

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

)	
In re:)	Chapter 11
)	
ZACHRY HOLDINGS, INC., <i>et al.</i> ¹)	Case No. 24-90377 (MI)
)	
Debtors.)	(Joint Administration Requested)
)	(Emergency Hearing Requested)

DEBTORS’ EMERGENCY MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO (A) PAY PREPETITION WAGES, SALARIES, OTHER COMPENSATION, AND REIMBURSABLE EXPENSES AND (B) CONTINUE EMPLOYEE BENEFITS PROGRAMS AND (II) GRANTING RELATED RELIEF

Emergency relief has been requested. Relief is requested not later than 4:15 p.m. (prevailing Central Time) on May 21, 2024.

If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

A hearing will be conducted on this matter on May 21, 2024 at 4:15 p.m. (prevailing Central Time) in Courtroom 404, 4th floor, 515 Rusk, Houston, Texas 77002. Participation at the hearing will only be permitted by an audio and video connection.

Audio communication will be by use of the Court’s dial-in facility. You may access the facility at (832) 917-1510. Once connected, you will be asked to enter the conference room number. Judge Isgur’s conference room number is 954554. Video communication will be by use of the GoToMeeting platform. Connect via the free GoToMeeting application or click the link on Judge Isgur’s home page. The meeting code is “JudgeIsgur.” Click the settings icon in the upper right corner and enter your name under the personal information setting.

Hearing appearances must be made electronically in advance of both electronic and in-person hearings. To make your appearance, click the “electronic appearance” link on Judge Isgur’s home page. Select the case name, complete the required fields and click “submit” to complete your appearance.

¹ The last four digits of Zachry Holdings, Inc.’s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://www.kccllc.net/zhi>. The location of the Debtors’ service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.



1. The above-captioned debtors and debtors in possession (collectively, the “**Debtors**,” and together with their non-Debtor affiliates, the “**Company**”) state as follows in support of this motion (this “**Motion**”):

Relief Requested

2. The Debtors seek entry of an order, substantially in the form attached hereto (the “**Order**”), (a) authorizing the Debtors (i) to pay prepetition wages, salaries, compensation, and reimbursable expenses to employees and independent contractors (the “**Compensation**”) as well as remit amounts withheld from the Compensation to applicable taxing authorities and applicable third party benefits administrators, (ii) to continue providing employees with benefits (the “**Benefits**”) pursuant to the Employee Benefits Programs (as defined below) in the ordinary course of business, including payment of certain prepetition obligations related thereto and (b) granting related relief.

3. In support of this Motion, the Debtors rely upon and incorporate by reference the *Declaration of Mohsin Y. Meghji in Support of Chapter 11 Petitions and Requests for First Day Relief* (the “**First Day Declaration**”),² filed contemporaneously herewith.

Jurisdiction, Venue, and Predicates for Relief

4. The United States Bankruptcy Court for the Southern District of Texas (the “**Court**”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b). The Debtors confirm their consent to the entry of a final order by the Court. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The predicates for the relief requested herein are sections 105(a), 363(b), 503(c)(1), and 507 of title 11 of the United States Code (the “**Bankruptcy Code**”), rules 6003 and 6004 of

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and the Bankruptcy Local Rules for the Southern District of Texas (the “**Bankruptcy Local Rules**”).

Background

I. Overview of Chapter 11 Cases

6. On May 21, 2024 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors are requesting procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No request for the appointment of a trustee or examiner has been made in these chapter 11 cases, and no official committees have been appointed or designated.

7. The Company is a leading provider of turnkey engineering, construction, maintenance, turnaround, and fabrication services. Headquartered in San Antonio, Texas, the Company has approximately 20,000 employees and has worked on some of the largest industrial projects in the United States. The Company was founded 100 years ago, in 1924, by H.B. Zachry. His first construction project was a series of four concrete-reinforced bridges in Laredo, Texas, which he built using mule-drawn wagons. Throughout the twentieth century, the Company completed high profile projects across the United States and the rest of the world, including the dredging of the Colorado River in Austin, Texas to increase the river’s depth and width, the engineering and construction of the Hilton Palacio del Rio Hotel in San Antonio, and on the other side of the globe, the completion of the U.S. Embassy in Moscow in the wake of the Cold War. In 1998, a third generation of Zachrys—brothers David Zachry and John Zachry—took over the business. A decade later, in 2008, the brothers split the business into two independent and separately run organizations: (1) Zachry Group, led by John Zachry and comprised of entities that

include the Debtors in these chapter 11 cases, which focuses on industrial projects, and (2) Zachry Construction Corporation, led by David Zachry, which focuses on heavy civil and building construction work. The two organizations have operated independently since. No entities related to Zachry Construction Corporation's business are included in these chapter 11 cases.

8. Today, Zachry Group, including the Debtors in these chapter 11 cases, is known for providing top-notch engineering and construction services to clients in the energy, chemicals, power, manufacturing, and industrial sectors across North America, all with an attention to detail and client service that customers have learned comes standard with the Zachry name. The Company had approximately \$5.4 billion in operating revenues in 2023. Debtor Zachry Industrial, Inc. ("ZII") is currently engaged in the construction of 5 major projects with an aggregate contract value of approximately \$25.1 billion, approximately \$13.8 billion of which constitutes ZII's share of the contract value (as opposed to its joint venture partners). In addition, the Debtors are engaged in over 700 hundred smaller maintenance, warranty, or site-support projects.

9. Additional factual background and information regarding the Debtors, including their business operations, their corporate and capital structure, and the events leading to the commencement of these chapter 11 cases, is set forth in detail in the First Day Declaration.

II. Debtors' Employees

10. As of May 21, 2024, the Debtors collectively employ approximately 20,000 employees. Zachry Industrial, Inc. employs approximately 12,993 of the employees, Zachry Maintenance Services, LLC employs approximately 2,965 of the employees, J.V. Industrial Companies, LLC employs approximately 2,732 of the employees, Zachry Enterprise Solutions, LLC employs approximately 498 of the employees, Zachry Engineering Corporation employs approximately 457 of the employees, , JVIC Fabrication, LLC employs approximately 214 of the employees, Zachry Nuclear Engineering, Inc. employs approximately 103 of the employees and

Madison Industrial Services Team, LLC (“**Madison**”) employs the remaining approximately 37 employees.

11. The employees perform a wide variety of services that are critical to the Debtors’ businesses and restructuring efforts. Most of the Debtors’ employees are stationed at their service locations across the country, while approximately 454 of the Debtors’ employees are stationed at the Debtors’ headquarters in San Antonio, Texas.

12. The employees’ skills, knowledge, and understanding of the Debtors’ infrastructure and operations are essential to the continued operation and viability of the Debtors’ businesses and preserving operational stability and efficiency. Many of the employees are highly trained personnel who are not easily replaced. Without their continued, uninterrupted employment, the Debtors will not be able to maintain their operations during these chapter 11 cases.

13. The Debtors believe that the vast majority of the employees rely exclusively on their compensation and benefits to pay their daily living expenses and support their families. Thus, employees will be exposed to significant financial hardship if the Debtors are not permitted to continue payment of their compensation, provide benefits, and maintain existing programs. The Debtors seek to minimize any personal hardship the employees would suffer if the obligations described herein were not satisfied by the Debtors when due or expected. The Debtors intend to continue their prepetition employee practices, programs, and policies in the ordinary course of business on a postpetition basis and, subject to the Court’s approval of the relief sought herein, to pay prepetition amounts related thereto, subject to and in accordance with the requirements imposed on the Debtors in any orders entered by this Court authorizing the Debtors’ use of cash collateral (any such order, including for the avoidance of doubt, the approved cash collateral budget, a “**Cash Collateral Order**”).

III. Employee Compensation and Benefits

14. The Debtors seek authority to: (a) pay and honor certain prepetition claims, if any, related to, among other things, Compensation Obligations, Reimbursement Obligations, Withholding Obligations, Employee Benefits Obligations, 401(k) Plan Obligations, and Independent Contract Obligations (each as defined below, and collectively, the “**Compensation and Benefits**”). Subject to Court approval, the Debtors intend to continue their applicable prepetition Compensation and Benefits in the ordinary course. Out of an abundance of caution, the Debtors further request confirmation of their right to modify, change, or discontinue any of the Compensation and Benefits, and to implement new programs, policies, and benefits in the ordinary course of business on a postpetition basis in the Debtors’ sole discretion and without the need for further Court approval, subject to applicable law and the Cash Collateral Order.

15. The Debtors believe that, as of the Petition Date, the aggregate amount of accrued prepetition Compensation and Benefits is approximately \$60,242,895. The prepetition amounts owing in relation to the Compensation and Benefits that the Debtors are seeking authority to pay pursuant to this Motion are summarized in the following table:

Employee Compensation and Benefits	Estimated Approximate Amount
Compensation Obligations	\$47,339,096
Reimbursement Obligations	\$5,625,891
Withholding Obligations	\$3,325,939
Employee Benefits Obligations	\$3,951,969
TOTAL:	\$60,242,895

A. Compensation Obligations

16. The Debtors pay the employees' salaries, wages, and other compensation (including overtime pay)³ in exchange for the services they provide. In the ordinary course of business, Debtors Zachry Engineering Corporation, Zachry Industrial, Inc., Zachry Enterprise Solutions, LLC, Zachry Nuclear Engineering, Inc., JVIC Fabrication, LLC, Zachry Maintenance Services, LLC, J.V. Industrial Companies, LLC, and Madison pay Compensation Obligations on a weekly basis to their respective employees, other than officers, who are paid monthly. The Debtors pool payroll funds for non-officer employees on Wednesday of each week, with the payroll process beginning Monday and Tuesday evenings. Such non-officer employees are paid on Thursdays, typically via direct deposit,⁴ in arrears for the preceding pay period.⁵ Officers are typically paid on the 12th of each month for the current month.⁶ Each paycheck includes earnings, net of deductions for taxes and garnishments, for all work performed during that period and any PTO (defined below) during the period it covers (collectively, the "**Compensation Obligations**"). The Debtors' last scheduled payroll before the Petition Date was made on May 16, 2024. The approximate amount of payroll processing fees paid by the Debtors each month is \$6,185.

17. The Debtors estimate that, as of the Petition Date, the aggregate amount of accrued, but unpaid prepetition Compensation Obligations totals approximately \$47,339,096.⁷ The Debtors

³ In addition to their standard hourly wage, eligible hourly employees may be entitled to overtime compensation, which is typically paid at 1.5 times the hourly employee's regular rate of pay.

⁴ Certain employees of Debtor Madison are paid via check.

⁵ Pay periods either cover the preceding Saturday to Friday, Sunday to Saturday, or Monday to Sunday, of the week prior to payment, depending on the type of employee.

⁶ If the 12th falls on a weekend or holiday, then officers are paid on the last weekday prior to the 12th.

⁷ This amount is the net total that will be received by employees on account of Compensation Obligations. Other amounts paid in connection with the Compensation Obligations, such as Withholdings Obligations, Employee Benefits Obligations, and Employee Bonus Obligations (each as defined below), are separately addressed below. The Debtors are not, by this Motion, seeking to pay any Employee Bonus Obligations, but reserve the right to

seek authority to continue paying Compensation Obligations in the ordinary course and to pay any prepetition amounts owed in full, up to the \$15,150 priority cap under section 507(a)(4) of the Bankruptcy Code, subject to and in accordance with the Cash Collateral Order.

B. Reimbursement Obligations

18. In the ordinary course of business, the Debtors reimburse their employees for certain eligible expenditures (“**Reimbursable Expenses**”) incurred by the employees. These reimbursements are made on account of Out-of-Pocket Expenses, the Relocation Program, the Cell Phone Allowance Program, and the Employee Vehicle Program (each as defined below, and collectively, the “**Reimbursement Obligations**,” and the programs such obligations are incurred under, the “**Reimbursement Programs**”).

19. As of the Petition Date, the Debtors estimate an aggregate of approximately \$5,625,891 in accrued but unpaid prepetition Reimbursement Obligations. The Debtors seek authority to pay such prepetition Reimbursement Obligations and continue the Reimbursement Programs in the ordinary course, including payment of all Reimbursement Obligations incurred in the ordinary course, subject to and in accordance with the Cash Collateral Order. Each of the Reimbursement Obligations is described in further detail below.

20. Out-of-Pocket Expenses. Certain of the Debtors’ employees who use personal credit cards or cash for business-related expenses (including airfare, lodging, rental cars, and meals related to business travel as well as tolls, parking, and other business-related purchases,

seek to pay additional Bonus Obligations, including amounts owed under prepetition bonus agreements, by later motion.

collectively, the “**Out-of-Pocket Expenses**”), are entitled to reimbursement after certain approvals are received in accordance with internal policies and procedures.⁸

21. Relocation Reimbursement Program. The Debtors offer variable reimbursements (“**Relocation Reimbursements**”) to employees required to relocate in the course of their employment (the “**Relocation Reimbursement Program**”). In calendar year 2023, the Debtors paid an aggregate of approximately \$588,000 in Relocation Reimbursements. As of the Petition Date, the Debtors estimate that the total accrued but unpaid obligations on account of the Relocation Reimbursements are approximately \$8,055.

22. Cell Phone Allowance Program. The Debtors reimburse cell phone expenses for certain of their employees by providing a cell phone allowance of \$50 per month (the “**Cell Phone Allowance Program**”). The Debtors expect to spend approximately \$43,750 monthly and \$525,000 annually through the Cell Phone Allowance Program. As of the Petition Date, the Debtors estimate that the total accrued but unpaid obligations on account of the Cell Phone Allowance Program are approximately \$197,581.

23. Employee Vehicle Programs. The Debtors reimburse certain of their employees for expenses related to the use of personal vehicles in the course of their work through a vehicle allowance disbursed with regular payroll that is subject to applicable taxes (the “**Vehicle Allowance Program**”). Alternatively, certain employees are supplied with company vehicles, and the Debtors pay for the lease, fuel, maintenance, and insurance for such vehicles on behalf of the applicable employee (the “**Vehicle Leasing Program**” and together with the Vehicle Allowance

⁸ Most business-related expenses incurred by employees in the course of their work for the Debtors are paid through purchase cards issued through programs with Comdata Network Inc., Comerica Bank, Gelco Corporation, Regions Bank, and U.S. Bank (the “**Purchase Card Program**”). The Out-of-Pocket Expenses are separate from the Purchase Card Program. There are no amounts owed in connection with the Purchase Card Program as of the Petition Date.

Program, the “**Employee Vehicle Programs**”). The Debtors expect to spend approximately \$117,065 weekly and \$6,087,364 annually through the Employee Vehicle Program. As of the Petition Date, the Debtors estimate that the total accrued but unpaid obligations on account of the Employee Vehicle Programs are approximately \$5,420,256.

C. Withholding Obligations

24. The Debtors are required by law to withhold from employees’ salaries, wages, and other compensation amounts related to federal, state, and local income taxes, as well as Social Security and Medicare taxes (collectively, the “**Withholding Taxes**”) and remit them to the appropriate taxing authorities (collectively, the “**Taxing Authorities**”). The Debtors are also required to make payments from their own funds on account of Social Security and Medicare taxes and to pay, based on a percentage of gross payroll (and subject to state-imposed limits), additional amounts to the Taxing Authorities for, among other things, state and federal unemployment insurance (collectively, the “**Employer Payroll Taxes**” and, together with the Withholding Taxes, the “**Payroll Tax Obligations**”). The Debtors’ average weekly liabilities for Withholding Taxes and Employer Payroll Taxes total approximately \$6,834,015 and \$588,006, respectively. The Debtors estimate that they will be required to withhold approximately \$3,180,867 on account of prepetition Payroll Tax Obligations as of the Petition Date.

25. In the ordinary course of processing payroll for employees, the Debtors may also be required by law to withhold from the wages of certain employees amounts for various garnishments, such as tax levies, child support or other court-ordered garnishments (collectively, the “**Garnishments**,” and together with the Payroll Tax Obligations, the “**Withholding Obligations**”). Each pay cycle, the Debtors withhold such amounts from the applicable employees’ paychecks and remit them to the appropriate governmental authorities or entities. On account of the most recent pay period, the Debtors withheld approximately \$338,503 on account

of Garnishments, all of which was remitted by the Debtors. The Debtors estimate that they will be withholding approximately \$145,073 on account of prepetition Garnishments as of the Petition Date.

26. As of the Petition Date, the Debtors estimate that the aggregate amount of prepetition Withholding Obligations they will have to withhold and remit totals approximately \$3,325,939. The Debtors seek authority to continue collecting and remitting the Withholding Obligations incurred in the ordinary course and to remit any prepetition amounts withheld, or otherwise required to be paid.

D. Employee Benefits Obligations

27. In addition to the aforementioned payment-related obligations, the Debtors maintain various employee benefit plans and policies for eligible employees. The benefit programs fall within the following categories: (i) Medical Benefits Program, (ii) Insurance Benefits Program, (iii) Retirement Plans, and (iv) Leave Policy (each as defined below, and collectively, the “**Employee Benefit Programs**,” and the obligations related thereto, the “**Employee Benefits Obligations**”). The Debtors estimate that, as of the Petition Date, the aggregate accrued, but unpaid prepetition amounts related to Employee Benefit Programs, including withholdings for pre-tax and after-tax deductions payable pursuant to the Employee Benefits Programs, totals approximately \$3,951,969, which will not exceed the cap set forth in section 507(a)(5) of the Bankruptcy Code on a per employee basis. The Employee Benefit Programs are explained in more detail below.

i. Medical Benefits Program

28. The Debtors offer certain eligible employees and their eligible dependents the opportunity to participate in a number of health benefits plans, including the Major Medical Plans, the HSA Program, the Dental Plan, the Vision Plan, the Basic Medical Plan, COBRA, the

Executive Plans, the Home Office Clinic Program, the Global Travel Medical Plan, and Stop-Loss Insurance (each as defined herein, and collectively, the “**Medical Benefits Program**”).

29. As of the Petition Date, the Debtors estimate an aggregate of approximately \$2,977,208 in prepetition amounts are accrued and unpaid under the Medical Benefits Program. The Debtors seek authority to continue paying their obligations under the Medical Benefits Program in the ordinary course and to pay, in full, any prepetition amounts on account thereof. The Medical Benefits Program is described in more detail below.

30. Major Medical Plans. The Debtors offer medical coverage (the “**Major Medical Plans**”) to certain eligible employees and their dependents through Blue Cross and Blue Shield of Texas (“**BCBS**”). The Major Medical Plans are self-insured by the Debtors and partly funded by premiums withheld from the salaries of employees in the amount of their applicable share of the cost of administering the Major Medical Plans. Under the Major Medical Plans, the employees receive the benefit of access to the service network provided by BCBS and the Debtors pay BCBS administrative fees for its services and amounts BCBS pays to third party network providers on account of claims under the Major Medical Plans. The Major Medical Plans include prescription drug coverage through CVS Caremark. As of the Petition Date, the Debtors estimate that the Major Medical Plans have approximately 11,358 program participants, which includes employees and their dependents. The monthly cost of the Major Medical Plans varies based upon the number of eligible employees who participate in the programs but has historically been approximately \$4,359,811 per month. Every week, the Debtors receive a statement from BCBS setting out the amount owing under the Debtors’ Major Medical Plans with respect to claims for the preceding week. That amount is then withdrawn from the Debtors’ specified account by BCBS each Tuesday. Claims amounts owed in relation to CVS Caremark prescriptions are also paid weekly

on Wednesdays or Thursdays. Administrative fees and costs are paid to BCBS and CVS on a monthly basis. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations under the Major Medical Plans are approximately \$2,672,142.

31. HSA Program. Employees enrolled in the health savings account medical plan may contribute a portion of their pre-tax compensation into a health savings account (an “HSA,” and the applicable program the “HSA Program”) administered through Fidelity. Participating employees may pay eligible health-related expenses with funds from their HSA account. The participating employee annual limit for all contributions, as set by the IRS, is \$4,150 and \$8,300 in 2024 for employees enrolled in single and family coverage respectively. The Debtors contribute to employees’ HSAs by offering an annual contribution of \$250 which is pro-rated on a weekly or monthly basis depending on a participant’s payroll frequency. Those funds then are credited to the HSA bank account of the participating employee. On average, the Debtors pay approximately \$39,584 each month in employer contributions on account of the HSA Program. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations on account of the HSA Program are approximately \$24,727.

32. Dental Plan. The Debtors offer eligible employees dental coverage (the “Dental Plan”) through Metropolitan Life Insurance Company (“MetLife”). As of the Petition Date, the Debtors estimate that the Dental Plan has approximately 14,726 program participants, including employees and their dependents. On average, approximately 20% of the costs of aggregate Dental Plan premiums are funded by eligible employees that participate in the program, while approximately 80% of the costs of aggregate Dental Plan premiums are funded by the Debtors. The Debtors withhold the applicable share of premiums from participating employees’ salary and wages each payroll period. The Debtors pay MetLife approximately \$382,459 per month on

account of the Dental Plan. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations under the Dental Plan are approximately \$234,410.

33. Vision Plan. The Debtors offer eligible employees vision coverage (the “**Vision Plan**”) through MetLife. As of the Petition Date, the Debtors estimate that the Vision Plan has approximately 13,194 program participants, including employees and their dependents. The Debtors do not contribute to the Vision Plan, but withhold the applicable premiums from participating employees’ salary and wages each payroll period. The Debtors then remit the participating employees’ premiums to MetLife on a monthly basis.

34. Basic Medical Plan. The Debtors offer eligible employees minimal essential coverage medical insurance (the “**Basic Medical Plan**”) through Pan-American Life. Preventive care (“**Preventive Care**”) provided through this program is self-insured by the Debtors. All other services through this program, including doctor’s office visits, surgical benefits, and prescription drugs, are fully insured. The premiums and costs associated with the Basic Medical Plan are shared between employees and the Debtors, with the exception of first-year craft employees who pay the full amount of their premiums. The Debtors withhold the applicable amount for the Basic Medical Plan from participating employees’ wages and remit those premiums to Pan-American Life on a monthly basis. The Debtors pay premium payments related to the Basic Medical Plan to Pan-American Life of approximately \$192,847 per month, while the monthly cost of Preventative Care has historically been approximately \$9,967 per month. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations resulting from the Basic Medical Plan, including Preventive Care, are approximately \$19,355.

35. COBRA. Under the Consolidated Omnibus Budget Reconciliation Act (“**COBRA**”), employees and their families who are terminated have the right to continue their

health benefits from their employer for a limited period of time and under certain circumstances. COBRA benefits are provided to exiting employees as required by law. The cost of COBRA is borne by the exiting employees or previously covered eligible dependents, including an administration fee of \$8.50 per enrolled COBRA participant. The costs of the administration fees associated with COBRA are embedded within the Major Medical Plans, the Basic Medical Plan, the Dental Plan and the Vision Plan.

36. Executive Plans. The Debtors provide physicals for 40 executives of the Debtors (the “**Executive Physicals**”), as well as executive health care (“**Executive Health Care**”) for 6 executives through Armada Care (collectively the “**Executive Plans**”). Executive Health Care is fully insured and the Debtors bear the cost of Executive Health Care premiums which are paid by the Debtors monthly. The Debtors expect an annualized cost of approximately \$159,496 for the Executive Health Care program. The Executive Physicals cost a flat fee per-service paid by the Debtors semi-yearly, with an approximate annual cost of \$128,800. For 2024 the Debtors owe one remaining Executive Physicals payment of \$64,000 which will become due in June. In total, the Debtors expect an annualized cost of approximately \$288,296 for the Executive Plans. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations related to the Executive Plans are approximately \$8,303.

37. Home Office Clinic Program. The Debtors offer an onsite home office clinic program (“**Home Office Clinic Program**”) which provides in-person acute care for certain eligible employees. The Debtors bear most of the costs of the Home Office Clinic which are paid monthly, though employees have an obligation to make a co-payment of \$44 per visit. The Debtors expect a monthly cost of approximately \$29,250 for the Home Office Clinic program, though the Debtors expect to cease offering this program on May 31, 2024. As of the Petition Date, the

Debtors estimate that their total accrued but unpaid obligations related to the Home Office Clinic are approximately \$18,271.

38. Global Travel Medical Plan. The Debtors provide medical insurance for employees travelling internationally for business (the “**Global Travel Medical Plan**”) through Cigna. The Debtors pay one-hundred percent (100%) of the premiums associated with the Global Travel Medical Plan. As of the Petition Date, the Debtors estimate that they have no unpaid obligations on account of the Global Travel Medical Plan.

39. Stop-Loss Insurance. The Debtors maintain stop-loss insurance (the “**Stop-Loss Insurance**”) through BCBS. The Stop-Loss Insurance has a deductible of \$500,000 before coverage begins. The Debtors pay the premiums associated with the Stop-Loss Insurance monthly, and the Stop-Loss Insurance costs are embedded within the Major Medical Plans. The Debtors seek authority to pay any unpaid prepetition amounts on account of the Stop-Loss Insurance and to continue the Stop-Loss Insurance on a postpetition basis in the ordinary course of business, subject to and in accordance with the Cash Collateral Order.

ii. Insurance Benefits Program

40. The Debtors offer certain insurance benefit plans to the employees under various policies and programs. These include the Basic Term Life Insurance Plan, the AD&D Insurance Plan, the Long-Term Disability Plan, the Short-Term Disability Plan, the Voluntary Long-Term Disability Plan, the Voluntary Life Insurance Plan, the Business Travel Accident Plan, the Critical Illness Insurance Plan, the Accident Insurance Plan, the Hospital Indemnity Plan, the Employee Assistance Program, the Safety Nets Program, and the Executive LifeLock Program (each defined herein, and together the “**Insurance Benefits Program**”).

41. In total under all plans and programs that make up the Insurance Benefits Program, as of the Petition Date, the Debtors estimate that they will owe or hold on behalf of employees an

aggregate of approximately \$102,695. The Debtors seek authority to pay or remit such prepetition amounts and continue the Insurance Benefits Program, and all constituent plans and programs, in the ordinary course. The Insurance Benefits Program is described in more detail below.

42. Basic Term Life Insurance Plan. The Debtors provides certain eligible employees with basic term life insurance (the “**Basic Term Life Insurance Plan**”), which is fully insured by The Standard. Premiums vary based upon the number of employees who receive coverage and the insured covered amount (based on either a flat amount or a multiple of salary), but total approximately \$134,372 per month. The Debtors pay one-hundred percent (100%) of Basic Term Life Insurance Plan premiums. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations on account of the Basic Term Life Insurance Plan are approximately \$82,357.

43. AD&D Insurance Plan. The Debtors provide certain eligible employees with the option to enroll in accidental death and dismemberment insurance coverage (the “**AD&D Insurance Plan**”), which is fully insured by The Standard. Premiums vary based on employee elections and covered amounts and are withheld from participating employees’ wages monthly, which the Debtors then remit to The Standard on a monthly basis.

44. Long-Term Disability Plan. The Debtors provide certain eligible employees with long-term disability benefits (the “**Long-Term Disability Plan**”) administered through The Standard. For employees earning less than \$200,000 annually, the Long-Term Disability Plan benefit is limited to 60% of the employee’s base monthly earnings up to \$10,000 per month with most benefits beginning one hundred and eighty (180) days after the onset of a covered and approved disability. For eligible employees earning \$200,000 or more annually, the benefit is 60% of the employee’s base monthly earnings with no cap. The Debtors pay one-hundred percent

(100%) of premiums for Long-Term Disability Plan coverage and remit those premiums to The Standard on a monthly basis. On average, the Debtors pay approximately \$119,601 per month on account of the Long-Term Disability Plan. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations related to the Long-Term Disability Plan are approximately \$19,660.

45. Short-Term Disability Plan. The Debtors provide certain eligible employees with the option to enroll in short-term disability benefits (the “**Short-Term Disability Plan**”) administered through The Standard. The Short-Term Disability Plan benefit is limited to 60% of the employee’s base weekly earnings up to \$1,000 per week with most benefits beginning fourteen (14) days after the onset of a covered and approved disability. The Debtors withhold premiums for Short-Term Disability Plan coverage from participating employees’ wages and remit those premiums to The Standard on a monthly basis.

46. Voluntary Long-Term Disability Plan. The Debtors provide certain eligible employees with the option to purchase additional long-term disability coverage (the “**Voluntary Long-Term Disability Plan**”) provided by The Standard. The Voluntary Long-Term Disability Plan is limited to 50% of the employee’s base monthly earnings up to \$10,000 per month and begins 180 days after disability, lasting until the earlier of the date at which the employee is no longer disabled or reaches social security retirement age. The Debtors withhold premiums for the Voluntary Long-Term Disability Plan from participating employees’ wages and remit those premiums to the appropriate carriers on a monthly basis.

47. Voluntary Life Insurance Plan. The Debtors provide certain eligible employees with the option to purchase additional life insurance (the “**Voluntary Life Insurance Plan**”) provided by The Standard. The Debtors withhold premiums for the Voluntary Life Insurance Plan

from participating employees' wages and remit those premiums to the appropriate carriers on a monthly basis. The Debtors withhold premiums for Voluntary Life Insurance Plan coverage from participating employees' wages and remit those premiums to The Standard on a monthly basis.

48. Business Travel Accident Plan. Eligible employees are automatically covered under the Debtors' business travel accident policy (the "**Business Travel Accident Insurance Plan**") provided by The Hartford Life & Accident Insurance Company. This policy provides eligible employees coverage for accidental loss of life, loss of limb, as well as other covered losses, as a result of an accident on a business trip paid for and approved by the Company. As of the Petition Date, the Debtors estimate that they have no unpaid obligations on account of the Business Travel Plan.

49. Critical Illness Insurance Plan. Employees may elect to purchase critical illness insurance (the "**Critical Illness Insurance Plan**") at their own expense. The Critical Illness Insurance Plan is administered by MetLife. The Debtors withhold the applicable amount from participating employees' wages and transfer those premiums to MetLife monthly. The Debtors transfer approximately \$90,067 per month in withheld employee contributions to MetLife on account of the Critical Illness Insurance Plan.

50. Accident Insurance Plan. Employees may elect to purchase accident insurance (the "**Accident Insurance Plan**") at their own expense. The Accident Insurance Plan is administered by MetLife. The Debtors withhold the applicable amount from participating employees' wages and remit those premiums to MetLife. The Debtors transfer approximately \$62,925 per month in withheld employee contributions to MetLife on account of the Accident Insurance Plan.

51. Hospital Indemnity Plan. Employees may elect to purchase hospital indemnity coverage (the "**Hospital Indemnity Plan**") at their own expense. The Hospital Indemnity Plan is

administered by MetLife. The Debtors withhold the applicable amount from participating employees' wages and remit those premiums to MetLife monthly. The Debtors transfer approximately \$64,998 per month in withheld employee contributions to MetLife on account of the Hospital Indemnity Plan.

52. Employee Assistance Program. The Debtors provide employees with an Employee Assistance Program (“EAP”) that provides employees and eligible family members access to licensed counselors through a third-party provider, as well as coaching and referrals to qualified professionals. The EAP is largely an internal program self-funded by the Debtors and paid from general assets. However, the Debtors rely on a third-party, ESPYR, for certain EAP services, including intake calls, counseling sessions and legal referrals, to which the Debtors pay approximately \$821.25 per month. The Debtors seek authority to continue to honor their obligations under the EAP in the ordinary course. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations related to the EAP are approximately \$513.

53. Safety Nets Program. The Debtors provide employees with a voluntary plan that features a bundle of services, including identity theft protection, roadside assistance, and virtual healthcare (The “**Safety Nets Program**”). The Safety Nets Program is administered by National Benefits Plans, Ltd. (“National Benefits”). The Debtors withhold the applicable amount from participating employees' wages and remit those premiums to National Benefits monthly. The Debtors transfer approximately \$18,543 per month in withheld employee contributions to National Benefits under the Safety Nets Program.

54. Executive LifeLock Program. The Debtors provide executive with an identity theft protection program (the “**Executive LifeLock Program**”). The Executive LifeLock Program is administered by National Benefits Plans, Ltd. (“National Benefits”). The Debtors pay one-

hundred percent (100%) of premiums for, and on average pay approximately \$1,002 per month on account of, the Executive LifeLock Program. As of the Petition Date, the Debtors estimate that their total accrued but unpaid obligations related to the Executive LifeLock Program are approximately \$165.

55. Other Employee Obligations. The Debtors provide their employees with the opportunity to pledge dollars to United Way and maintains a dollar-for-dollar match of employee contributions (such employee and employer contributions, the “**Other Employee Obligations**”). Employees can select from various giving options, which typically range from \$5 per week to approximately \$40 per week, with the option to select a custom amount. The Debtors remit the employee contribution portion of the Other Employee Obligations to United Way one month in arrears in the middle of each month for the preceding month. The Debtors typically remit their employer match by the end of the applicable calendar year. As of the Petition Date, approximately \$321,300 in prepetition Other Employee Obligations are accrued and unpaid, which the Debtors seek to remit to United Way pursuant to this motion in the ordinary course.

iii. Retirement Plans

56. The Debtors maintain two retirement plans for their employees, the 401(k) Plan and the Deferred Compensation Plan (each as defined below, and collectively, the “**Retirement Plans**”). The Retirement Plans are explained in more detail below.

57. 401(k) Plan. The Debtors maintain a defined contribution plan for the benefit of all eligible employees (the “**401(k) Plan**”) meeting the requirements of sections 401(a) and 401(k) of the Internal Revenue Code. As of the Petition Date, 15,106 employees have account balances in the 401(k) Plan. The 401(k) Plan is primarily funded by withholdings from employees’ wages and salaries (the “**401(k) Plan Withholdings**”). The Debtors remit the 401(k) Plan Withholdings to the plan trustee, Fidelity (the “**401(k) Plan Trustee**”), on a weekly basis every Thursday. In

addition, as part of the 401(k) Plan, the Debtors have historically matched 100% of employee 401(k) contributions for the first 3% of such contributions and matched 50% for the next 3% of contributions. The Debtors have historically funded these matches weekly every Thursday for non-officers and monthly for officers, in connection with their regular payroll, with matches being remitted to Fidelity a few days after the payroll process ends. The Debtors estimate that their total accrued but unpaid obligations related to the 401(k) Plan (the “**401(k) Plan Obligations**”) will be approximately \$550,766. The Debtors seek authority, but not direction, to continue to honor their obligations under the 401(k) Plan in the ordinary course and to remit and pay any prepetition amounts on account of the 401(k) Plan, including matching contributions consistent with historical practices, in all instances subject to and in accordance with the Cash Collateral Order.⁹

58. Deferred Compensation Plan. The Debtors offer a supplemental non-qualified deferred compensation plan providing tax deferred income for certain employees (the “**Deferred Compensation Plan**”). The Deferred Compensation Plan provides participating employees with the opportunity to defer payment of certain earned compensation, thereby deferring the associated income tax obligations to a later date. The amount that the Debtors pay to plan participants in pay-status through the Deferred Compensation Plan each year varies, and is dependent on, among other things, the employment status of the participants and elections made by the participants as to the timing of payments. While the Debtors stopped matching contributions to the Deferred Compensation Plan after 2015, the Debtors still owe some amounts to participants from employer matches to employee contributions under the Deferred Compensation Plan. There are 333 participants in the Deferred Compensation Plan. As of the Petition Date, the Debtors estimate that

⁹ The Debtors reserve the right to discontinue matching contributions in the ordinary course of operations after the Petitions Date.

they owe participants approximately \$56,560,922.68 under the Deferred Compensation Plan, of which \$2,000,352.36 is from employer matches to employee contributions. The next payments scheduled under the Deferred Compensation Plan are scheduled to be made on June 12, 2024, to 77 of the Deferred Compensation Plan Participants.

59. The Deferred Compensation Plan is an unsecured obligation of the Debtors and provides that any payments made pursuant to the Deferred Compensation Plan must be made from assets available to the Debtors' general unsecured creditors. The Deferred Compensation Plan is funded by a rabbi trust which provides its assets are subject to the claims of the general creditors of Debtors. Under Section 409A of the Internal Revenue Code of 1986, as amended, and Treasury Regulations thereunder (the statute and regulations, "**Section 409A**") and the terms of the Deferred Compensation Plan, the Debtors may not terminate the plan if such termination occurs "proximate to a downturn in the financial health of the plan sponsor." However, both Section 409A and the plan document allow termination with the approval of the bankruptcy court.

60. Some participants have made employee deferral elections that they cannot change for 2024 without adverse tax consequences under Section 409A absent a termination of the plan. Since the Deferred Compensation Plan is an unsecured obligation of the Debtors, participants may never receive such amounts deferred from postpetition wages. Thus, rather than providing an income-enhancing tax benefit, any such deferrals made postpetition to the Deferred Compensation Plan may inequitably lower the participants' base compensation. Section 409A permits termination and liquidation of a nonqualified deferred compensation plan with the approval of a bankruptcy court which would terminate further deferrals being made to the plan. In any event, the bankruptcy court can determine that amounts deferred to the Deferred Compensation Plan postpetition should qualify as administrative claims under section 503(b)(1)(A) of the Bankruptcy

Code; *provided* that any such administrative expense status claim shall be junior and subordinate to the carve out and approved superpriority administrative expense claims provided for in any order, including a Cash Collateral Order.

61. With respect to the Deferred Compensation Plan, the Debtors are seeking an order of this Court, pursuant to section 363(b)(1) of the Bankruptcy Code and Rule 6004 of the Bankruptcy Rules, (a) authorizing, but not directing, the Debtors to terminate the Deferred Compensation Plan retroactive to the Petition Date,¹⁰ (b) deeming as an administrative claim under section 503(b) of the Bankruptcy Code any portion of a participant's regular postpetition income, earned on account of postpetition services provided for the benefit of the Debtors, that has been deferred or contributed to the Deferred Compensation Plan, or that has been elected for contribution to the Deferred Compensation Plan for the remainder of calendar year 2024 and going forward; *provided* that any such administrative expense status claim shall be junior and subordinate to the carve out and approved superpriority administrative expense claims provided for in any order, including a Cash Collateral Order, and (c) authorizing, but not directing, the Debtors to pay participants amounts deferred or contributed prepetition to the Deferred Compensation Plan, subject to the cap set forth in section 507(a)(4) of the Bankruptcy Code, in all instances subject to and in accordance with the Cash Collateral Order. The Debtors reserve the right to seek further relief with respect to the Deferred Compensation Plan by later motion.

¹⁰ Although the Debtors are seeking authority to terminate the Deferred Compensation Plan pursuant to this Motion to provide flexibility in the event that the Debtors determine that doing so is in the best interests of their estates, they do not intend to terminate the plan at this time.

iv. Leave Policy

62. The Debtors provide eligible employees with paid and unpaid time off benefits that include holidays, vacation days, sick days, personal days, family emergencies, and other permitted purposes (the “**Leave Policy**”).

63. As part of the Leave Policy, certain eligible full-time employees of the Debtors are eligible for vacation, paid time off, or rest and renewal time (collectively, “**PTO**”). Eligible full-time employees earn PTO in one of four tiers based on their job classification. Within each tier, employees earn additional PTO based on the length they remain employed by the Debtors. Under the Debtors’ policies and state law, when an employee leaves the Debtors or his or her service is terminated, she or he may be entitled to receive payment for their unused PTO (the “**PTO Obligations**”). For the avoidance of doubt, the Debtors are seeking authority to permit employees to take PTO during the pendency of these chapter 11 cases in the ordinary course of business. To the extent that any employees are entitled to a cash out of accrued PTO, the Debtors seek authority to pay any such amounts, subject to applicable statutory caps and subject to and in accordance with the Cash Collateral Order.¹¹

64. The Debtors believe that the continuation of the Leave Policy in accordance with prior practice is essential to maintaining employee morale during these chapter 11 cases. Further, the Leave Policy is a broad-based program upon which employees have come to depend. Finally, the Debtors anticipate that their employees will use any accrued paid leave in the ordinary course of business, which will not create any material cash flow requirements beyond the Debtors’ normal payroll obligations. The Debtors request authority to continue the Leave Policy in the ordinary

¹¹ The Debtors reserve all rights to seek later relief to pay any required cash out in excess of the statutory cap.

course and consistent with past practice and to honor any amounts accrued thereunder prior to the Petition Date.

E. Independent Contractor Obligations

65. In addition to the Debtors' employees, from time to time, the Debtors rely on the services of certain independent contractors (the "**Independent Contractors**") to complete discrete tasks. As of the Petition Date, the Debtors have contracted with approximately one (1) Independent Contractor. As of the Petition Date, the Debtors estimate that they have no unpaid obligations to the Independent Contractor.

F. Incentive and Retention Bonus Plans

66. The Debtors have historically maintained a variety of incentive plans (the "**Incentive and Retention Bonus Plans**") offered to certain employees for the purposes of reward and motivation. These plans include:

- (a) an ad hoc senior executive incentive plan and an ad hoc executive incentive plan offered to certain senior executives on a discretionary basis;
- (b) an ad hoc incentive plan offered to those employees of the Debtors with a "director" title or equivalent on a discretionary basis;
- (c) An ad hoc incentive plan offered to those employees of the Debtors with a title of "manager" or equivalent on a discretionary basis;
- (d) an ad hoc incentive plan offered to salaried exempt employees of the Debtors that are not included in the plans referenced above in (a)-(d);
- (e) an incentive plan offered for field superintendents on a discretionary basis; and
- (f) a retention plan offered to certain key employees of the Debtors on a discretionary basis.

67. While the Debtors do not seek authority to pay any prepetition amounts on account of the Incentive and Retention Bonus Plans by this Motion, the Debtors reserve the right to seek authority to enter into similar incentive plans at a later date.

Basis for Relief

I. Cause Exists to Authorize the Debtors to Honor the Compensation and Benefits

A. Certain Compensation and Benefits are Entitled to Priority

68. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code entitle certain of the Compensation and Benefits owed to the employees to priority treatment. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code requires the Debtors to pay wages, salaries, commissions, vacation, severance, sick leave, and contributions to employee benefits plans as administrative priority claims up to a limit of \$15,150 per individual. Because such claims are priority claims, the Debtors are required to pay them in full to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment in full of certain allowed unsecured claims for (a) wages, salaries, or commissions, including severance, and sick leave pay earned by an individual, and (b) contributions to an employee benefit plan). Thus, granting the relief requested herein with respect to payment of certain amounts up to the priority cap will likely only affect the timing of such payments, and should not negatively affect recoveries for general unsecured creditors. Payment of the Compensation and Benefits at this time enhances value for the benefit of all interested parties as the continued operation of the Debtors' business relies on the employees, without whom the Debtors would have to shut down operations and the enterprise value of their business would greatly decline.

B. Payment of Certain Compensation and Benefits is Required by Law

69. The Debtors seek authority to pay the Withholding Obligations to the appropriate third-party entities. These amounts principally represent employee earnings that governments, employees, and judicial authorities have designated for deduction from the employees' paychecks. Certain Withholding Obligations are not property of the Debtors' estates because the Debtors have withheld such amounts from the employees' paychecks on another party's behalf. *See* 11 U.S.C.

§§ 541(b)(1), (d). Furthermore, federal and state laws require the Debtors to withhold certain tax payments from the employees' paychecks and to pay such amounts to the appropriate taxing authority. 26 U.S.C. §§ 6672, 7501(a); *see also In re Chabrand*, 301 B.R. 468, 475–81 (Bankr. S.D. Tex. 2003) (noting that individual officers of a company may be held personally liable for failure to pay trust fund taxes). Because the Withholding Obligations may not be property of the Debtors' estates, the Debtors request that the Court authorize them to transmit the Withholding Obligations on account of the employees to the proper parties in the ordinary course of business.

II. Payment of the Employee Compensation and Benefits Is Warranted Under Sections 105(a), 363(b), and 1107 of the Bankruptcy Code

70. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], 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). Courts in the Fifth Circuit have granted a debtor’s request to use property of the estate outside of the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code upon a finding that such use is supported by sound business reasons. *See, e.g., Inst’l Creditors of Cont’l Air Lines, Inc. v. Cont’l Air Lines, Inc. (In re Cont’l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (“[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”); *see also In re Crutcher Res. Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987) (“A Bankruptcy Judge has considerable discretion in approving a § 363(b) sale of property of the estate other than in the ordinary course of business, but the movant must articulate some business justification for the sale.”).

71. Further, section 105(a) of the Bankruptcy Code provides that a court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the

Bankruptcy Code, pursuant to the “doctrine of necessity.” 11 U.S.C. § 105(a). The “doctrine of necessity” functions in a chapter 11 case as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical claims not explicitly authorized by the Bankruptcy Code and further supports the relief requested herein. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (recognizing the “doctrine of necessity”). Additionally, section 1107 of the Bankruptcy Code provides that a debtor in possession has, among other things, an “implied duty of the debtor-in-possession to ‘protect and preserve the estate, including an operating business’ going-concern value.” *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. at 497).

72. Payment of the Compensation and Benefits is warranted under this authority and the facts of these chapter 11 cases. The Debtors believe that the vast majority of the Debtors’ employees rely exclusively on their compensation and benefits to pay their daily living expenses and support their families. Thus, the employees will be exposed to significant financial difficulties if the Debtors are not permitted to honor obligations for unpaid Employee Compensation and Benefits. Consequently, the relief requested is necessary and appropriate.

73. The employees provide the services necessary for the Debtors to conduct business. The Debtors believe that, absent the payment of the Compensation and Benefits owed to the employees, the Debtors may experience turnover and instability, which they cannot afford during these chapter 11 cases. The Debtors believe that without these payments, the employees may become demoralized and unproductive because of the potential significant financial strain and other hardships they may face, causing them to elect to seek alternative employment opportunities. Additionally, a significant portion of the value of the Debtors’ business is tied to their employees, who cannot be replaced without significant efforts—which efforts may not be successful given the

potential overhang and stigma associated with being a debtor in possession. Enterprise value may be materially impaired to the detriment of all stakeholders in such a scenario. Payment of the prepetition obligations with respect to the Compensation and Benefits is thus a necessary and critical element of the Debtors' efforts to preserve value and will provide the Debtors the greatest likelihood of retention of their employees as the Debtors seek to operate their businesses in these chapter 11 cases.

74. Accordingly, the Debtors request that the Court authorize the Debtors to pay the prepetition and postpetition obligations specified herein and to continue the Compensation and Benefits in the ordinary course of business and consistent with past practice, in all instances subject to and in accordance with the Cash Collateral Order.

III. The Debtors Should be Authorized to Terminate the Deferred Compensation Plan Pursuant to Section 363(b) of the Bankruptcy Code

75. Although the Debtors do not intend to terminate the Deferred Compensation Plan at this time, terminating the Deferred Compensation Plan would be a sound exercise of the Debtors' business judgment and may be in the best interests of the Debtors' estates and stakeholders. Any portion of a participant's compensation deferred pursuant to the Deferred Compensation Plan will only be recoverable by participants only as a general unsecured claim against the Debtors' estates. *See, e.g., In re Silicon Graphics, Inc.*, 363 B.R. 690, 700 (Bankr. S.D.N.Y. 2007); *In re The Colonial BancGroup, Inc.*, 436 B.R. 695, 712 (Bankr. M.D. Ala. 2010). Thus, if the Debtors do not terminate the Deferred Compensation Plan, rather than providing a compensation enhancing benefit to participants, the Deferred Compensation Plan could inequitably lower participants' effective compensation going forward. Putting participants' compensation at risk would negatively impact the morale of key members of the Debtors' workforce and have a negative effect on the administration of the Debtors' chapter 11 cases, to the

detriment of all stakeholders. Moreover, the express terms of the Deferred Compensation Plan permit the Debtors to terminate the Deferred Compensation Plan with the approval of the bankruptcy court.

76. Accordingly, the Debtors submit that the relief requested with respect to terminating the Deferred Compensation Plan is a valid exercise of the Debtors' business judgment, and that terminating the Deferred Compensation Plan may be in the best interests of the Debtors, their estates, and all parties in interest in these chapter 11 cases.

77. Further, termination of the Deferred Compensation Plan may have adverse tax consequences to individual Participants, absent Bankruptcy Court approval. Because the Deferred Compensation Plan provides a form of deferred compensation, it is subject to the requirements of Section 409A, which imposes a tax penalty (in addition to ordinary income tax) on participants in nonqualified deferred compensation plans, including plans that are terminated and liquidated "proximate to a downturn in the financial health" of the employer, unless such terminations are made pursuant to bankruptcy court order. Treas. Reg. § 1.409A-3(j)(4)(ix)(C)(1). Nonqualified deferred compensation plans, can, however, be terminated "with approval of a bankruptcy court". Treas. Reg. § 1.409A-3(j)(4)(ix)(A). Additionally, distributions upon plan termination can be made with respect to a deferred compensation plan subject to IRC Section 409A, without additional penalties, if such payments are authorized by a bankruptcy court pursuant to 11 U.S.C. § 503(b)(1)(A).

78. As discussed above, if the Debtors do not terminate the Deferred Compensation Plan in the near-term, or seek other relief with respect to the Deferred Compensation Plan, a portion of certain of the Participants' postpetition salaries will be contributed to the Deferred Compensation Plan, inequitably reducing such Participants' postpetition base

compensation. Accordingly, the Court should authorize termination of the Deferred Compensation Plan.

79. Further, out of an abundance of caution and to ensure compliance with IRC Section 409(A), the Debtors request authority to treat as an administrative expense under section 503(b)(1)(A), any postpetition deferrals or contributions of the participants' salaries, earned on account of postpetition services provided to the Debtors, including any amounts that have been elected for deferral for calendar year 2024 (through elections that cannot be changed for 2024 under Section 409A) but that have not yet been contributed under the Deferred Compensation Plan; *provided* that any such administrative expense status claim shall be junior and subordinate to the carve out and approved superpriority administrative expense claims provided for in any order, including a Cash Collateral Order. Section 503(b)(1)(A) of the Bankruptcy Code expressly provides that "the actual, necessary costs and expenses of preserving the estate" include "wages, salaries, or commissions for services rendered after the commencement of the case . . ." 11 U.S.C. § 503(b)(1)(A); *see also In re Continental Airlines, Inc.*, 148 B.R. 207, 212 (D. Del. 1992) (wage claims which are paid to induce employees to continue to work for an employer who has filed a petition for Chapter 11 are necessary).

Processing of Checks and Electronic Fund Transfers Should Be Authorized

80. The Debtors have sufficient funds to pay the amounts described in this Motion in the ordinary course of business by virtue of expected cash flows from ongoing business operations. Under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the relief requested herein. There is minimal risk that checks or wire transfer requests that the Court has not authorized will be honored inadvertently. The Debtors request that the Court authorize and direct all applicable

financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested in this Motion.

Emergency Consideration

81. Bankruptcy Rule 6003 empowers a court to grant relief within the first twenty-one days after the Petition Date “to the extent that relief is necessary to avoid immediate and irreparable harm.” Failure to receive the relief requested in this Motion during the first 21 days of these chapter 11 cases would severely disrupt the Debtors’ operations at this critical juncture. The Debtors have satisfied the “immediate and irreparable” harm standard in Bankruptcy Rule 6003 and request that the Court approve the relief requested on an emergency basis.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

82. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14 day stay period under Bankruptcy Rule 6004(h).

Reservation of Rights

83. Nothing contained in this Motion nor any action taken pursuant to the relief requested herein is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Debtors’ rights to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a waiver of any claim or cause of action that may exist against any creditor or interest holder; (f) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (g) a waiver or limitation of the Debtors’ rights under the

Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to this Motion are valid and the Debtors expressly reserve their rights to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to an order of the Court is not intended and should not be construed as an admission as to the validity or priority of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

Notice

84. The Debtors will provide notice of this Motion to: (a) the United States Trustee for the Southern District of Texas; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) the United States Attorney's Office for the Southern District of Texas; (d) the state attorneys general for the states in which the Debtors operate; (e) the Internal Revenue Service; (f) the United States Securities and Exchange Commission; and (g) the Prepetition Agent, and (h) any party that has requested notice pursuant to Bankruptcy Rule 2002 and Bankruptcy Local Rule 9013-1(d). In light of the nature of the relief requested, no other or further notice need be provided.

The Debtors request that the Court enter the Interim Order and Final Order granting the relief requested in this Motion and such other and further relief as the Court deems appropriate under the circumstances.

Dated: May 21, 2024
Houston, Texas

/s/ Charles R. Koster

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*Proposed Counsel to the Debtors and
Debtors in Possession*

Certificate of Accuracy

I certify that the foregoing statements are true and accurate to the best of my knowledge. This statement is being made pursuant to Bankruptcy Local Rule 9013-1(i).

/s/ Charles R. Koster
Charles R. Koster

Certificate of Service

I certify that on May 21, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Koster
Charles R. Koster

Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due, sufficient, and proper notice of the Motion having been provided under the circumstances and in accordance with the Bankruptcy Rules and the Bankruptcy Local Rules, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the “**Hearing**”); and upon consideration of the First Day Declaration and the record of the Hearing and all of the proceedings had before this Court; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates, their creditors, their stakeholders, and all other parties in interest, and that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Debtors are authorized to pay, honor, and/or reimburse all prepetition and postpetition obligations on account of the Compensation and Benefits as set forth in the Motion, including, without limitation, Compensation Obligations, Reimbursement Obligations, Withholdings Obligations, Employee Benefits Obligations, 401(k) Plan Obligations, and Independent Contractor Obligations, subject to and in accordance with the Cash Collateral Order (defined below); *provided*, that the Debtors shall not make any payments to any member of their employees or Independent Contractors that exceed the priority cap amounts set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code; *provided further*, that nothing in this Order shall be construed to authorize the Debtors to pay, honor, or implement the Incentive and Retention Bonus Plans, as such programs are described in the Motion, without a further order from the Court.

2. The Debtors are authorized to continue, administer, modify, change, and/or discontinue the Compensation and Benefits and to implement new programs, policies, and

benefits, in the ordinary course of business and, consistent with past practices, using the business judgment standard of care, during these chapter 11 cases and without need for further Court approval, subject to applicable law.

3. The Debtors are authorized, in their sole discretion, to transmit any deductions previously withheld or deducted from the employee payroll on account of the Benefits to the appropriate third party recipient, subject to and in accordance with the Cash Collateral Order.

4. The Debtors are authorized to pay any and all Withholding Obligations, including, but not limited to, all local, state, and federal withholding and payroll-related taxes, social security taxes, Medicare taxes, or similar taxes related to the Employee Benefits Programs, whether withheld from employees' wages or paid directly by the Debtors to governmental entities and whether such taxes relate to the period before or after the Petition Date, subject to and in accordance with the Cash Collateral Order.

5. The Debtors are authorized to reimburse the employees for all Reimbursable Expenses and to make direct payments to third parties on account of amounts owed in connection with the Reimbursable Expenses, subject to and in accordance with the Cash Collateral Order.

6. The Debtors are authorized to "cash out" unpaid PTO upon termination of an employee to the extent required by applicable non-bankruptcy law.

7. The Debtors shall not make any bonus, incentive, retention, or severance payments to any Insiders (as such term is defined in section 101(31) of the Bankruptcy Code) without further order of this Court.

8. Neither this Order, nor any payments made by the Debtors pursuant to the Motion or this Order, shall be deemed to change the classification of any claim or to in any way change the rights or create new rights of any employees or Independent Contractors or any other person,

including, without limitation, the creation of any right to payment entitled to administrative expense priority pursuant to sections 503 and 507 of the Bankruptcy Code, and subject to and in accordance with the Cash Collateral Order.

9. Pursuant to section 363(b) of the Bankruptcy Code, the Debtors are, in the exercise of their reasonable business judgment, authorized, but not directed, to terminate the Deferred Compensation Plan, effective as of the Petition Date; *provided that* before terminating the Deferred Compensation Plan, the Debtors shall provide twenty-one (21) days advance notice to the U.S. Trustee and any statutory committee appointed in these Chapter 11 Cases. Upon expiration of the notice period, the Debtors shall be authorized to terminate the Deferred Compensation Plan unless any notice party has objected to such payment in writing to the Debtors. To the extent that the parties are unable to resolve any such objection within five (5) business days of receipt, the applicable notice party shall file a written objection with the Court.

10. The Debtors are authorized to pay any amounts deferred or contributed prepetition to the Deferred Compensation Plan, subject to the cap set forth in section 507(a)(4) of the Bankruptcy Code.

11. Nothing herein shall prejudice the rights of the Debtors to seek additional or further relief from the Court with respect to the Deferred Compensation Plan.

12. Amounts, if any, of Participants' postpetition base salary contributed or otherwise deferred to the Deferred Compensation Plan in connection with postpetition services provided to the Debtors by the Participants constitute administrative expenses of the Debtors and shall be paid to Participants pursuant to Section 503(b)(1)(A) of the Bankruptcy Code and Section 409A, subject to and in accordance with the Cash Collateral Order *provided that* any such administrative expense

status claim shall be junior and subordinate to the carve out and approved superpriority administrative expense claims provided for in any order, including a Cash Collateral Order.

13. The Debtors shall maintain a matrix/schedule of any amounts paid related to the Compensation and Benefits, made pursuant to this Order, including the following information: (a) the names of the payee; (b) the date and amount of the payment; (c) the category or type of payment, as further described and classified in the Motion; and (d) the Debtor or Debtors that made the payment. The Debtors shall provide a copy of such matrix/schedule to the U.S. Trustee, and any statutory committee appointed in these Chapter 11 Cases every 30 days beginning upon entry of this Order.

14. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, pay, and, if necessary, reissue any and all checks, including prepetition checks that the Debtors reissue postpetition, and electronic fund transfers drawn on the Debtors' bank accounts relating to the Employee Compensation and Benefits, whether such checks were presented or funds transfer requests were submitted prior to or subsequent to the Petition Date, *provided* that sufficient funds are available in the applicable accounts to make the payments.

15. The Debtors are authorized to execute and deliver such documents and to take and perform all actions necessary to implement and effectuate the relief granted in this Order.

16. Notwithstanding anything to the contrary contained in the Motion or this Order, any payment to be made and any relief or authorization granted hereunder shall be limited by, and shall be subject to, the requirements imposed on the Debtors in any orders entered by this Court authorizing the Debtors' use of cash collateral (any such order, including, for the avoidance of doubt, the approved cash collateral budget, a "**Cash Collateral Order**"). To the extent of any

conflict (but solely to the extent of such conflict) between the terms of this Order and the terms of any Cash Collateral Order, the terms of the Cash Collateral Order will govern.

17. Nothing contained in the Motion or this Order, nor any action taken pursuant thereto, nor any payment made pursuant to the authority granted thereby, is intended to be or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Debtors' rights to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a waiver of any claims or causes of action that may exist against any creditor or interest holder; (f) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (g) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the Motion are valid and the Debtors expressly reserve their rights to contest the extent, validity, or perfection or seek avoidance of all such liens.

18. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

19. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Bankruptcy Local Rules are satisfied by such notice.

20. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

21. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: _____, 2024
Houston, Texas

UNITED STATES BANKRUPTCY JUDGE