

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., <sup>1</sup>	)	Case No. 19-12239 (CSS)
Debtor.	)	

**MOTION OF DEBTOR FOR ENTRY OF ORDER (I) AUTHORIZING THE DEBTOR TO (A) PAY AND HONOR PREPETITION COMPENSATION, REIMBURSABLE BUSINESS EXPENSES, AND EMPLOYEE BENEFIT OBLIGATIONS, AND (B) MAINTAIN AND CONTINUE CERTAIN COMPENSATION AND BENEFIT PROGRAMS POSTPETITION; AND (II) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”) files this motion (this “Motion”) for the entry of an order authorizing the Debtor, in accordance with its current policies and practices, to: (a) pay and honor any prepetition obligations to its workforce of employees and independent contractors, and continue to honor ongoing obligations in the ordinary course of business, on account of accrued wages and salaries; (b) pay and honor any prepetition obligations, with respect to each of the Debtor’s employee benefits, plans, and programs (the “Benefit Programs”); (c) reimburse the employees for reasonable prepetition expenses incurred on behalf of the Debtor in the ordinary course of business (the “Reimbursable Expenses”); (d) pay all related prepetition payroll taxes and other deductions (the “Withholding Obligations”); and (e) pay, to the extent that any of the foregoing programs is administered, insured, or paid through a third-party administrator or provider, any prepetition claims of such

<sup>1</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



administrator in the ordinary course of business.<sup>2</sup> In support of this Motion, the Debtor respectfully represents as follows:

**Jurisdiction and Venue**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Debtor confirms its consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a), 363(b), 507(a)(4), 507(a)(5), 541, 1107(a), and 1108 of Title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 9013-1(m).

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<sup>2</sup> The Debtor does not seek any relief by this Motion relating to ordinary course employee bonuses. The Debtor will be filing a separate motion addressing such bonuses.

## **Background**

### **A. Case Background**

4. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or committee has been appointed in this chapter 11 case.

5. A more detailed description of the business and operations of the Debtor, and the events leading to the commencement of this chapter 11 case, is provided in the *Declaration of Frank Waterhouse in Support of First Day Motions*, filed concurrently herewith (the “Declaration”) and incorporated herein by reference.<sup>3</sup>

### **B. The Debtor’s Workforce**

6. The Debtor employs approximately 76 employees (the “Employees”), all but one of whom are full-time Employees. Approximately 55 Employees are salaried workers, while approximately 21 are hourly Employees. Except as otherwise noted, the Debtor provides the Benefit Programs (discussed below) to all of its Employees.

7. In addition to the Employees, the Debtor also periodically retains specialized individuals as independent contractors and temporary workers (the “Independent Contractors”) to complete certain projects or tasks. As of the Petition Date, the Debtor retained approximately six (6) Independent Contractors. The Independent Contractors are a critical

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<sup>3</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Declaration.

supplement to the efforts of the Employees and integral to the Debtor's operations and business.

8. Typically, the Employees, as well as the Independent Contractors, rely on their compensation and benefits (as applicable) to pay their daily living expenses and to support their families. If the Debtor is not permitted to continue to pay wages and salaries, provide employee benefits, and maintain benefit programs in the ordinary course of business, many of the Employees may be exposed to significant financial constraints. Consequently, the Debtor respectfully submits that the relief requested herein is necessary and appropriate under the facts and circumstances of this chapter 11 case.

9. As explained in more detail below, the Debtor seeks authority to pay, in its discretion, any prepetition amounts owed for the programs and benefits described in this Motion up to the cap amounts set forth in the chart below. The Debtor also seeks authority to continue to pay amounts related to the programs described in this Motion in the ordinary course of business.

<b>BENEFIT/PROGRAM</b>	<b>CAP AMOUNT<sup>4</sup></b>
Wages	\$50,000
Independent Contractor Compensation	\$40,000
Payroll Processor	\$2,500
Medical Plan/FSA	\$200,000
Dental Plan	\$15,000
Life and Disability Plans	\$15,000
Workers Compensation Plan	\$5,000

<sup>4</sup> Unless otherwise noted, the dollar caps included in the table above and in the proposed order include reasonable cushions in the event that the Debtor's estimates are understated.

COBRA	\$2,500
401(k) Plan	\$25,000
Other Employee Benefits	\$20,000
Reimbursable Expenses	\$110,000
Independent Contractor Compensation	\$40,000

**C. Employee and Contractor Compensation**

10. Employee compensation is comprised primarily of wages and salaries (“Wages”).<sup>5</sup> The current average payroll of the Debtor is approximately \$240,000 per calendar week on account of Wages.

11. Employees are paid Wages on a semi-monthly payroll schedule (*i.e.*, on the 15<sup>th</sup> day of each month, or the business day immediately preceding the 15<sup>th</sup> day if that day falls on a weekend or holiday, and the last business day of the month). Per the Debtor’s direction, payrolls are processed by a third party service provider, Paylocity (the “Payroll Processor”), and are generally funded with money in the Debtor’s operating account one (1) business day prior to the applicable payroll date. Although the Payroll Processor typically withdraws funds from the Debtor’s operating account using ACH, in some cases where the aggregate amount exceeds \$1,000,000 or the employee needs to be paid off-cycle as in the case of severance payments, the Debtor wires the money to the Payroll Processor or applicable

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<sup>5</sup> In addition to Wages, most Employees are eligible to receive bonuses under certain ordinary course programs. No commissions are paid to Employees. The Debtor will file a separate motion relating to ordinary course Employee bonuses. The Debtor further reserves the right to seek approval of an additional bankruptcy-related key employee incentive plan and key employee retention plan.

employee recipient. The Payroll Processor then makes the applicable payroll distributions to Employees on the applicable payday.

12. The Debtor's last payroll was paid to Employees on October 11, 2019 (four days early in light of the Debtor's anticipated bankruptcy filing), on account of Wages earned from October 1, 2019, through October 15, 2019. The next payroll date is October 31, 2019, with employees to be paid concurrently. Although the last payroll was paid a few days early, it is nonetheless possible that certain Employees did not receive payment of their prepetition Wages. Accordingly, the Debtor requests authority to pay up to \$50,000 to Employees in the aggregate on account of Wages for prepetition services (excluding any vacation or other paid-time-off, reimbursable expenses, or other compensation).<sup>6</sup>

**D. Payroll Administration Fees**

13. As noted above, the Debtor uses the Payroll Processor to administer its payroll. The Debtor estimates that it owes no more than \$2,500 to the Payroll Processor on account of prepetition costs and fees for administrative services as of the Petition Date. The Debtor seeks authority to pay any and all prepetition amounts owing to the Payroll Processor up to the cap requested herein and to continue to make payments on account of such fees and charges in the ordinary course of business postpetition.

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<sup>6</sup> As noted, unless stated otherwise, the dollar caps set forth herein and in the proposed order include reasonable cushions in the event that the Debtor's estimates are understated.

**E. Employee Benefits & Insurance Plans**

14. The Debtor provides eligible Employees with several Benefit Programs, including (a) medical, dental, life, disability, and other insurance plans, (b) a 401(k) plan, and (c) other benefit programs.

*(i) Medical Plan*

15. The Debtor offers eligible Employees and their dependents 100% employer-paid PPO health insurance coverage (the “Medical Plan”) through BlueCross BlueShield of Texas (“BCBS”). The Medical Plan is self-insured, but the Debtor maintains a stop-loss insurance policy with BCBS to cover catastrophic medical claims (the “Stop-Loss Insurance”). The total premiums cost of the Medical Plan, including the Stop-Loss Insurance, is approximately \$102,000 per month, paid by the Debtor each month in advance into a bank account used to pay medical/dental plan administrative fees and claims. From the total premiums of approximately \$102,000 per month, the Debtor pays approximately \$85,000 per month on average on medical claims asserted under the self-insured Medical Plan. Without the Medical Plan, the Employees and their dependents would be forced to either forego health insurance coverage entirely or obtain themselves potentially expensive out-of-pocket insurance coverage, which would likely adversely affect the Employees’ morale.

16. Relatedly, the Debtor provides Employees who participate in the Medical Plan with access to flexible spending accounts (the “FSA”), administered by Discovery Benefits, which can be used to cover incidental medical costs and dependent childcare. The Debtor pays

Discovery Benefits, on average, \$300 per month for the administration of the FSAs. The Debtor does not make any contributions to any Employee's FSA.

17. The Debtor believes that, as of the Petition Date, no more than \$200,000 will be owed on account of obligations associated with the Medical Plan and the FSA. By this Motion, the Debtor seeks authorization to pay any prepetition amounts due on account of or related to the Medical Plan and FSAs (including any medical claims that may have accrued prepetition) up to the cap requested herein and to continue the Medical Plan and the FSA in the ordinary course of business postpetition.

(ii) *Dental Plan*

18. The Debtor offers eligible Employees a PPO dental insurance plan (the "Dental Plan") administered by BlueCross BlueShield of Texas. The Dental Plan premiums for eligible Employees and their dependents are paid by the Debtor. The average cost to the Debtor of maintaining the Dental Plan, including administrative costs and premiums, is approximately \$6,600 per month. As of the Petition Date, the Debtor estimates that no more than \$15,000 will be owed on account of obligations associated with the Dental Plan. By this Motion, the Debtor seeks authorization to pay any prepetition amounts due on account of the Dental Plan up to the cap requested herein and to continue the Dental Plan in the ordinary course of business postpetition.

(iii) *Life and Disability Plans*

19. The Debtor provides all of its full-time Employees with basic life insurance, accidental death and dismemberment insurance, and short-term and long-term



disability insurance (collectively, the “Standard Life and Disability Plans”), which are provided by Lincoln Financial; *provided, however*, the Debtor’s short-term disability insurance coverage is self-insured by the Debtor and administered by Lincoln Financial. Additionally, the Debtor offers its eligible senior personnel with additional life insurance and long-term disability insurance coverage (collectively, the “Executive Life and Disability Plans” and together with the Standard Life and Disability Plans, the “Life and Disability Plans”) provided by Brighthouse/MetLife and The Standard, respectively.

20. The Life and Disability Plans are fully paid for by the Debtor (except with respect to any supplemental coverage that is paid by the Employees through paycheck withholding deductions). In the aggregate, the Debtor’s average annual cost of maintaining the Life and Disability Plans, including administrative costs and premiums, is approximately \$140,000.<sup>7</sup> As of the Petition Date, the Debtor estimates that no more than \$15,000 in prepetition obligations associated with the Life and Disability Plans will be owed. By this Motion, the Debtor seeks authorization to pay any and all prepetition amounts due on account of the Life and Disability Plans (including, without limitation, any Employee claims payable under the self-insured short-term disability insurance plan) up to the cap requested herein, and to continue the Life and Disability Plans in the ordinary course of business postpetition.

*(iv) Paid Time Off and Sick Time*

21. The Debtor grants paid time off to all Employees, which includes vacation and sick time (“PTO”), ranging from 15 to 24 days based on certain factors, in addition to

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<sup>7</sup> This aggregate amount excludes any claim amounts that may be paid by the Debtor to recipients under the self-insured short-term disability insurance coverage.

holiday pay. Employees are able to carry forward up to 10 days of PTO for each year of service into a subsequent year (*e.g.*, after two years of service, an Employee can potentially roll over 20 days of PTO). In accordance with applicable state law, the Debtor pays all accrued PTO to Employees upon termination. As of the Petition Date, the accrued liabilities of the Debtor with respect to PTO are estimated to total approximately \$940,000. The Debtor seeks authority to allow Employees to use accrued prepetition PTO time after the Petition Date in the ordinary course. The Debtor further seeks authority to pay out any PTO owed to Employees who become separated from the Debtor postpetition to the extent required under the Debtor's policies and applicable state law.

(v) *Workers' Compensation Plan*

22. The Debtor provides all eligible Employees with workers' compensation insurance (the "Workers' Compensation Plan") as required by federal and state law. The Workers' Compensation Plan is a policy-based, fully insured plan provided by Chubb. The average annual cost of maintaining the Workers' Compensation Plan, including administrative costs and premiums, is approximately \$11,000 in the aggregate. The Debtor makes payments to Chubb monthly in arrears. As of the Petition Date, the Debtor believes that no more than \$5,000 will be owed on account of prepetition obligations under the Workers' Compensation Plan. By this Motion, the Debtor seeks authorization to satisfy all obligations related to the Workers' Compensation Plan, including, without limitation, premiums and any related fees, costs, and expenses up to the cap requested herein, and to continue its Workers' Compensation Plan in the ordinary course.

23. The Debtor submits that the continuance of the Workers' Compensation Plan is appropriate in the ordinary course of business, but out of abundance of caution, seeks authority to maintain the Workers' Compensation Plan in accordance with applicable law postpetition. The Debtor also seeks authority for relief from the automatic stay solely to allow holders of workers' compensation claims to proceed with their claims in accordance with the Workers' Compensation Plan and to allow the Workers Compensation Plan insurer to administer, handle, defend, settle and/or pay a claim covered by the Workers' Compensation Plan and the cost related hereto in accordance with such plan.

(vi) *COBRA*

24. Pursuant to the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), the Debtor provides temporary continuation of healthcare benefits at group rates to former Employees after their termination, retirement, or disability leave. The former Employee or the Debtor bears the costs associated with COBRA, depending on the terms of the separation agreement between the former Employee and the Debtor. As of the Petition Date, the Debtor was responsible for COBRA related costs of approximately \$2,300 per month. The Debtor requests that former Employees and eligible dependents retain the right to coverage under the Medical Plan in accordance with the requirements of the terms of COBRA and requests authorization to pay obligations arising under such plans, regardless of when such obligations accrued, up to \$2,500.

(vii) *401(k) Plan*

25. The Debtor allows eligible Employees to participate in a 401(k) plan (the “401(k) Plan”) administered by an independent third party, BOK Financial (the “401(k) Administrator”). The 401(k) Plan is funded by participating Employees through payroll withholding deductions, and the Debtor makes matching contributions up to 4% of the applicable Employee’s compensation (subject to certain annual caps of \$5,000 for highly compensated employees and \$11,000 for other employees). The Debtor estimates that it will fund approximately \$400,000 in total matching contributions in 2019; more than \$300,000 has been funded by the Debtor for this year to date. The Debtor intends to continue to make ordinary course matching contributions to the 401(k) Plan on a going forward basis.

26. The Debtor also has a discretionary profit sharing plan (the “Profit Sharing Plan”) administered by the 401(k) Administrator. For a given calendar year, Employees who are enrolled in the 401(k) Plan and employed by the Debtor as of December 31 of that year are eligible to participate in the Profit Sharing Plan. If profit sharing is approved for a given year, each eligible Employee would receive a percentage of his or her cash compensation based on various factors, and capped at a certain amount. The profit sharing contribution typically ranges from 4% to 7.5% of eligible compensation (for 2019, the maximum eligible compensation is \$280,000). The award is then paid into the 401(k) Plan for the Employee’s benefit as a Debtor contribution; this award vests upon three (3) years of service (with a year defined as 1,000 hours in a calendar year), but once the initial three (3) years of service has been met, all future awards vest immediately. The approved profit sharing contributions for 2018 (approximately \$854,000)

were previously funded by the Debtor prepetition. No profit sharing for year 2019 has been calculated or approved by the Debtor as yet, but would typically be approved in the ordinary course in February 2020 and would be payable no later than September 15, 2020. The Debtor will be filing a separate motion to seek authority to continue the Profit Sharing Plan on a postpetition basis in the ordinary course.

27. In the aggregate, with respect to 401(k) Plan, the Debtor annually pays approximately \$82,000 in administrative costs to the 401(k) Administrator (typically funded in part out of 401(k) Plan forfeitures), actuarial and legal costs of approximately \$50,000, and audit costs of approximately \$7,000 (audit cost is for 2018 audit which is nearly complete; 2019 audit has not yet been commenced).

28. The Debtor believes that, as of the Petition Date, all of Q3 2019 administrative costs and only a relatively *de minimis* amount of prepetition Q4 2019 administrative costs is owed relating to the 401(k) Plan. The Debtor seeks authorization to continue to pay any prepetition amounts due on account of the 401(k) Plan, including any administrative, audit or advisory fees, up to a cap of \$25,000 and to continue to pay postpetition costs of the 401(k) Plan in the ordinary course of business.

*(viii) Other Employee Benefits*

29. The Debtor provides eligible Employees with a number of other miscellaneous benefits (the “Other Employee Benefits”), which include, without limitation, (i) flexible spending accounts; (ii) daily catered lunches (the Debtor pays \$16 maximum per workday through GrubHub, *etc.*); (iii) cell phone service reimbursement (the Debtor provides

each eligible Employee \$100 per month in reimbursement); (iv) gym memberships (the Debtor pays gym dues of approximately \$25 per month for each eligible Employee); (v) paid office parking; and (vi) access to stocked office kitchens.

30. As the foregoing descriptions suggest, the aggregate cost of maintaining the Other Employee Benefits is relatively *de minimis*. The Debtor seeks authorization to pay any prepetition amounts that may be due on account of the Other Employee Benefits up to \$20,000, and to continue the Other Employee Benefits in the ordinary course of business postpetition.

**F. Reimbursable Expenses**

31. Prior to the Petition Date, the Debtor reimbursed Employees for Reimbursable Expenses incurred on behalf of the Debtor in the scope of their duties. The Reimbursable Expenses are incurred in the ordinary course of the Debtor's business operations and include, without limitation, reasonable expenses for business meals, travel, relocation, car rentals, and other business-related expenses. As of the Petition Date, the Debtor estimates that it owes no more than \$110,000 in Reimbursable Expenses. Although the Debtor has requested that Employees submit reimbursement requests promptly, Employees may nonetheless submit reimbursement requests for prepetition Reimbursable Expenses after the Petition Date. Absent authority to pay the Reimbursable Expenses incurred prepetition, the Employees could be obligated to pay such amounts out of their personal funds. The Debtor therefore seeks authority to pay all outstanding prepetition Reimbursable Expenses, and to continue its expense reimbursement policies in the ordinary course of business.

**G. Withholding Obligations**

32. The Debtor routinely deducts amounts from Employees' compensation with respect to certain Withholding Obligations, including, but not limited to, various federal, state, and local income taxes, wage garnishments, flexible spending account contributions, dependent daycare account contributions, and 401(k) contributions (the "Employee Withholdings").

33. The Debtor is also responsible for remitting to third parties, for their own account, various taxes and fees associated with payroll pursuant to the Federal Insurance Contributions Act and federal and state laws regarding unemployment and disability taxes (the "Payroll Taxes"). On average, the Debtor pays approximately \$15,000 in the aggregate for employer-obligated Payroll Taxes each pay period.

34. The Debtor does not believe that any prepetition Withholding Obligations remain to be remitted to the appropriate parties. However, out of caution, the Debtor seeks authority to deduct and remit any outstanding prepetition Employee Withholdings and Payroll Taxes, and to continue to deduct and remit all owed Employee Withholdings and all owed Payroll Taxes to the appropriate third party recipients in the ordinary course of business.

**H. Independent Contractors**

35. As noted above, the Debtor also uses and depends on various Independent Contractors. The Debtor makes payments to Independent Contractors ("Independent Contractor Compensation") and together with Wages, "Workforce Compensation") for the performance of certain specialized services important to the Debtor's business and operations, including, among

other things, investment management, tax/legal, real estate advisory, executive recruiting, life settlements valuation / actuary, and other miscellaneous consulting services. On average, the Debtor pays approximately \$80,000 per month in Independent Contractor Compensation. As of the Petition Date, the Debtor estimates that it may owe up to \$40,000 on account of accrued, unpaid Independent Contractor Compensation.

36. Importantly, the Debtor relies on the continuous support of Independent Contractors to handle and/or assist with projects and matters in furtherance of the Debtor's business. The Debtor believes the authority to continue paying the Independent Contractor Compensation, including any prepetition amounts, is critical to minimize disruption of the Debtor's operations. Accordingly, the Debtor seeks authority to satisfy any prepetition accrued but unpaid Independent Contractor Compensation up to \$40,000 and continue to pay the Independent Contractor Compensation on a postpetition basis in the ordinary course of business and consistent with past practices.

**I. Direction to Banks and Financial Institutions**

37. The Debtor also seeks an order authorizing its banks and other financial institutions (collectively, the "Banks") to receive, process, honor, and pay all of the Debtor's prepetition checks and fund transfers on account of any prepetition amounts owed on account of or relating to Workforce Compensation or the Benefit Programs, including all checks issued with regard to any Workforce Compensation and Benefit Programs, and prohibiting the Banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for prepetition Workforce Compensation and Benefit Programs



obligations. The Debtor also seeks an order authorizing the issuance of new postpetition checks or new postpetition funds transfers on account of prepetition Workforce Compensation and Benefit Program obligations to replace any prepetition checks or funds transfer requests that may be dishonored or rejected, and to reimburse Employees or other applicable party for any fees or expenses incurred in connection with any rejected checks as a result of the Debtor's bankruptcy filing.

### **Relief Requested**

38. By this Motion, the Debtor requests entry an order substantially in the form attached hereto as **Exhibit A**: (a) authorizing the Debtor to (i) to pay all prepetition Workforce Compensation and all costs related to the prepetition Benefit Programs, as set forth in this Motion; and (ii) maintain and continue to honor the Benefit Programs as they were in effect as of the Petition Date and as such may be modified, amended, or supplemented from time to time in the ordinary course of business; and (b) authorizing the Banks to honor and process checks and electronic transfer requests for payment of prepetition obligations with respect to the Workforce Compensation and Benefit Programs. The Debtor does not seek authority to pay any Employees on account of Wages in excess of the statutory cap of \$13,650.

39. The Debtor submits that any delay in paying the prepetition amounts owed in respect of the Workforce Compensation and Benefit Programs will adversely impact the Debtor's relationships with its workforce and could irreparably harm employee morale and cooperation, to the substantial detriment of the Debtor, the estate, and its stakeholders.

**Basis for Relief Requested**

40. Statutory support for the requested relief exists pursuant to sections 105(a), 362(d), 363(b)(1) and (c)(1), and 507(a) of the Bankruptcy Code and the “necessity of payment” doctrine (discussed *infra*). Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to use property of the estate other than in the ordinary course of business after notice and a hearing. Section 363(c) of the Bankruptcy Code authorizes a debtor in possession to enter into transactions in the ordinary course of business without notice and a hearing. Section 105(a) of the Bankruptcy Code further provides, in pertinent part, that this Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.

41. The relief requested in this Motion is supported by the well-established “necessity of payment” doctrine.<sup>8</sup> The “necessity of payment” doctrine, which has been embraced by the Third Circuit, “teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during reorganization, payment may be authorized even if it is made out of corpus.” *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981). *See also In re Sharon Steel Corp.*, 159 B.R. 730, 737 (Bankr. W.D. Pa. 1993) (embracing “necessity of payment” doctrine and citing *Lehigh & New England Ry. Co.* with approval). Similarly, the court in *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989), stated that the “necessity of payment” doctrine “recognizes the

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<sup>8</sup> The doctrine was first articulated by the Supreme Court in railroad reorganization cases, *see Miltenberger v. Logansport Ry.*, 106 U.S. 286 (1882), and it has been held to be equally applicable to non-railroad debtor cases. *See, e.g., Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (hotel); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989) (airline).

existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” *Id.* at 176. In that case, the court permitted Eastern Air Lines, Inc., to pay its current employees’ prepetition wages, salaries, medical benefits, and business expense claims. Judge Lifland relied on his equitable powers under section 105(a) of the Bankruptcy Code and, in particular, the “necessity of payment” doctrine to authorize such payments, recognizing that the debtor had to make the payments in order to retain its current employees and maintain positive employee morale – two factors that he deemed critical to the rehabilitation of an operating debtor. *Id.* at 176-77 (citing H.R. Rep. No. 595 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 16 (1977)). Other courts also have found that the “necessity of payment” doctrine applies to the payment of prepetition employee compensation and benefits. *See In re Chateaugay Corp.*, 80 B.R. 279, 281 (Bankr. S.D.N.Y. 1987) (under the “necessity of payment” doctrine, bankruptcy court should defer to the debtor’s business judgment in permitting payment of certain workers’ compensation claims).

42. Courts in this District similarly have approved the payment of prepetition claims of employees for wages, salaries, expenses, and benefits on the grounds that the payment of such claims was necessary to effectuate a successful reorganization or liquidation. *See, e.g., In re iPic-Gold Class Entertainment LLC*, Case No. 19-11739 (LSS) (Bankr. D. Del. Aug. 6, 2019); *In re Fuse, LLC*, Case No. 19-10872 (KG) (Bankr. D. Del June 5, 2019); *In re J & M Sales, Inc., et al.*, Case No. 18-11801 (LSS) (Bankr. D. Del Aug. 27, 2018); *In re Aquion Energy Inc.*, Case No. 17-10500 (KJC) (Bankr. D. Del March 10, 2017); *In re Basic Energy Services, Inc., et al.*, Case No. 16-12320 (KJC) (Bankr. D. Del. October 26, 2016); *In re Key Energy*

*Services, Inc., et al.*, Case 16-12306 (BLS) (Bankr. D. Del. October 25, 2016); *In re Malibu Lighting Corporation, et al.*, Case No. 15-12082 (KG) (Bankr. D. Del. October 9, 2015); *In re Ablest, Inc.*, Case No. 14-10717 (KJC) (Bankr. D. Del. Apr. 2, 2014); *In re iBAHN Corporation*, Case No. 13-12285 (PJW) (Bankr. D. Del. Sept. 9, 2013); *In re Highway Technologies, Inc.*, Case No. 13-11326 (KJC) (Bankr. D. Del. May 23, 2013); and *In re Digital Domain Media Group, Inc.*, Case No. 12-12568 (BLS) (Bankr. D. Del. Oct. 22, 2012).

43. The “necessity of payment” doctrine authorizes the Debtor to pay the amounts it seeks authority to pay pursuant to this Motion because the members of the Debtor’s workforce are critical assets necessary both to the Debtor’s operations and the successful administration of this chapter 11 case.

44. The Debtor believes that all of the Wages relating to the period prior to the Petition Date constitute priority claims under sections 507(a)(4) of the Bankruptcy Code. As priority claims, the Wages must be paid in full before any general unsecured obligations of the Debtor may be satisfied. Accordingly, the relief requested may affect only the timing of the payment of these priority obligations and will not prejudice the rights of general unsecured creditors or other parties in interest.

45. Moreover, the Debtor believes that if it is unable to honor accrued Workforce Compensation and benefits under the Benefit Programs described above, including honoring PTO, employee morale and loyalty will be jeopardized at a time when the support of the Debtor’s workforce is critical. The Debtor believes that any uncertainty with regard to payment of Workforce Compensation and the continuation of the Benefit Programs will cause

significant anxiety at precisely the time that the Debtor needs its Employees to perform their respective jobs at peak efficiency.

46. Additionally, the Debtor submits that the Withholding Obligations do not constitute property of the Debtor's estate and principally represent employee earnings that governments, Employees, and/or judicial authorities, have designated for deduction from Employee paychecks. The failure to transfer these withheld funds could result in hardship to certain Employees. Moreover, if the Debtor cannot remit certain of these Withholding Obligations, such as child support payments, the Employees may face legal action.

47. The Debtor submits that with respect to the wage-related taxes that constitute "trust fund" taxes, the payment of such taxes will not prejudice other creditors of the Debtor's estate given that the relevant taxing authorities would have a priority claim 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 the Employee Withholdings, are not property of the Debtor's estate. *See, e.g., Begier v. IRS*, 496 U.S. 53 (1990) (withholding taxes are property held by a debtor in trust for another and, as such, are not property of the debtor's estates).

48. Courts have also authorized debtors to pay employee-related taxes under section 363(b)(1) of the Bankruptcy Code, which provides 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). Under such section, a court may authorize a debtor to pay certain prepetition claims. *See In re FV Steel & Wire Co.*, Case No. 04-22421 (Bankr. E.D. Wis. Feb.

26, 2004) (authorizing the continuation of customer programs and the payment of prepetition claims under section 363 of the Bankruptcy Code); *In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 9, 2002) (authorizing payment of prepetition claims under section 363 of the Bankruptcy Code as an out-of-the-ordinary-course transaction); *Ionosphere Clubs*, 98 B.R. at 175 (affirming lower court order authorizing payment of prepetition wages pursuant to section 363(b) of the Bankruptcy Code). To do so, “the debtor must articulate some business justification, other than the mere appeasement of major creditors.” *Id.* at 175. As discussed herein, the Debtor’s failure to pay employee-related taxes could have a material adverse impact on its ability to operate in the ordinary course of business.

49. Indeed, in numerous chapter 11 cases, courts in this District have exercised their equitable powers under section 105 of the Bankruptcy Code to authorize debtors to pay a variety of prepetition claims of creditors, including claims similar to the prepetition employee-related taxes. *See, e.g., In re Fuse, LLC*, Case No. 19-10872 (KG) (Bankr. D. Del Jun. 5, 2019); *In re J & M Sales, Inc., et al.*, Case No. 18-11801 (LSS) (Bankr. D. Del Aug. 27, 2018); *In re Aquion Energy Inc.*, Case No. 17-10500 (KJC) (Bankr. D. Del March 10, 2017); *In re Basic Energy Services, Inc., et al.*, Case No. 16-12320 (KJC) (Bankr. D. Del. October 26, 2016); *In re Key Energy Services, Inc., et al.*, Case 16-12306 (BLS) (Bankr. D. Del. October 25, 2016); *In re Malibu Lighting Corporation, et al.*, Case No. 15-12082 (KG) (Bankr. D Del. October 9, 2015); *In re Savient Pharmaceuticals, Inc.*, Case No. 13-12680, ECF No. 44 (MFW) (Bankr. D. Del. Oct. 16, 2013); *In re Furniture Brands Int’l, Inc.*, Case No. 13-12329, ECF No. 71 (CSS) (Sept. 11, 2013); *In re Exide Technologies*, Case No. 13-11482, ECF No. 71 (KJC)

(Bankr. D. Del. June 11, 2013); *In re Synagro Technologies, Inc.*, Case No. 13-11041 (BLS), ECF No. 43 (Bankr. D. Del. Apr. 25, 2013). The Debtor submits that the present circumstances warrant similar relief in this chapter 11 case to preserve the Debtor's assets and avoid business interruption.

50. Finally, the Debtor's workforce has an intimate knowledge of the operation of the Debtor's business and is a critical and necessary component to the success of this chapter 11 case. Deterioration in the morale and welfare of this workforce at this critical time undoubtedly would adversely impact the Debtor and its ability to maximize the value of its assets. Payment of the Workforce Compensation and continuation of the Benefit Programs, as described herein, is necessary to maintain employee morale during the case and to insure continued, efficient operation in order to maximize value for the estate.

#### **Reservation of Rights**

51. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor and its estate, a waiver of the rights of the Debtor and its estate to dispute any claim, or an approval or assumption of any agreement or contract under section 365 of the Bankruptcy Code. The Debtor expressly reserves its rights to dispute any claim under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the rights of the Debtor and its estate to subsequently dispute such claim.

**Satisfaction of Bankruptcy Rules 6003 and 6004**

52. Pursuant to Bankruptcy Rule 6003(b), “a motion to pay all or part of a claim that arose before the filing of the petition” shall not be granted by the Court within 21 days of the Petition Date “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm . . . .” Fed. R. Bankr. P. 6003(b). For the reasons described more fully above, and as supported by the Declaration, and to the extent that the relief requested herein implicates Bankruptcy Rule 6003(b), the Debtor submits that the requirements of Bankruptcy Rule 6003 have been met and that the relief requested in this Motion is necessary to avoid immediate and irreparable harm.

53. Finally, to implement the foregoing successfully, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h), to the extent these rules are applicable.

**Notice**

54. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the District of Delaware; (c) the Debtor’s twenty largest unsecured creditors; and (d) the Debtor’s principal secured parties. As the Motion is seeking “first day” relief, within two business days after the hearing on the Motion, the Debtor will serve copies of the Motion and any order entered respecting the Motion as required by Del. Bankr. LR 9013-



1(m). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

**Conclusion**

WHEREFORE, the Debtor respectfully requests entry of the proposed order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as is just.

Dated: October 16, 2019

PACHULSKI STANG ZIEHL & JONES LLP

*/s/ James E. O'Neill*

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*Proposed Counsel for the Debtor  
and Debtor in Possession*

**EXHIBIT A**

**Proposed Order**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)				
	)				Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., <sup>1</sup>	)				Case No. 19-12239 (CSS)
Debtor.	)				
	)				

**ORDER (I) AUTHORIZING THE DEBTOR TO (A) PAY AND HONOR PREPETITION COMPENSATION, REIMBURSABLE BUSINESS EXPENSES, AND EMPLOYEE BENEFIT OBLIGATIONS, AND (B) MAINTAIN AND CONTINUE CERTAIN COMPENSATION AND BENEFIT PROGRAMS POSTPETITION; AND (II) GRANTING RELATED RELIEF**

Upon consideration of the motion (“Motion”)<sup>2</sup> of the above-referenced debtor and debtors in possession (the “Debtor”) in the above-captioned chapter 11 case for the entry of an order (the “Order”), pursuant to sections 105(a), 363, and 507(a) of title 11 of the United States Code (the “Bankruptcy Code”), to authorize, but not require, the Debtor to (i) pay prepetition wages, salaries, employee benefits, and other compensation; (ii) remit withholding obligations and deductions; (iii) maintain employee compensation and benefits programs and pay related administrative obligations; and (iv) authorize applicable banks and other financial institutions receive, process, honor, and pay certain checks presented for payment and honor certain fund transfer requests; and it appearing that the relief requested is in the best interest of the Debtor’s estate, its creditors, and other parties in interest; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this proceeding is a

<sup>1</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

<sup>2</sup> All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that the requirements of Rule 6003 of the Federal Rules of Bankruptcy Procedure have been satisfied; and due and adequate notice of the Motion having been given under the circumstances; and after due deliberation and cause appearing therefor;

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.
2. The Debtor is authorized, but not directed, to make payments to applicable third parties from the Employee Withholdings, and other Withholding Obligations and in respect of the Benefit Programs, and costs associated therewith, in accordance with the Debtor's ordinary course of business and stated policies, as set forth in the Motion.
3. The Debtor is authorized, but not directed, to honor outstanding checks for Workforce Compensation that may be outstanding as of the Petition Date.
4. In accordance with this Order and any other order of this Court, the banks and financial institutions at which the Debtor maintains its accounts are authorized to honor checks presented for payment, whether issued prior to or after the Petition Date, and to honor all fund transfer requests made by the Debtor related thereto, to the extent that sufficient funds are on deposit in such accounts.
5. The Debtor is authorized to pay prepetition amounts on account of the Workforce Compensation and Benefit Programs, including all processing and administrative fees associated with payment of the Workforce Compensation and Benefit Programs, subject to the aggregate caps set forth in the chart below, *provided however*, that no payments to or on behalf

of any Employee with respect to Wages will exceed \$13,650; *provided further* that, for the avoidance of doubt, no prepetition and postpetition bonuses may be paid to Employees without further Court order:

<b>BENEFIT/PROGRAM</b>	<b>CAP AMOUNT</b>
Wages	\$50,000
Independent Contractor Compensation	\$40,000
Payroll Processor	\$2,500
Medical Plan/FSA	\$200,000
Dental Plan	\$15,000
Life and Disability Plans	\$15,000
Workers Compensation Plan	\$5,000
COBRA	\$2,500
401(k) Plan	\$25,000
Other Employee Benefits	\$20,000
Reimbursable Expenses	\$110,000
Independent Contractor Compensation	\$40,000

6. The Debtor is authorized to allow Employees to use accrued prepetition PTO in the ordinary course. The Debtor is also authorized, in its discretion, to pay out any accrued PTO amounts that are owed to Employees to the extent required under the Debtor's policies and applicable state law.

7. The Debtor is authorized to continue to administer and provide its Benefit Programs postpetition in the ordinary course of business and in the Debtor's discretion.

8. Nothing in this Order authorizes or approves any payment, bonus plan, or severance plan subject to section 503(c) of the Bankruptcy Code.

9. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtor.

10. Notwithstanding anything to the contrary contained herein, any payment made or to be made under this Order, any authorization contained in this Order, or any claim for which payment is authorized hereunder, shall be subject to any orders of this Court approving any debtor in possession financing for, or any use of cash collateral by, the Debtor, and any documents providing for such debtor in possession financing and the Budget governing such debtor in possession financing and use of cash collateral.

11. The Debtor is authorized, but not directed, to continue to maintain its Workers' Compensation Plan in the ordinary course of business. The automatic stay is hereby modified pursuant to section 362(d) of the Bankruptcy Code solely to allow the Debtor, in its discretion, to continue to assess, determine, and adjudicate any of the unpaid workers' compensation claims during this chapter 11 case in accordance with the Workers' Compensation Plan; *provided however*, however that nothing in this order or the Motion gives a non-workers' compensation claimant relief from the automatic stay.

12. The requirements of Bankruptcy Rule 6004(a) are waived.

13. The stay under Bankruptcy Rule 6005(h) is waived.

14. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

15. Notwithstanding anything to the contrary contained herein, any payment to be made or authorization contained hereunder shall not be deemed to constitute postpetition assumption or adoption of any contract, program, or policy pursuant to section 365 of the Bankruptcy Code and shall not affect the Debtor's rights to contest the amount or validity of claims.

16. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: \_\_\_\_\_, 2019

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UNITED STATES BANKRUPTCY JUDGE