

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

In re:

SCHUTT SPORTS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 10-12795 (____)

(Joint Administration Requested)

**MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) AUTHORIZING
DEBTORS TO PAY (A) ALL PREPETITION EMPLOYEE OBLIGATIONS,
AND (B) PREPETITION WITHHOLDING OBLIGATIONS, AND
(II) DIRECTING BANKS TO HONOR RELATED TRANSFERS**

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) hereby move the Court (the “**Motion**”) for the entry of an order pursuant to sections 105, 363, 364, 503, 507, 541, 1107 and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), and Rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing, but not directing, the Debtors to pay (i) (a) all prepetition employee obligations up to the relevant statutory maximums and (b) prepetition withholding obligations; and (ii) directing banks to honor related prepetition transfers. In support of this Motion, the Debtors respectfully state as follows:

Status of the Case and Jurisdiction

1. On the date hereof (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
2. The Debtors have continued in possession of their properties and are operating and managing their business as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

¹ The Debtors, along with the last four digits of each Debtor’s tax identification number, are: Mountain View Investment Company of Illinois (3563), Schutt Sports, Inc. (0521), Circle System Group, Inc. (7711), Melas, Inc. (9761), R.D.H. Enterprises, Inc. (2752), and Triangle Sports, Inc. (6936).

3. No request has been made for the appointment of a trustee or examiner and a creditors' committee has not yet been appointed in these cases.

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This matter is core within the meaning of 28 U.S.C. § 157(b)(2).

5. The statutory predicates for the relief sought herein are sections 105(a), 363, 503, 507, 541, 1107, and 1108 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004(h).

Background

6. The Debtors are a leading designer, manufacturer, distributor and marketer of team sporting goods equipment, offering an extensive line of football, baseball and softball protective gear and complementary accessories. The Debtors' product line is anchored by their football helmet offering, for which the Debtors have the leading position in the country, both in terms of technological advancement and market share. The Debtors also have the number-one market share in football faceguards and maintain leading and growing market positions in shoulder pads, women's fast-pitch softball equipment, baseball and softball bases and protective gear. The Debtors are the exclusive provider of bases to Major League Baseball. The Debtors' total revenues for fiscal year 2009 was approximately \$68.6 million.

7. The Debtors are a significant employer in Easton, Pennsylvania and Litchfield and Salem, Illinois. The Debtors are also a critical provider of football-related products to the local sporting goods dealers throughout the country and typically represent a significant portion of their overall business. In addition, the Debtors provide football helmet replacement parts and reconditioning services for millions of football helmets that are being used by athletes of colleges, high schools, youth leagues and other institutions across the country.

8. A detailed factual background of the Debtors' businesses and operations, as well as the events precipitating the commencement of these cases, is more fully set forth in the *Declaration of Rollen Jones in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* (the "**First Day Declaration**"), filed contemporaneously herewith and incorporated herein by reference.

I. Employees

9. The Debtors operate in three different locations—namely, Litchfield and Salem, Illinois through Shutt Sports, Inc. ("**Shutt Sports**"), and Easton, Pennsylvania through Circle System Group, Inc. ("**Circle System**," together with Shutt Sports, the "**Operating Entities**").

10. The Debtors have a total of approximately 520 employees (the "**Employees**"), which includes 5 executives. Out of the total 520 employees, approximately 160 are temporary seasonal workers and 360 are permanent workers. In addition, approximately 110 of the Employees are salaried employees and 410 are hourly. At Circle System, employee levels generally fluctuate between 90 and 180 persons depending on seasonal demand. Employee levels are generally lower from September through December and then increase from March through August during the peak of the football manufacturing and reconditioning season.

11. In addition, the Debtors have agreements with a total of approximately 31 individuals who work with the Debtors as independent sales representatives (the "**Independent Sales Reps**"). The Debtors' expansive dealer network, both institutional and recreational, is a significant competitive advantage and a key strategic asset. The Debtors have a lean in-house sales and marketing team consisting of only four employees whose responsibility is to manage the Independent Sales Reps. The Independent Sales Reps manage over 1,000 sporting goods accounts (the "**Team Dealers**"), who in turn manage over 3,000 individual road men (the "**Direct Sales Men**") who sell the Debtors' products to the ultimate customers (youth leagues,

high school, collegiate teams and professional sports organizations). The Independent Reps have cultivated relationships with Team Dealers that span decades, and the Team Dealers are loyal to the Debtors' products. The Debtors estimate that a majority of its sales take place through their tiered sales structure. If the Debtors are unable to continue to pay the Independent Sales Reps their withheld commissions (described below), they will lose the services of the Independent Sales Reps, their institutional knowledge and relationships with the Direct Sales Men, and their sales network will collapse. Therefore, the Independent Sales Reps are a critical component of the Debtors' ability to obtain new customers and maintain long-term customers.

II. Wages, Salaries and Payroll Obligations

12. All Employees are paid wages and salary (collectively, the “**Wages and Salaries**”) on a bi-weekly basis on every other Friday for the prior two week period. Payroll averages \$603,955 in the aggregate, including the portion of the Payroll Taxes (as defined below). All of the Employees of Schutt Sports in Illinois are paid through electronic fund transfers, i.e. direct deposit. Approximately 70% of the Employees of Circle System in Pennsylvania are paid by paper checks.

13. The Debtors' last regular payroll date was August 27, 2010 for the prior bi-weekly payroll and the next payroll date is scheduled for September 10, 2010. The Debtors estimate that, as of the Petition Date, approximately \$604,000 in Wages and Salaries has accrued and is owed to their Employees, with no employees owed in excess of \$11,725. By this Motion, the Debtors request the authority to pay all unpaid Wages and Salaries to their Employees in the ordinary course of business.

14. Integrated Payroll Services, Inc. (“**IPS**”) processes payroll for the Debtors at all locations. The Debtors pay IPS a total of approximately \$2,500 per month on account of payroll administration and certain other payroll related services. IPS deducts the monthly fee of \$2,500

from the Debtors' accounts. The Debtors estimate that there are no accrued and unpaid costs in connection with IPS. By this Motion, the Debtors request the authority to continue pay IPS the monthly fee in the ordinary course of business.

15. The Independent Sales Reps receive commissions based on their sales, generally 6% of each sale. The Debtors withhold 10% of the Independent Sales Reps' commissions during the calendar year until January of the next calendar year, when the Debtors true-up their accounts. On average, the Debtors withhold \$250,000 in commissions per year. The Debtors estimate that, as of the Petition Date, in the aggregate, there will be approximately \$130,000 in accrued and unpaid commissions associated with the withheld commissions and approximately \$320,000 in accrued and unpaid commissions associated with sales activity in August of this year. By this Motion, the Debtors request authority to pay all prepetition amounts owing for the services of the Independent Sales Reps and to continue to pay such amounts in the ordinary course of business and consistent with their business practices.

16. The Debtors, as employers, are required by law to withhold federal, state and local taxes from Wages and Salaries for remittance to appropriate tax authorities (the "**Employee Taxes**"). In addition, the Debtors are required to pay, from their own funds, the social security and Medicare taxes and pay, based on a percentage of gross payroll and subject to state-imposed limits, additional amounts for state and federal unemployment insurance (together with the Employee Taxes, the "**Payroll Taxes**") and remit the same to the appropriate authorities (collectively, the "**Taxing Authorities**"). For permanent Employees, the Debtors pay Payroll Taxes to various Taxing Authorities in accordance with the Internal Revenue Code and applicable state law. The Debtors' average two-week total obligation for Payroll Taxes is approximately \$40,000 - \$50,000. The Debtors seek authority to honor and process the prepetition obligations with respect to the Payroll Taxes.

III. Vacation Time and Sick/Personal Days

17. Unless otherwise provided for in an Employment Agreement, Employees receive paid personal time off (“**PTO Days**”) based on their length of service: 1/12th of nine PTO Days for each month of service during the first year of hire, nine PTO Days during the first full calendar year after the year of hire, 14 PTO Days during the second through the fifth full calendar years after the year of hire, 16 PTO Days during the sixth through ninth full calendar years after the year of hire, and 20 PTO Days from the tenth full calendar year after the year of hire through retirement. The Debtors offer PTO Days instead of vacation and sick days. PTO Days may be used for vacation, personal time, illness, or the like. PTO Days are earned throughout the year. For example, if an employee qualifies for 12 PTO Days per year, the employee will earn one PTO day per month throughout the year. An employee is allowed to carry over no more than five unused PTO Days into the following calendar year. An employee is allowed to have negative PTO Days up to a maximum of five days. If an employee is terminated and has negative PTO Days, these days are reimbursed to the Debtors per the employee’s last paycheck. Accrued, unused paid time off is paid out upon separation from the company. As of the Petition Date, the Debtors estimate that they owe approximately \$266,000 for accrued PTO Days. By this Motion, the Debtors request authority to continue to honor their PTO Days policies in the ordinary course of business and to honor all prepetition obligations related thereto.

IV. Employee Benefit Plans

18. In the ordinary course of business, and as is customary for companies of their size, the Debtors maintain various employee benefits and policies that provide their Employees with medical, dental, disability insurance, and other benefits which are described in more detail below (collectively, the “**Employee Benefit Plans**”). Some of the Employee Benefit Plans are

fully funded by the Employees, and others are funded either partially or fully through contributions made by the Debtors.

A. Medical/Dental/Vision Plans

19. The Debtors offer to their Employees a variety of health insurance plans. For those employees at Schutt Sports in Litchfield and Salem, Illinois, the Debtors offer a “pay as you go” health insurance plan administered by HealthSCOPE Benefits (the “**Illinois Plans**”), which is partly funded by the Debtors and partly funded by the Schutt Sports Employees. For the employees of Circle System in Easton, Pennsylvania, the Debtors offer a traditional health insurance plan administered by Capital BlueCross (the “**Pennsylvania Plans**,” together with the Illinois Plans, the “**Employee Health Plans**”). With respect to the Illinois Plans, the Debtors pay health insurance claims via electronic transfer every Friday and claims are normally paid one to two months in arrears. In addition, the Debtors have a stop loss carrier for the Illinois Plans, OptumHealth Specialty Benefits (“**OptumHealth**”), who covers any claims over \$80,000. On average, the Debtors incur an annual cost of approximately \$1,430,000 in connection with the Illinois Plans. The Debtors pay a monthly premium of \$30,000 in connection with the Pennsylvania Plans. As of the Petition Date, the Debtors estimate that the accrued and unpaid costs for the Illinois Plans is \$140,000 and that there are no accrued and unpaid costs in connection with the Pennsylvania Plans.

20. The Debtors also offer a dental plan administered by UniCare (the “**Dental Plan**”). The Dental Plan is fully funded by the participating Employees themselves, however the Debtors pay UniCare directly a monthly premium, which the Debtors then deduct from the participating Employees’ paychecks.

21. In addition, the Debtors offer a vision plan to their Employees administered by UniCare (the “**Vision Plan**”). The Vision Plan is fully funded by the participating Employees

themselves, however the Debtors pay UniCare directly a monthly premium, which the Debtors then deduct from the participating Employees' paychecks. As of the Petition Date, the Debtors estimate that they owe approximately UniCare \$7,080 for the accrued and unpaid monthly premiums of the Dental and Vision Plans.

22. By this Motion, the Debtors seek authority to (a) continue to provide the Employee Health Plans, the Dental Plan and the Vision Plan for their Employees in the ordinary course of business, (b) continue to honor obligations under such benefit programs, including any premiums and administrative fees, and (c) pay all such amounts owed under the Employee Health Plans to the extent that they remain unpaid on the Petition Date.

B. Other Insurance Plans

23. Various short-term disability insurance plans are offered to the Employees the Debtors and are fully funded by the participating Employees, including short-term and long-term disability insurance. In addition, the Debtors provide a basic life insurance benefit (the "**Basic Life Insurance**") of \$20,000 for all full-time employees, which includes an Accidental Death and Dismemberment benefit. The Debtors pay in the aggregate \$14,300 per month for the Basic Life Insurance, of which approximately \$1,700 is paid by the Employees. The Debtors offer voluntary life insurance and dependent life insurance in addition to the basic life insurance, and employees bear the premium costs (which vary depending on age, amount of coverage elected, or other factors). As of the Petition Date, the Debtors estimate the amount of accrued and unpaid costs for the Basic Life Insurance to be \$16,000. By this Motion, the Debtors seek authority to pay all prepetition amounts owed on account of the Basic Life Insurance and to continue their prepetition practices with respect to such benefit.

C. Workers Compensation Insurance

24. Under the applicable law, the Debtors are required to maintain workers' compensation insurance programs to provide their Employees with workers compensation insurance coverage for claims arising from or related to their employment with the Debtors and to satisfy the Debtors' obligations arising under or related to these programs (collectively, the "**Workers' Compensation Programs**"). The Workers' Compensation Programs cover all Employees in Illinois and Pennsylvania and are administered primarily through workers' compensation insurance policies with National Union Fire Insurance Company of Pennsylvania. The Debtors pay an aggregate annual premium of approximately \$468,815 on a monthly basis. It is critical that the Debtors be permitted to continue their workers' compensation insurance and pay their premiums for workers' compensation coverage, as not doing so would almost certainly be more costly. In addition, failure to maintain this insurance in the various states in which the Debtors do business could result in the institution of administrative or legal proceedings against the Debtors and their officers and directors and an inability of the Debtors to continue as a going concern. By this Motion, the Debtors request authority to pay any and all prepetition amounts due or that may become due with respect to the Workers' Compensation Programs. The Debtors further seek authority to maintain and continue their prepetition practices with respect to the Workers' Compensation Programs, including, among other things, allowing workers' compensation claimants, to the extent they hold valid claims, to proceed with their claims under the Workers' Compensation Programs.

D. Retirement Plan

25. Employees who are 18 years of age or older are eligible to enroll in a 401(k) plan (the "**Retirement Plan**") on the first month on or after they meet the eligibility requirements. Employees may contribute to the Retirement Plan through salary deferrals and may contribute up

to 100% of their total pay up to the IRS limit (\$16,500 in 2010) each year. Employees are automatically enrolled in the Retirement Plan with elective deferrals of 4% of salary. The Debtors may make matching contributions at the end of the year, generally equal to 50% of the 4% elective deferrals of each Employee's salary. Employees are always 100% vested in their contributions and cannot forfeit the contributions. Employees are vested in the Operating Entities' contributions over time based on length of employment. The Retirement Plan is administered by Principal ("**Principal**") and the Plan year runs from November 1st through October 31st. On average, the Debtors remit approximately \$130,000 directly to Principal to match the contributions of their Employees, normally in July or August of the following Retirement Plan year. For example, in July, 2010, the Debtors remitted approximately \$120,000 to Principal for the period from November 1, 2008 through October 31, 2009. As of the Petition Date, the Debtors believe that the aggregate amount of accrued but unpaid matching contributions under the Retirement Plan as of the Petition Date is approximately \$109,000. By this Motion, the Debtors seek authority to continue to honor and make funding contributions to the Retirement Plan in the ordinary course of business.

V. Flexible Spending

26. The Debtors offer their Employees the ability to contribute a portion of their compensation, which amounts are generally deducted automatically from each participating Employee's paycheck, into flexible spending accounts for health and dependent care (the "**Flexible Spending Program**"). Approximately 36 Employees participate in the Flexible Spending Program, for which the Debtors pay approximately \$268 per month to administer. The Debtors estimate that there are no accrued and unpaid costs in connection with administration of the Flexible Spending Program. By this Motion, the Debtors seek authority to continue their prepetition practices with respect to the Flexible Spending Program.

VI. Expense Reimbursement

26. The Debtors have a formal policy whereby their Employees seek reimbursement of business-related expenses. The Debtors reimburse Employees on a weekly basis for certain ordinary course expenses incurred within the scope of the Employees' employment, including travel, lodging, transportation, meals, cell phone bills, fax charges and other miscellaneous expenses (collectively, the "**Business Expenses**"). All reimbursement requests must be submitted to the AP department by means of an approved expense report along with the receipts. The Debtors' average weekly Business Expenses are approximately \$15,000 and are paid in full every Friday. Although the Debtors encouraged the submission of reimbursement requests prior to the Petition Date, the Debtors anticipate that many Employees will have not yet submitted their requests for accrued and unpaid Business Expenses. Therefore, as of the Petition Date, the Debtors estimate that approximately \$30,000 in Business Expenses have been incurred but remain unpaid. By this Motion, the Debtors seek authority to continue their prepetition practices with respect to the Business Expenses and to pay all prepetition amounts outstanding in connection therewith.

VI. Prepetition Withholding Obligations

27. As part of the relief requested herein, the Debtors also seek authorization to pay all Employee federal and state withholding and payroll-related taxes relating to prepetition periods, including, but not limited to, all withholding taxes, Social Security taxes, unemployment taxes, Medicare taxes, and garnishments, as well as all other withholdings such as contributions to savings, retirement or pension plans, insurance contributions, and charitable contributions, if any (collectively, the "**Withholding Obligations**"). As of the Petition Date, the Debtors estimate that the amount of accrued and outstanding Withholding Obligations was approximately \$51,500.

28. The Debtors routinely withhold from Employee paychecks the Withholding Obligations, and are required to transmit these amounts to third parties. The Debtors believe that such withheld funds, to the extent that they remain in the Debtors' possession, constitute moneys held in trust and therefore, are not property of the Debtors' bankruptcy estates. Thus, whether or not such funds are prepetition amounts, the Debtors believe that directing such funds to the appropriate parties does not require Court approval. Nevertheless, out of an abundance of caution, the Debtors are seeking Court authority to pay any outstanding amounts owed by the Debtors for Withholding Obligations, in the ordinary course of business, including those incurred prior to the Petition Date.

Relief Requested

29. In order to enable the Debtors to maintain morale during this critical time, retain their current Employees, and minimize the personal hardship such Employees may suffer if prepetition employee-related obligations are not paid when due or honored as expected, the Debtors, by this Motion, seek authority, in their discretion, to pay and honor, as the case may be, (a) all prepetition claims of Employees, including, but not limited to, claims for Wages and Salaries, PTO Days, and certain costs and disbursements related to the foregoing, up to the statutory cap of \$11,725 per Employee, (b) any claims or payments pursuant to the Employee Benefit Plans, and (c) all prepetition federal and state Withholding Obligations (collectively, the "**Employee Obligations**"). The Debtors further request that the Court enter an order directing all banks to honor the Debtors' prepetition checks or electronic transfers for payment of the foregoing, and prohibiting banks from placing any holds on, or attempting to reverse, any automatic transfers on account of the foregoing.

Direction to Banks

30. The Debtors also seek an order authorizing and directing all banks to receive, process, honor, and pay any and all checks or electronic transfers drawn on the Debtors' payroll and general disbursement accounts related to ordinary course Employee Obligations, whether presented before or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

Basis for Relief Requested

31. Courts generally acknowledge that it is appropriate to authorize the payment (or other special treatment) of prepetition employee obligations in appropriate circumstances. Pursuant to Bankruptcy Code sections 1107(a) and 1108, debtors in possession are authorized to operate the business while maintaining a "fiduciary duty to act in the best interest of the estate as a whole, including its creditors, equity interest holders and other parties in interest." *LaSalle Nat'l Bank v. Perelman*, 82 F.Supp.2d 279, 292 (D. Del. 2000). Implicit in the fiduciary duties of any debtor-in-possession is the obligation to "protect and preserve the estate, including an operating business's going-concern value." *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty "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 the debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate." *Id.* In the instant case, the Debtors are operating as debtors in possession consistent with Bankruptcy Code sections 1107(a) and 1108 and payment of the Employee Obligations is necessary to protect and preserve the Debtors' business operations. Thus, the Court should authorize the relief requested in this Motion.

32. Consistent with the Debtors' fiduciary duties, this Court may also grant the relief requested herein pursuant to sections 363(b), 363(c), and 105(a) of the Bankruptcy Code and the "necessity of payment" doctrine (discussed below). 11 U.S.C. §§ 363(b), 363(c), and 105(a). Section 363(b)(1) of the Bankruptcy Code states in pertinent part that: "The 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). If the debtor's determination to use estate assets represents a reasonable business judgment, the bankruptcy court should approve such use. Moreover, this Court has approved the payment of prepetition claims of employees for wages, salaries, expenses, and benefits on the ground that the payment of such claims were necessary to effectuate a successful reorganization or liquidation. *See, e.g., In re American Safety Razor Co. LLC, Case No. 10-12351 (MFW)* (Bankr. D. Del. July 30, 2010); *In re Chem Rx Corp., et al., Case No. 10-11567 (MFW)* (Bankr. D. Del. May 13, 2010); *In re Magic Brands, LLC, et al., Case No. 10-11310 (BLS)* (Bankr. D. Del. April 23, 2010); *In re Stant Parent Corp., Case No. 09-12647 (BLS)* (Bankr. D. Del. July 29, 2009). Section 105(a) of the Bankruptcy Code further provides, in pertinent part, that a "court may 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).

33. The "necessity of payment" doctrine authorizes the relief requested in this Motion because the Employees are indispensable to both the Debtors' operations and the successful resolution of these chapter 11 cases. In addition, the Debtors believe that the unpaid wages and other benefits earned within 180 days of the Petition Date that the Debtors seek to pay are entitled to priority status under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and individually do not exceed \$11,725 (*i.e.*, the maximum priority amount under that statute, effective April 1, 2010).

34. As set forth in the First Day Declaration, the Employees are essential to the continued operation of the Debtors' business, and the Employees' morale directly affects their effectiveness and productivity. Consequently, it is critical that the Debtors continue, in the ordinary course, those personnel policies, programs, and procedures that were in effect prior to the Petition Date. If the checks issued and electronic fund transfers requested in payment of any of the compensation or other Employee obligations are dishonored, or if such obligations are not timely paid postpetition, the Employees may likely suffer extreme personal hardship and may be unable to pay their daily living expenses. A loss of employee morale and goodwill at this juncture would undermine the Debtors' stability, and undoubtedly would have an adverse effect on the Debtors, their customers, the value of their assets and business, and their ability to achieve their objectives in chapter 11. As noted by the court in *In re Equalnet Communications Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2000), "the need to pay pre-petition employee wage claims in an ordinary course of business time frame is simple common sense. Employees are more likely to stay in place and to refrain from actions which could be detrimental to the case and/or the estate if their pay and benefits remain intact and uninterrupted." *Id.* at 370.

35. As part of the foregoing relief, the Debtors also seek authority to pay all Withholding Obligations. The failure to make such payments may also subject the Debtors and their officers to federal or state liability. See *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92 (3d Cir. 1994) (state law requiring debtor to withhold city income tax from its employees' wages created trust relationship between debtor and city for payment of withheld taxes); *DuCharmes & Co. v. Michigan (In re DuCharmes & Co.)*, 852 F.2d 194 (6th Cir. 1988) (noting the special liabilities for failure to pay trust fund taxes). Moreover, the monies payable for amounts held in trust like the Withholding Obligations generally are not property of a debtor's estate. See *Begier v. IRS*, 496 U.S. 53, 59 (1990) (because the debtor does not own an equitable interest in property

he holds in trust for another, that interest is not “property of the estate”). The failure to transfer these withheld funds could result in hardship to certain Employees or others. Furthermore, if the Debtors cannot remit these amounts, the Employees may face legal action due to the Debtors’ failure to submit these payments.

36. Finally, payment of Withholding Obligations that constitute “trust fund” taxes will not prejudice general unsecured creditors of the Debtors’ estates as the relevant taxing authorities would hold priority claims under section 507(a)(8) of the Bankruptcy Code in respect of such obligations. Moreover, the monies payable for trust fund taxes, as well as the other funds that are held in trust for the benefit of third parties, such as withheld funds with respect to the Debtors’ 401k plan, are not property of the Debtors’ estates.

37. The relief requested in this Motion is necessary to the viability of the Debtors’ business and maximization of the value of the Debtors’ assets. Accordingly, the Debtors submit that the relief sought herein is consistent with sections 105(a), 507(a), and 541 of the Bankruptcy Code.

38. Nothing in this Motion, nor any payments made by the Debtors pursuant to the Motion, shall be deemed an assumption or rejection of any Employee Benefit Plan, employment agreement, other program or contract, or otherwise affect the Debtors’ rights under section 365 of the Bankruptcy Code to assume or reject any executory contract between the Debtors and any Employee.

Bankruptcy Rule 6003 Satisfied and Request for Waiver of Stay

39. The Debtors further submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein and in the First Day Declaration, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

40. Specifically, Bankruptcy Rule 6003 provides:

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

41. No court within the Third Circuit has interpreted the “immediate and irreparable harm” language in the context of Bankruptcy Rule 6003 in any reported decision. However, the Third Circuit Court of Appeals has interpreted the same language in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that 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 Fed. Appx. 907, 910 (3d Cir. 2007) (*citing Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle County*, 40 F.2d 645, 653-55 (3d Cir. 1994).

42. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Rule 6004(h) of the Bankruptcy Rules, “[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise.” As set forth above, the relief requested herein is essential to prevent irreparable damage to the Debtors’ operations, going-concern value, and their efforts to pursue a sale or restructuring of their assets and liabilities.

43. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rules 6003 and 6004(h).

Notice

44. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) counsel to the Debtors' prepetition secured lenders; (c) creditors holding the forty (40) largest unsecured claims as set forth in the consolidated list filed with Debtors' petitions; (d) the Office of the United States Attorney General for the District of Delaware; (e) the International Revenue Service; and (f) the Securities and Exchange Commission. As the Motion is seeking "first day" relief, within two business days of the hearing on the Motion, the Debtors will serve copies of the Motion and any order entered respecting the Motion in accordance with the Local Rules. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

45. No previous application for the relief sought herein has been made to this or any other court.

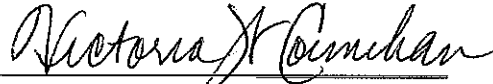
Conclusion

WHEREFORE, the Debtors respectfully request that this Court enter an order granting the relief requested herein and that it grant the Debtors such other and further relief as is just and proper.

[Signature on next page]

Dated: Wilmington, Delaware
September 6, 2010

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