’s operations from experiencing serious disruption if goods and raw materials are not shipped on a timely basis.

C. Payment of the Subject Charges is in Furtherance of the Debtor’s Fiduciary Duties Under Bankruptcy Code Sections 1107(a) and 1108

38. The Debtor, operating its business as debtor in possession under Bankruptcy Code sections 1107(a) and 1108, is a fiduciary “holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” Id.

39. 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., 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.

40. Payment of the Subject Charges meets each element of the CoServ court's standard. First, as described above, each of the Subject Vendors has possession of certain critical goods and raw materials, which the Debtor needs to continue operations. Second, the cost of replacing such goods and materials in the Subject Vendors' possession would be significantly more than the prepetition claim that the Debtor would have to pay. Additionally, any disruption in the Debtor's interdependent transportation network would significantly disrupt the Debtor's business and restructuring process, which would cost the Debtor's estate a substantial amount in lost revenue. Accordingly, the harm and economic disadvantage that would stem from the failure to pay any of the Subject Vendors is grossly disproportionate to the amount of the prepetition claim that would have to be paid. Finally, with respect to each of the Subject Vendors, the Debtor has determined that, to avoid significant disruption of the Debtor's business operations, there exists no practical or legal alternative to payment of the Subject Charges. Therefore, the Debtor can only meet its fiduciary duties as debtor in possession under Bankruptcy Code sections 1107(a) and 1108 through payment of the Subject Charges.

D. Granting the Motion Will Provide the Import/Export Providers No More Than They Are Supposed To Receive under the Bankruptcy Code

41. The Import/Export Charges would likely be paid in full under any plan of reorganization pursuant to Bankruptcy Code section 507(a)(8), which provides eighth priority status to the claims of a governmental unit based on a customs duty arising out of the importation

of certain merchandise. Thus, payment of the Import/Export Charges as proposed in the Motion merely accelerates the distribution that the Import/Export providers would receive in any event upon confirmation of a plan. Therefore, granting the Motion with respect to the Import/Export Charges would have no substantial effect on the relative distribution of the estate's assets.

E. Bankruptcy Code Section 105(a) and the Doctrine of Necessity Further Support Payment of the Shipping Charges

42. The proposed payments of the Subject Charges should be authorized under Bankruptcy Code section 105(a) and under the “doctrine of necessity.” This Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in Miltenberger v. Logansport Ry. Co., 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 310. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in Miltenberger. See In re Lehigh & New England Ry. Co., 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

43. The doctrine of necessity “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” In re Ionosphere Clubs, Inc., 98 B.R. at 176;

see also 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); In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition 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 pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the chapter 11 process.”).

44. The doctrine of necessity 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. at 175.

45. For the reasons set forth herein, and in light of the critical need for the Debtor to preserve the going concern value of its business and successfully emerge from chapter 11, payment of the Subject Charges as requested herein is proper in accordance with Bankruptcy Code section 105(a) and the doctrine of necessity.

46. The relief requested herein is commonly granted in this District. See, e.g., In re A123 Sys., Inc., Case No. 12-82159 (KJC) (Bankr D. Del. Oct. 18, 2012); In re Harry & David Holdings, Inc., Case No. 11-10884 (MFW) (Bankr. D. Del. Mar. 29, 2011); In re Sportsman’s Warehouse, Inc., Case No. 09-10990 (CSS) (Bankr. D. Del. Mar. 23, 2009); In re

Goody's Family Clothing, Inc., Case No. 08-11133 (CSS) (Bankr. Del. Del. June 10, 2008); In re Tweeter Home Entm't Grp., Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 12, 2007); In re Radnor Holdings Corp., Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); In re Werner Holding Co. (DE), Inc., Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); In re Ultimate Elecs., Inc., Case No. 05-10104 (PJW) (Bankr. D. Del. Jan. 13, 2005); In re Cone Mills Corp., Case No. 03-12944 (MFW) (Bankr. D. Del. Sept. 26, 2003).

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

RESERVATION OF RIGHTS

48. 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 affect the Debtor's rights under Bankruptcy Code section 365 to assume or reject any executory contract with any party subject to the Motion. Further, the Debtor, nor its officers, directors, attorneys or agents will have any liability on account of any decision by the Debtor not to pay a Shipping Charge or an Import/Export Charge, and nothing contained in the Motion shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect a Shipping Charge or Import/Export Claim to the extent it is not paid.

49. Additionally, nothing in the Motion is intended to modify or waive any of the Debtor's rights with respect to services performed by the Distribution Vendors, including the Debtor's rights to (a) cancel or contest any invoice on any grounds or (b) decline the acceptance of goods and services.

IMMEDIATE RELIEF IS NECESSARY TO AVOID IMMEDIATE AND IRREPARABLE HARM

50. 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, 548-49 (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 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 County, 40 F.3d 645, 653-55 (3d Cir. 1994). The Debtor submits that for the reasons already set forth herein, the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtor.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

51. The Debtor also requests that this 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 its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully

requests that this Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

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 this Court enter an order, substantially in the form 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

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.¹ : **Related Docket No. _____**
:

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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

Upon the motion (the “Motion”)² of the Debtor for entry of an order, pursuant to Bankruptcy Code sections 105(a), 363(b), 503(b), 506, 1107 and 1108 and Bankruptcy Rule 6003, authorizing the Debtor to pay (i) certain prepetition shipping, warehousing, and related charges (the “Shipping Charges”) and (ii) certain prepetition customs duties, detention and demurrage fees, tariffs and excise taxes, freight forwarding or consolidation charges and other similar obligations (the “Import/Export Charges”); 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 shareholders and other parties in interest; and after due deliberation thereon and sufficient cause appearing therefor, it is hereby

¹ 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.

² Capitalized terms used but not 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. Subject to paragraph 4, the Debtor is authorized, but not directed, to make such payments, either directly or indirectly, to the Distribution Vendors for the obligations owing in respect of the Shipping Charges as the Debtor determines, in the exercise of its business judgment, are necessary or appropriate to (a) secure the delivery, distribution and sale of the Debtor's goods to customers throughout the United States and abroad, (b) ensure the delivery of goods and raw materials to the Debtor's facilities or (c) satisfy liens, if any, in respect of amounts owed to such parties. The Debtor is authorized, but not directed, to pay the Shipping Charges, in the ordinary course of business, in an aggregate amount of up to \$9.2 million, without prejudice to seek additional relief on an emergency basis.

3. The Debtor is authorized, but not directed, to make payments directly or indirectly to the Import/Export Providers for obligations owing in respect of the Import/Export Charges as the Debtor determines, in the exercise of its business judgment, are necessary or appropriate to secure the import or export of goods. The Debtor is authorized, but not directed, to pay the Import/Export Charges, in the ordinary course of business, in an aggregate amount of up to \$123,000, without prejudice to seek additional relief on an emergency basis.

4. The Debtor is authorized, in its sole discretion to pay the Shipping Charges on the following terms and conditions:

- (a) The Debtor, in its sole discretion, shall determine which parties, if any, are entitled to payment under this Order subject to the limits imposed on the aggregate payments authorized to be made under this Order;
- (b) If a party accepts payment under this Order, such party is deemed to have agreed to (i) release any liens it may have on the Debtor's goods or property provided, however, that should such party fail promptly to release such lien and/or interest upon payment by the

Debtors, any such lien and/or interest shall be deemed released and expunged, without necessity of further action, and this Order, together with proof of payment, shall be all that is required to evidence such release and expungement, and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtor on customary trade terms during the pendency of this Chapter 11 Case. Customary Trade Terms means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Distribution Vendor and the Debtor during the 180 days preceding the Petition Date³ or (ii) such other trade terms as the Debtor and the Distribution Vendor may mutually agree upon;

- (c) Subject to subparagraph (d), if a party accepts payment under this Order and thereafter does not continue to provide goods or services to the Debtor on the Customary Terms during the pendency of this Chapter 11 Case, then (i) any payment on a prepetition claim received by such party shall be deemed to be an unauthorized voidable postpetition transfer under Bankruptcy Code Section 549 and, therefore, recoverable by the Debtor in cash upon written request and (ii) subject to subparagraph (f) below, upon recovery by the Debtor, any such prepetition claim shall be reinstated as if the payment had not been made, less the Debtor's reasonable costs in recovering such amounts;
- (d) In the event of the assertion of a possessory lien against the Debtor's property that prevents the Debtor from accessing its property without payment of the prepetition claim giving rise to the lien, the Debtor may pay the claim without regard to subparagraphs (b)(ii) and (c) above; and
- (e) Prior to paying a prepetition claim under this Order, the Debtor may, in its absolute discretion, settle all or part of such claim for less than its face amount without further notice or hearing. In any event, the Debtor may elect to only pay part of a prepetition claim under the authorization granted, leaving the remainder of the claim to be addressed pursuant to their plan of reorganization.

5. Should the Debtor seek to recover payments under paragraph 4(c) of this Order, nothing in this Order shall preclude a party from contesting such treatment by making a

³ In the event the relationship between the party accepting payment under this Order and the Debtor does not extend to 180 days preceding the Petition Date, the Customary Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtor in the reasonable exercise of their business judgment.

written request (the "Request") to the Debtor to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtor received the Request, of which hearing the Debtor will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of this Court.

6. 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 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.

7. All applicable banks and other financial institutions are authorized to rely on the Debtor's direction to pay amounts in accordance with this Order provided that there are sufficient good funds standing to the Debtor's credit in the applicable accounts to make the payments and all applicable banks shall not have any liability to any party for relying on the Debtor's direction.

8. The Debtor is authorized to issue postpetition checks as necessary to replace any prepetition checks that were issued with respect to the Subject Charges and may be dishonored.

9. The authority granted by this Order to pay certain claims shall not be construed as: (a) an admission by the Debtor 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 by the Debtor to pay any claim; (d) an implication or admission by the Debtor that any particular claim

would constitute a Subject Charge; (e) an assumption or rejection of any executory contract or unexpired lease pursuant to Bankruptcy Code Section 365; or (f) otherwise affect the Debtor's rights under Bankruptcy Code Section 365 to assume or reject any executory contract with any party subject to this Order.

10. The Debtor nor its officers, directors, attorneys or agents shall have any liability on account of any decision by the Debtor not to pay a Subject Charge, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect a Subject Charge to the extent it is not paid.

11. Nothing in the Motion or this Order, nor the Debtor's implementation of the relief granted in this Order, shall be deemed to modify or waive any of the Debtor's rights with respect to goods and services requested or received from the Distribution Vendors or the Import/Export Providers, including the Debtor's rights to (a) cancel or contest any invoice on any grounds, or (b) decline the acceptance of goods and services.

12. To the extent that there may be any inconsistency between the terms of the interim or final order approving the proposed debtor in possession financing, if and when entered, and this Order, the terms of the interim or final order approving the proposed debtor in possession financing, as applicable shall govern.

13. This 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.

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

15. 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

UNITED STATES BANKRUPTCY JUDGE