

other financial institutions (collectively, the “**Banks**”) to honor and process check and electronic transfer requests related to the foregoing; and (iii) granting certain related relief. In support of this Motion, the Debtors rely upon and incorporate by reference the *Declaration of Frank Pometti in Support of Debtors’ Chapter 11 Petitions and First-Day Motions* (the “**First Day Declaration**”),² filed contemporaneously herewith. In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the “**Amended Standing Order**”). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105(a), 363(b), 1107(a), and 1108 of the Bankruptcy Code.

BACKGROUND

A. General

2. On the date hereof (the “**Petition Date**”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No official committees have been appointed in these chapter 11 cases and no request has been made for the appointment of a trustee or an examiner.

² Each capitalized term used but not defined herein shall have the meaning ascribed to it in the First Day Declaration.

3. Additional information regarding the Debtors' business, their capital structure, and the circumstances leading to the filing of these chapter 11 cases is set forth in the First Day Declaration.

B. Vendor Claims

4. As described in greater detail below, due to the nature of the Debtors' business operations, various third parties (*i.e.*, the Lien Vendors) may be able to assert liens against the assets of the Debtors and their estates. Also, the Debtors have determined, in an exercise of their business judgment, that their continued receipt of certain goods and services from the Critical Vendors is necessary to ensure that there are not any unexpected or inopportune interruptions in the Debtors' business operations, and to preserve and maximize the value of the Debtors' estates. Without the relief requested herein, the Debtors believe that many of the Lien Vendors and the Critical Vendors (each, a "**Vendor**," and collectively, the "**Vendors**")³ may cease delivering necessary goods and providing services to the Debtors, which could have devastating consequences for the Debtors' efforts in connection with these chapter 11 cases.

5. The Debtors estimate that, as of the Petition Date, their aggregate amount of outstanding accounts payable on account of trade obligations is approximately \$6.0 million.

i. Lien Claims

6. An integral component of operating the Debtors' business is the efficient flow of certain materials, machinery, and equipment to and from the Debtors' various construction locations, which are presently in Ohio, Pennsylvania, and West Virginia. As a result, the

³ This motion does not seek authority to pay vendors on account of the fact they may be able to assert liens against the assets of certain third parties to which the Debtors may owe indemnification obligations and/or obligations to keep the third parties' assets free from liens, namely the Debtors' customers. These vendors are instead the subject of that certain *Debtors' Motion for Entry of an Order, Pursuant to Sections 105(a), 363(b), 503(b)(1), 1107(a) and 1108 of the Bankruptcy Code, Authorizing, but not Directing (I) the Debtors to Pay Certain Prepetition Claims, Conditioned upon Prior Customer Payment, (II) the Debtors to Honor Customer Obligations, (III) the Debtors to Implement Control Procedures for Customer Project Funding and Completion, and (IV) Granting Related Relief* filed contemporaneously herewith.

Debtors rely on certain common carriers and other third-party service providers to transport materials, machinery, and equipment for the Debtors. In addition, in the ordinary course of business, the Debtors regularly engage various service providers to repair, maintain, and improve the Debtors' real and personal property. As such, the Lien Vendors may maintain possession of materials, machinery and equipment that are vital to the Debtors' business operations. These Lien Vendors could potentially assert liens, including mechanic's liens, possessory liens, and other similar liens, against the Debtors' property.

7. Pursuant to section 362(b)(3) of the Bankruptcy Code, the act of perfecting mechanic's liens and the like, to the extent consistent with section 546(b) of the Bankruptcy Code, is excluded from the automatic stay. Under section 546(b) of the Bankruptcy Code, 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).

8. The Lien Vendors may also have the right under federal or state law to assert certain possessory liens on the goods or property in their possession, which secure the charges or expenses incurred in connection with such goods and property.⁴ Because the perfection and maintenance of the liens held by Lien Vendors in most cases is dependent upon possession, it is anticipated that the Lien Vendors will refuse to deliver or release such goods before their claims have been satisfied and their liens extinguished. The Debtors believe that any

⁴ For example, section 7-307 of the Uniform Commercial Code provides, in pertinent part, that a "carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." U.C.C. § 7-307(1); see also U.C.C. § 7-209(a) ("[A] warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law."). Substantially similar versions of these provisions of the U.C.C. have been enacted in each of the major domestic jurisdictions in which the Debtors do business.

such interruption in obtaining the services and cooperation of the Lien Vendors would, among other things, (i) delay necessary deliveries for the Debtors, (ii) undermine the Debtors' ability to perform for their customers, and (iii) adversely and irreparably affect the Debtors' ability to continue operating on a post-petition basis. Moreover, even if suitable alternative vendors are available, the time necessary to identify replacement providers and integrate them into the Debtors' operations would likely cause a significant disruption to the Debtors' operations and result in substantial costs and delays.

9. Although it is difficult to estimate with precision the Lien Vendor Claims outstanding at any given moment, the Debtors estimate that the amount of outstanding Lien Vendor Claims is no more than \$10,000.

ii. Critical Vendor Claims

10. In the ordinary course of business, the Debtors rely on the Critical Vendors for the delivery of goods and services that are critical to the continued and uninterrupted operation of the Debtors' business, including, without limitation, fuel, machinery, equipment, information technology services, and mechanical and environmental supplies. The Critical Vendors provide goods and services to the Debtors that are essential to operating the Debtors' highly-specialized business, timely meeting customer requirements, and complying with environmental laws and permitting requirements. Absent the continued supply of goods and services from these Critical Vendors, the Debtors would be unable to efficiently operate their business, meet customer-specifications and comply with applicable environmental laws and permitting requirements, and would lose significant revenue.

11. The Debtors need to be able to assure their customers, vendors, and employees that, notwithstanding the filing of these chapter 11 cases, the Debtors will nonetheless

be able to provide their clients with high quality services. Ensuring uninterrupted access to key materials, machinery, equipment, services, and supplies is paramount to meeting these goals. It is necessary that the Debtors be able to maintain their business relationships with, and honor outstanding payment obligations to, certain key vendors and service providers—the Critical Vendors—in light of the role that they play in the Debtors’ day-to-day operations. To prevent the commencement of these cases from causing an unexpected or inopportune interruption to their business operations, the Debtors are seeking authority to pay Critical Vendor Claims to ensure the Debtors’ continued receipt of goods and services and favorable credit terms from the Critical Vendors.

12. To identify the Critical Vendors, the Debtors have reviewed their pre-petition accounts payable and vendor lists to identify those creditors most essential to the Debtors’ operations pursuant to certain criteria, including the following: (i) whether certain quality specifications or other requirements of the Debtors’ customers prevent the Debtors from obtaining a vendor’s products or services from alternative sources within a reasonable timeframe; (ii) whether, if a vendor is not a single source supplier, the Debtors have sufficient materials and supplies on hand to continue their operations while a replacement vendor is put in place; and (iii) whether a vendor meeting the foregoing criteria is able or likely to refuse to ship goods or provide services to the Debtors post-petition if its prepetition balances are not paid.

13. The Debtors seek authority to pay Critical Vendor Claims up to \$480,000.⁵

⁵ The Debtors estimate that \$10,000 of the Vendor Claims they seek authority to pay are entitled to 503(b)(9) status.

RELIEF REQUESTED

14. By this Motion, the Debtors request the Court to enter the Proposed Orders, (i) authorizing, but not directing, the Debtors, in their discretion, to pay the Lien Claims and Critical Vendor Claims (each, a “**Vendor Claim**,” and collectively, the “**Vendor Claims**”) subject to the caps provided for in the Proposed Interim Order and the Proposed Final Order, as summarized immediately below, (ii) authorizing the Banks to honor and process check and electronic transfer requests related thereto, and (iii) granting certain related relief.

	<u>Proposed Interim Order Cap</u>	<u>Proposed Final Order Cap</u>
Lien Claims	\$10,000	\$10,000
Critical Vendor Claims	\$280,000	\$480,000

15. The Debtors further request that they be authorized, but not required, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on terms that are as or more favorable to the Debtors as the most favorable trade terms, practices, and programs in effect between the Vendor and the Debtors in the six months prior to the Petition Date (collectively, the “**Customary Trade Terms**”), or such other trade terms as are agreed to by the Debtors and the Vendor.

16. To the extent that the Debtors determine, in their business judgment, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, the Debtors propose that a letter (a “**Vendor Letter**”) be sent to the Vendor, along with a copy of any order granting this Motion (the “**Vendor Order**”), including, without limitation, the following terms:

a. The amount of the Vendor’s estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of

the Vendor Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);

b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in the Vendor Order;

c. The Vendor's agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (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), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates, or any third party or any of the foregoing's respective assets or property (real or personal) 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 pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor's agreement to release such Lien becomes effective immediately upon execution of the Vendor Letter;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of the Vendor Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of the Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor. The Debtors may then take any and all appropriate steps to cause such Vendor to repay payments made to it on account of its pre-petition claim to the extent that such payments exceed the post-petition amounts then owing to such Vendor.

17. Any such Vendor Letter, once agreed to by the Debtors and a Vendor, shall be the agreement between the parties that governs their post-petition trade relationship (the "**Trade Agreement**"). The Debtors request that they be authorized, but not required, in their

discretion, to enter into Trade Agreements with the Vendors. The Debtors further request authority to pay the Vendors in advance or to modify trade terms as necessary.

BASIS FOR RELIEF

A. The Court Should Authorize, But Not Direct, the Debtors, in Their Discretion, to Pay the Vendor Claims

I. The Vendors Are Essential To Avoiding Any Unexpected or Inopportune Interruption to the Debtors' Business Operations

18. The Debtors believe that the goods and services provided by the Vendors are necessary to ensure that there are not any unexpected or inopportune interruptions to the Debtors' operations, because the Vendors are the most cost-efficient and, in many cases, the only source from which the Debtors can procure critical goods and services within a timeframe that would permit the Debtors to avoid unwarranted interruptions or delays in their operations. Any failure to pay the Vendor Claims would, in the Debtors' business judgment, result in the Vendors refusing to provide necessary goods and services to the Debtors. Any unexpected or inopportune interruptions or delays in the Debtors' operations resulting from a refusal by the Vendors to do business with the Debtors on a post-petition basis, or the Debtors' inability to obtain necessary goods and services, would have disastrous effects on the Debtors' business, and undermine the Debtors' ability to preserve and maximize the value of their estates.

19. As noted above, the Lien Vendors may assert and perfect mechanic's liens, construction lien, possessory liens, or other similar liens on the Debtors' assets, thereby jeopardizing the Debtors' ability to prosecute these chapter 11 cases in a timely and efficient manner.

20. With respect to the Critical Vendor Claims, the Debtors have reviewed their accounts payable and undertaken a process to identify those vendors which are essential to avoid any unexpected or inopportune interruptions to the Debtors' operations. The Debtors have

further developed certain procedures that, if and when implemented, in their discretion and business judgment, will ensure that the Critical Vendors receiving payment of their Critical Vendor Claims will continue to provide goods and services to the Debtors based upon the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendors.

21. The Debtors believe that authority to pay the Vendor Claims is vital to their efforts to preserve and maximize the value of their estates. If the Proposed Orders are not entered, the Debtors believe that many of the Vendors will refuse to do business with the Debtors and some may have to cease their own operations. Such a result would be damaging to the Debtors' efforts to successfully prosecute these chapter 11 cases, to the detriment of the Debtors' estates and creditors. Moreover, the continued availability of trade credit in amounts and on terms consistent with the Debtors' pre-petition trade terms is critical. The retention or reinstatement of the Customary Trade Terms will enable the Debtors to maximize the value of their business. Conversely, a deterioration in post-petition trade credit available to the Debtors, together with a disruption in the Debtors' receipt of necessary goods and services, would, among other things, increase the amount of liquidity needed by the Debtors post-petition, and impede the Debtors' chapter 11 efforts.

22. For the foregoing reasons, the Debtors respectfully submit that entry of the Proposed Order is in the best interests of the Debtors, their estates, and creditors.

II. The Relief Requested Herein Is Supported by the "Doctrine of Necessity"

23. Section 363(b)(1) of the Bankruptcy Code provides that, after notice and a hearing, the trustee "may use, sell, or lease, other than in the ordinary course of business, property of the estate...." 11 U.S.C. § 363(b)(1).

24. Section 105(a) of the Bankruptcy Code empowers a bankruptcy court 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). Bankruptcy courts have invoked the equitable power of section 105 of the Bankruptcy Code to authorize the post-petition payment of pre-petition claims where such payment is necessary to preserve the value of a debtor’s estate. See, e.g., Tropical Sportswear Int’l Corp., 320 B.R. 15, 20 (Bankr. M. D. Fla. 2005) (“Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.”). Courts have likewise acknowledged that “[u]nder [section] 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing In re Ionosphere Clubs, Inc., 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989)); see In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999) (citing In re Penn Central Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972)) (holding that the court is authorized under section 105(a) of the Bankruptcy Code to allow immediate payment of pre-petition claims of vendors found to be critical to the debtor’s continued operation).

25. In a long line of well-established cases, federal courts consistently have permitted post-petition payment of pre-petition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. See, e.g., Miltenberger v. Logansport, C. & S. W. Ry. Co., 106 U.S. 286, 312 (1882) (payment of pre-receivership claim permitted to prevent “stoppage of [crucial] business relations”); In re Lehigh & New Eng. Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (holding that “if payment of a claim which arose prior to [the commencement of the bankruptcy case] is essential to the continued operation of the . . . [business] during [the bankruptcy case], payment may be authorized even if it is made out of

[the] corpus”); Dudley v. Mealey, 147 F.2d 268, 271 (2d Cir. 1945) (extending doctrine for payment of pre-petition claims beyond railroad reorganization cases).

26. This legal principle—known as the “doctrine of necessity”—functions in chapter 11 cases as a mechanism by which a bankruptcy court can exercise its equitable power to allow payment of critical pre-petition claims not explicitly authorized by the Bankruptcy Code. See Just for Feet, 242 B.R. at 826 (finding that “to invoke the necessity of payment doctrine, a debtor must show that payment of the pre-petition claims is critical to the debtor’s [continued operation].”); In re Columbia Gas Sys., Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a pre-petition claim is essential to the continued operation of [the debtor], payment may be authorized”); In re Boston & Me. Corp., 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation). The doctrine is frequently invoked early in a bankruptcy case, particularly in connection with those Bankruptcy Code sections that relate to payment of pre-petition claims. In one case, the court indicated its accord with “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of pre-petition claims where such payment is necessary ‘to permit the greatest likelihood of . . . payment of creditors in full or at least proportionately.’” In re Structurelite Plastics Corp., 86 B.R. 922, 931 (Bankr. S. D. Ohio 1988).

27. As explained above, the goods and services provided by the Vendors are essential to ensure that there is not an unexpected or inopportune interruption to the operation of the Debtors’ business. The Debtors submit that the total amount to be paid to the Vendors is minimal compared to the importance and necessity of the Debtors’ continued uninterrupted receipt of the necessary goods and services provided by the Vendors. Moreover, under the

circumstances, the Debtors do not believe there are cost-effective or readily accessible alternatives to the Vendors.

28. Accordingly, the Debtors submit that the Court should exercise its equitable power to grant the relief requested herein.

III. The Court Should Authorize Payment of the Vendor Claims as a Valid Exercise of the Debtors' Fiduciary Duties

29. Authority for satisfying the Vendor Claims also may be found in sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors, operating their business as debtors in possession under sections 1107(a) and 1108, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). 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.

30. 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.

31. Payment of the Vendor Claims meets each element of the CoServ court's standard. As described above, the Debtors believe that the Vendor Claims encompass the claims of those Vendors that: are able to assert and perfect liens against the Debtors' property; and/or would otherwise refuse, or would be unable to, provide goods and services to the Debtors on a post-petition basis if their pre-petition balances are not paid, thereby creating the significant risk that the Debtors will experience an unexpected or inopportune interruption to their operations. Any such interruption would diminish estate value and frustrate the Debtors' chapter 11 efforts. The harm and economic disadvantage that would stem from the failure of any of the Vendors to perform is disproportionate to the amount of the Vendor Claims.

32. Finally, the Debtors have examined other options short of payment of the Vendor Claims and have determined that, to avoid an unexpected or inopportune interruption to their business operations, there exists no practical alternative to their payment of the Vendor Claims under the circumstances. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of the Vendor Claims.

IV. Payment of the Lien Claims Now Will Not Affect Creditor Recoveries In These Chapter 11 Cases

33. As it pertains to the Lien Claims, the relief requested herein will not affect the recovery of creditors in these cases. In instances where the amounts owed to the Lien Vendors is less than the value of the goods that could be held to secure the related Lien Claims, such parties are arguably fully-secured creditors of the Debtors' estates. In such instances, payment now only provides such parties with what they would be entitled to receive under a

chapter 11 plan, only without any interest costs that might otherwise accrue during these chapter 11 cases.

34. As explained above, it is critical to the Debtors' chapter 11 efforts that they continue to receive goods and services, as applicable, from the Vendors on an uninterrupted basis throughout the chapter 11 process. The Debtors believe that without the relief requested herein, many of the Vendors may cease delivering goods and providing services to the Debtors, which could have devastating consequences for the Debtors and their estates. Reflecting the recognition that payment of pre-petition claims of certain essential suppliers and vendors is, in fact, critical to a debtor's ability to preserve and maximize creditor recoveries, courts in this district regularly grant relief consistent with that which the Debtors are seeking in this Motion.

35. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein.

B. The Court Should Authorize the Banks to Honor and Process the Debtors' Payments on Account of the Vendor Claims

36. The Debtors also request the Court to authorize the Banks, when requested by the Debtors, in their discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations described herein, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Debtors further request that all of the Banks be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion.

SATISFACTION OF BANKRUPTCY RULE 6003

37. Pursuant to Bankruptcy Rule 6003(b), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code or to satisfy prepetition claims

within twenty-one days of the Petition Date requires the Debtors to demonstrate that such relief “is necessary to avoid immediate and irreparable harm.” As set forth throughout this Motion, the failure of any Vendor to deliver necessary goods and services to the Debtors would have immediate and negative consequences to the Debtors’ business, and would jeopardize the Debtors’ efforts to preserve and maximize the value of their estates, to the detriment and prejudice of all of the Debtors’ stakeholders. Moreover, it is the Debtors’ business judgment that continuation of their positive relationship with the Vendors is critical to avoid any unexpected or inopportune interruption to their operations, and increases the likelihood of successfully prosecuting these cases. Thus, if the relief requested herein is not granted, the Debtors’ failure to satisfy the Vendor Claims would cause their estates immediate and irreparable harm by detracting from, and potentially derailing, their chapter 11 efforts.

38. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

39. Pursuant to Bankruptcy Rule 6004(h), “[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 set forth throughout this Motion, any delay in paying the Vendor Claims would be detrimental to the Debtors, their creditors and estates, as the Debtors’ ability to manage and run their business operations without any unexpected or inopportune interruption requires, in part, that they continue to receive the goods and services provided by the Vendors.

40. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the fourteen day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable to the Proposed Orders.

RESERVATION OF RIGHTS

41. Nothing in the Proposed Orders or this Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors and their estates, (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, (iii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action against any of the Vendors, or (iv) shall be construed as a promise to pay a claim.

NOTICE

42. Notice of this Motion has been provided 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) the Internal Revenue Service; (iv) the Debtors' thirty (30) largest unsecured creditors (excluding insiders); (v) the Securities and Exchange Commission; and (vi) counsel to the Debtors' post-petition lenders. Notice of this Motion and any order entered hereon will be served in accordance with Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

NO PRIOR REQUEST

43. The Debtors have not previously sought the relief requested herein from this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully entry of the Proposed Orders, granting the relief requested herein and such other and further relief as is just and proper.

Dated: October 22, 2018
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ M. Blake Cleary

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EXHIBIT A

Proposed Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

)	
In re:)	Chapter 11
)	
WELDED CONSTRUCTION, L.P., <i>et al.</i> , ¹)	Case No. 18-12378 (KG)
)	
Debtors.)	(Jointly Administered)
)	Ref. Docket No. ____

INTERIM ORDER, PURSUANT TO SECTIONS 105(a), 363(b), 1107(a) AND 1108 OF THE BANKRUPTCY CODE, (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS (A) OF LIEN VENDORS, AND (B) OF CRITICAL VENDORS, (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECK AND ELECTRONIC TRANSFER REQUESTS RELATED THERETO, AND (III) GRANTING CERTAIN RELATED RELIEF

Upon consideration of the motion (the “**Motion**”)² of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 1107(a) and 1108 of title 11 of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in their discretion, to pay, in the ordinary course of business, (a) Lien Claims and (b) Critical Vendor Claims, (ii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing, and (iii) granting related relief; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. §

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Welded Construction, L.P (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is 26933 Eckel Road, Perrysburg, OH 43551.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Lien Claims in the ordinary course of their business up to an aggregate amount of \$_____ without further order of the Court.
3. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Critical Vendor Claims in the ordinary course of their business up to an aggregate amount of \$_____ without further order of the Court.
4. The Debtors are authorized, but not directed, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendor.
5. The Debtors are authorized, but not directed, in their discretion, to enter into Trade Agreements with the Vendors, including, without limitation, on the following terms:
 - a. The amount of the Vendor's estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of this Order and shall not be deemed a claim allowed by this Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of this Court);
 - b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in this Order;
 - c. The Vendor's agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (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), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates, or any third party or any of the foregoing's respective assets or property (real or personal) 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 pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor's agreement to release such Lien becomes effective immediately upon execution of the Vendor Letter;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of this Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of the Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor. The Debtors may then take any and all appropriate steps to cause such Vendor to repay payments made to it on account of its pre-petition claim to the extent that such payments exceed the post-petition amounts then owing to such Vendor.

6. The Debtors are authorized to pay the Vendors in advance or to modify trade terms as necessary.

7. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and

any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Order.

8. A final hearing on the relief sought in the Motion shall be conducted on _____, 2018 at _____ (ET). The deadline by which objections to entry of the Proposed Final Order must be filed is _____, 2018 at 4:00 p.m. (ET). If no objections to entry of the Proposed Final Order are timely filed, this Court may enter the Proposed Final Order without further notice or a hearing.

9. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors and their estates, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, (c) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action against any of the Vendors, or (d) shall be construed as a promise to pay a claim.

10. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

11. The requirements of Rule 6003(b) of the Federal Rules of Bankruptcy Procedure are satisfied.

12. Notwithstanding any applicability of Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2018
Wilmington, Delaware

Kevin Gross
United States Bankruptcy Judge

EXHIBIT B

Proposed Final Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
)	
WELDED CONSTRUCTION, L.P., <i>et al.</i> , ¹)	Case No. 18-12378 (KG)
)	
Debtors.)	(Jointly Administered)
)	
)	Ref. Docket No. ____

**FINAL ORDER, PURSUANT TO SECTIONS 105(a), 363(b), 1107(a) AND 1108 OF THE
BANKRUPTCY CODE, (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN
PREPETITION CLAIMS (A) OF LIEN VENDORS AND (B) OF CRITICAL VENDORS,
(II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECK AND
ELECTRONIC TRANSFER REQUESTS RELATED THERETO, AND
(III) GRANTING CERTAIN RELATED RELIEF**

Upon consideration of the motion (the “**Motion**”)² of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 1107(a) and 1108 of title 11 of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in their discretion, to pay, in the ordinary course of business, (a) Lien Claims and (b) Critical Vendor Claims, (ii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing, and (iii) granting related relief; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Welded Construction, L.P (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is 26933 Eckel Road, Perrysburg, OH 43551.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

§ 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on a final basis as set forth herein.

2. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Lien Claims in the ordinary course of their business up to an aggregate amount of \$_____ without further order of the Court, exclusive of amounts previously approved by the Interim Order.

3. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Critical Vendor Claims in the ordinary course of their business up to an aggregate amount of \$_____ without further order of the Court, exclusive of amounts previously approved by the Interim Order.

4. The Debtors are authorized, but not directed, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendor.

5. The Debtors are authorized, but not directed, in their discretion, to enter into Trade Agreements with the Vendors, including, without limitation, on the following terms:

a. The amount of the Vendor's estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of this Order and shall not be deemed a claim allowed by this Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of this Court);

b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in this Order;

c. The Vendor's agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (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), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates, or any third party or any of the foregoing's respective assets or property (real or personal) 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 pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor's agreement to release such Lien becomes effective immediately upon execution of the Vendor Letter;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of this Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of the Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor. The Debtors may then take any and all appropriate steps to cause such Vendor to repay payments made to it on account of its pre-petition claim to the extent that such payments exceed the post-petition amounts then owing to such Vendor.

6. The Debtors are authorized to pay the Vendors in advance or to modify trade terms as necessary.

7. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds

are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Order.

8. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors and their estates, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, (c) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action against any of the Vendors, or (d) shall be construed as a promise to pay a claim.

9. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

10. The requirements of Rule 6003(b) of the Federal Rules of Bankruptcy Procedure are satisfied.

11. Notwithstanding any applicability of Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

12. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2018
Wilmington, Delaware

Kevin Gross
United States Bankruptcy Judge