

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

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In re: : Chapter 11  
 :  
HI-CRUSH INC., *et al.*,<sup>1</sup> : Case No. 20-33495 (DRJ)  
 :  
Debtors. : (Jointly Administered)  
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**DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN  
ORDER (I) AUTHORIZING (A) PAYMENT OF PREPETITION  
WORKFORCE OBLIGATIONS AND (B) CONTINUATION  
OF WORKFORCE PROGRAMS ON A POSTPETITION BASIS, (II)  
AUTHORIZING PAYMENT OF PAYROLL TAXES, (III) CONFIRMING  
THE DEBTORS' AUTHORITY TO TRANSMIT PAYROLL DEDUCTIONS,  
(IV) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OWING TO  
ADMINISTRATORS, AND (V) DIRECTING BANKS TO HONOR PREPETITION  
CHECKS AND FUND TRANSFERS FOR AUTHORIZED PAYMENTS**

**EMERGENCY RELIEF HAS BEEN REQUESTED. A HEARING WILL BE  
CONDUCTED ON THIS MATTER ON JULY 13, 2020 AT 3:30 P.M.  
PREVAILING CENTRAL TIME IN COURTROOM 400, 4th FLOOR, 515  
RUSK STREET, HOUSTON, TX 77002. IF YOU OBJECT TO THE RELIEF  
REQUESTED OR YOU BELIEVE THAT EMERGENCY CONSIDERATION  
IS NOT WARRANTED, YOU MUST EITHER APPEAR AT THE HEARING  
OR FILE A WRITTEN RESPONSE PRIOR TO THE HEARING.  
OTHERWISE, THE COURT MAY TREAT THE PLEADING AS  
UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

**RELIEF IS REQUESTED NOT LATER THAN JULY 13, 2020.**

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC, Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors' address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.



Please note that on March 24, 2020, through the entry of General Order 2020-10, the Court invoked the Protocol for Emergency Public Health or Safety Conditions.

It is anticipated that all persons will appear telephonically and also may appear via video at this hearing.

Audio communication will be by use of the Court's regular dial-in number. The dial-in number is +1 (832) 917-1510. You will be responsible for your own long-distance charges. You will be asked to key in the conference room number. Judge Jones' conference room number is 205691.

Parties may participate in electronic hearings by use of an internet connection. The internet site is [www.join.me](http://www.join.me). Persons connecting by mobile device will need to download the free [join.me](http://www.join.me) application.

Once connected to [www.join.me](http://www.join.me), a participant must select "join a meeting". The code for joining this hearing before Judge Jones is "judgejones". The next screen will have a place for the participant's name in the lower left corner. Please complete the name and click "Notify".

Hearing appearances should be made electronically and in advance of the hearing. You may make your electronic appearance by:

- 1) Going to the Southern District of Texas website;
- 2) Selecting "Bankruptcy Court" from the top menu;
- 3) Selecting "Judges' Procedures & Schedules";
- 4) Selecting "view home page" for Judge David R. Jones;
- 5) Under "Electronic Appearance," select "Click here to submit Electronic Appearance";
- 6) Select "Hi-Crush Inc., et al." from the list of Electronic Appearance Links; and
- 7) After selecting "Hi-Crush Inc., et al." from the list, complete the required fields and hit the "Submit" button at the bottom of the page.

Submitting your appearance electronically in advance of the hearing will negate the need to make an appearance on the record at the hearing.

The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") respectfully state the following in support of this emergency motion (this "**Motion**"):

### **RELIEF REQUESTED**

1. By this Motion, the Debtors request entry of an order substantially in the form attached hereto (the "**Order**"):

- (i) authorizing the Debtors, in their discretion, to (a) pay or otherwise honor various prepetition workforce-related obligations (the "**Workforce**");

**Obligations**)<sup>2</sup> to or for the benefit of their employees (the “**Employees**”), and, as applicable, their independent contractors (the “**Independent Contractors**,” and together with the Employees, the “**Workforce**”) for compensation, expense reimbursements, and benefits under all plans, programs, policies, and agreements maintained by, or for the benefit of, or contributed to or entered into by, the Debtors prior to the Petition Date (collectively, and as further described herein, the “**Workforce Programs**”),<sup>3</sup> and (b) continue the Workforce Programs in the ordinary course of business during the pendency of the Chapter 11 Cases in the manner and to the extent that such Workforce Programs were in effect immediately prior to the filing of the Chapter 11 Cases;<sup>4</sup>

- (ii) authorizing the Debtors to pay any and all local, state, federal, and foreign withholding and payroll-related or similar taxes, as applicable, relating to the prepetition Workforce Obligations;
- (iii) authorizing, but not requiring the Debtors to continue to deduct and to transmit deductions from payroll checks as authorized by Employees, as required by any Workforce-related plan, program or policy, or as required by law;
- (iv) authorizing, but not requiring, the Debtors to pay any prepetition claims owing to vendors and third party Administrators (as defined below); and
- (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors’ prepetition checks and fund transfers on account of any obligations authorized to be paid pursuant hereto.

### **JURISDICTION AND VENUE**

2. 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 is a core

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<sup>2</sup> The Workforce Obligations are comprised of the Workforce Compensation Obligations, the Employee Reimbursement Obligations and the Employee Benefits Obligations (each as defined and described herein).

<sup>3</sup> The Workforce Programs are comprised of the Workforce Compensation Programs, the Employee Reimbursement Programs, and the Employee Benefits Programs (each as defined and described herein).

<sup>4</sup> By this Motion, the Debtors do not seek to assume or reject any Workforce Program to the extent that such Workforce Program is deemed to be an executory contract within the meaning of section 365 of the Bankruptcy Code. Moreover, the Debtors do not waive their right to modify or terminate any Workforce Program to the extent that such right exists under the terms of the Workforce Program or as may be authorized by applicable law.

proceeding under 28 U.S.C. § 157(b), and this Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 105(a), 362(d), 363(b), 507(a), 541, 553, 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), rule 9013-1 of the Bankruptcy Local Rules for the Southern District of Texas (the “**Bankruptcy Local Rules**”), and the Procedures for Complex Chapter 11 Cases in the Southern District of Texas (the “**Complex Case Procedures**”).

### BACKGROUND

4. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of J. Philip McCormick, Jr., Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings*, (the “**First Day Declaration**”),<sup>5</sup> which is filed with the Court concurrently herewith and is fully incorporated herein by reference.

5. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have been appointed.

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<sup>5</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

6. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration of the Chapter 11 Cases.

### **BASIS FOR RELIEF**

#### **A. The Debtors' Workforce**

7. As of the Petition Date, the Debtors' Workforce consisted of 297 Employees (116 salaried and 181 hourly).<sup>6</sup> None of the Debtors' Employees are subject to a collective bargaining agreement or similar labor agreement. The Debtors' Workforce also includes certain Independent Contractors. The number of Independent Contractors utilized by the Debtors at any given time fluctuates based on whether the Debtors are in a peak business season and the Debtors' specific needs at any given time. The Debtors' Workforce currently includes 13 Independent Contractors.

8. The skills, expertise, and experience of the Workforce, as well as their relationships with customers and vendors and their knowledge of the Debtors' business and infrastructure, are essential to the Debtors' operations and ability to effectively maximize the value of their businesses during the Chapter 11 Cases.

#### **B. Workforce Compensation Programs**

9. In the ordinary course of business, the Debtors compensate their Workforce by making various payments and allowances, including, without limitation: (i) making payments on account of Employee payroll and allocating Employee Deductions (as defined below), (ii) making payments on accounts of obligations due to Independent Contractors, (iii) providing PTO (as defined below), and (iv) making distributions in connection with the Employee Cash Incentive

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<sup>6</sup> As described in the First Day Declaration, in the months leading up to the Petition Date and as part of the Debtors' cost-reduction efforts, the Debtors gradually reduced their Workforce from 733 Employees to 297 Employees (such reductions hereinafter referred to as "**RIFs**").

Programs and the LTIP (each as defined below) (collectively, the “**Workforce Compensation Programs**” and, any obligations thereunder, the, “**Workforce Compensation Obligations**”). The Workforce Compensation Programs are described in further detail below.

**(i) Employee Payroll and Payroll Deductions**

**a. Employee Payroll**

10. The Employees are paid wages and salaries on a bi-weekly basis and five days in arrears. In the twelve months prior to the Petition Date, the average payroll amount for each two-week pay period was approximately \$1,726,800,<sup>7</sup> net of the Deductions (as defined below).<sup>8</sup> The Debtors utilize Automatic Data Processing, Inc. (“**ADP**”) for payroll processing services related to payment of the Employees’ wages and salaries. The Debtors pay their Employees in arrears for work performed prior to the Debtors’ normal bi-weekly payroll. As a result, such Employees often have a significant amount of unpaid wages and other compensation that has accrued but is unpaid. The Debtors estimate that, as of the Petition Date, they owe approximately \$358,900 in wages and salaries to Employees, net of Deductions (as defined below). The Debtors do not believe that any Employees are owed wages or salary compensation in excess of the \$13,650 statutory cap pursuant to section 507(a)(4) of the Bankruptcy Code, nor are they seeking authority to pay any amounts in excess of such cap pursuant to this Motion.

**b. Independent Contractors’ Compensation**

11. As stated above, the Debtors’ Workforce occasionally includes certain Independent Contractors. The number of Independent Contractors varies depending on the Debtors’ needs at

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<sup>7</sup> As a consequence of RIFs, this amount is expected to decrease going forward to reflect the Debtors’ reduced headcount.

<sup>8</sup> This amount is inclusive of compensation on account of overtime work (approximately \$316,700 per month on average, on a gross basis) and compensation for work during irregular shifts (approximately \$225,200 per month on average, on a gross basis).

any given time, particularly during peak season or as specific needs arise from time to time in the ordinary course of business. The Debtors pay the Independent Contractors directly. It is critical for the Debtors' business to maintain the flexibility to secure the services of their Independent Contractors as necessitated by their business needs from time to time. Remaining current on payments due to Independent Contractors is necessary for that purpose.

12. In the twelve months prior to the Petition Date, the Debtors spent on average approximately \$110,100 per month on account of obligations due to Independent Contractors. As of the Petition Date, the Debtors estimate that there are approximately \$96,700 in amounts due and owing to Independent Contractors.

c. **Payroll Deductions**

13. In the ordinary course of their businesses, the Debtors make deductions from Employees' paychecks for payments to third parties on behalf of Employees for various federal, state, local, and foreign income, FICA, employment insurance and other taxes, as well as for court ordered garnishments, savings programs, repayments for loans taken against the savings programs, benefit plans, insurance and other similar programs (collectively, the "**Deductions**"). In the twelve months prior to the Petition Date, the Debtors' average aggregate bi-weekly Deductions for Employees was approximately \$758,900.<sup>9</sup>

14. As of the Petition Date, and as permitted under the Coronavirus Aid, Relief, and Economic Security Act (the "**CARES Act**"), the Debtors have deferred the remittance of approximately \$991,786 in employer social security taxes ("**FICA Taxes**") related to their

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<sup>9</sup> As a consequence of RIFs, this amount is expected to decrease going forward to reflect the Debtors' reduced headcount.

Employees' wages (the "**FICA Deferrals**") and anticipate an additional \$775,385 in FICA Deferrals during 2020 (for an estimated total of \$1,767,171 in FICA Deferrals during 2020).

15. As of the Petition Date, certain Employees are owed certain prepetition amounts related to their compensation. Where Employees are owed such amounts, the applicable Deductions have not yet been taken. Additionally, the Debtors may not yet have forwarded to the various third parties noted above the payments that are attributable to the Deductions that have been withheld from Employees' paychecks, including the FICA Deferrals. The Debtors estimate that, as of the Petition Date, accrued but not remitted Deductions (including FICA Deferrals) total approximately \$1,147,800.

**(ii) PTO**

16. As part of their overall compensation, Employees are eligible, in certain circumstances, to receive paid time off ("**PTO**") for, among other things, vacation, illness, and personal days. Entitlements under the Debtors' PTO policy vary based upon the Employee's work experience or length of employment, whichever is greater, as outlined in the table below.

<b>Hi-Crush Service Based PTO Accrual (Hours per Year)</b>		<b>Overall Work Experience Accrual (Hours per Year)</b>	
1 to 5 years of service	136	<35 years of age	136
5 to 10 years of service	160	35 to 45 years of age	160
10 to 15 years of service	184	45 to 55 years of age	184
15+ years of service	200	55+ years of age	200

17. In addition to PTO, all Employees are entitled to nine (9) paid holidays per year. The Debtors' Employees may carry over up to forty (40) hours of accrued but unused PTO time into the following year. Employees with over one year of service who voluntarily separate employment, or who are terminated without cause, receive payment on account of any accrued but unused PTO, less applicable withholdings. Accrued but unused PTO is not paid out to Employees



who voluntarily terminate with less than one year of service, nor to any Employees who are involuntarily terminated for cause or poor performance, unless otherwise required by applicable law.

18. Employees are also entitled to paid jury and civic duty leave, paid bereavement leave for up to five (5) days (which can be extended on a case-by-case basis), and paid voting leave as required by applicable state law.

19. The Debtors estimate that, as of the Petition Date, aggregate accrued but unpaid PTO liability for all Employees totals approximately \$609,700. This accrued amount, however, does not represent a true “cash” liability for the Debtors, as the Debtors anticipate that Employees will use most of their PTO in the ordinary course of business. Accordingly, unless an eligible Employee has resigned, PTO is not calculated for the purposes of the statutory priority cap under section 507(a)(4) of the Bankruptcy Code.

(iii) **The Employee Cash Incentive Programs, the LTIP, and the Prepetition KERP Payments**

a. **The Employee Cash Incentive Programs**

20. In the ordinary course of business, to encourage and reward outstanding performance, the Debtors offer certain Employees the opportunity to earn bonuses under three incentive programs (the “**Employee Cash Incentive Programs**”). The first such program is referred to as the “**PES Monthly Program**,” the second as the “**NexStage Quarterly Program**,” and the third as the “**Broad-based Annual Incentive Program**.” Payments with respect to the Employee Cash Incentive Programs are made by the Debtors directly to the applicable Employees. The Employee Cash Incentive Programs are not retention or severance plans as contemplated by section 503(c) of the Bankruptcy Code. With the exception of the Broad-based Annual Incentive Program, no insiders participate in or are eligible for the Employee Cash Incentive Programs. For

the avoidance of doubt, the Debtors are not seeking authority in this Motion to make any retention or incentive payments to insiders under any of the Employee Cash Incentive Programs absent further order of the Court.

21. Pursuant to the PES Monthly Program and the NexStage Quarterly Program, certain non-insider Employees are eligible to receive bonus compensation, on a monthly or quarterly basis, based on their performance during the previous month as determined by their supervisors via a scorecards system built around objective individual and business performance metrics. Only salaried Employees are eligible for awards under the PES Monthly Program, while both hourly and salaried Employees are eligible for awards under the NexStage Quarterly Program.

22. Pursuant to the Broad-based Annual Incentive Program, certain Employees who are not eligible for either the PES Monthly Program or the NexStage Quarterly Program are eligible to receive bonus compensation on an annual basis. Payments under the Broad-based Incentive Program are partly discretionary and partly based on both individual and company-wide performance (as indicated by certain financial and operational metrics).

23. During the twelve months prior to the Petition Date, the Debtors paid approximately \$6,091,400 in connection with the Employee Cash Incentive Programs.<sup>10</sup> As of the Petition Date, the Debtors believe that approximately \$65,000 is owed in connection with the Employee Cash Incentive Programs (all of which is owed to non-insider Employees pursuant to the PES Monthly Program and the NexStage Quarterly Program).

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<sup>10</sup> As a consequence of RIFs, this amount is expected to decrease going forward to reflect the Debtors' reduced headcount.

b. **The LTIP**

24. In the ordinary course of business, the Debtors provide certain of their Employees (both insiders and non-insiders) with the opportunity to earn additional compensation under the Hi-Crush Inc. Long Term Incentive Plan (the “**LTIP**”). Under the LTIP, Employees are eligible to receive awards such as options, stock appreciation rights, restricted stock, restricted stock units, cash awards, stock awards, dividend equivalents, other stock-based awards, substitute awards, or any combination of the foregoing, in the Debtors’ discretion. An Employee’s eligibility to receive awards under the LTIP is based on roles, responsibilities, performance, and service. Under the LTIP, the Debtors have granted certain insider and non-insider Employees restricted stock units (the “**Stock Units**” and the awards thereof, the “**LTIP Awards**”). The grant of the Stock Units also included a grant of a tandem dividend equivalent rights with respect to each Stock Unit (the “**DERs**”).

25. The vesting of certain of the Stock Units is time-based, while the vesting of others is performance-based. Time-based Stock Units granted under the LTIP generally vest over a three year period, with 50% of the Stock Units vesting on the second anniversary of the grant of the LTIP Award and 50% of the Stock Units vesting on the third anniversary of the Grant of the LTIP Award. The vesting of performance-based Stock Units is dependent on the Debtors meeting certain thresholds with respect to Hi-Crush Inc.’s total shareholder return relative to the total shareholder return of certain select peer companies during the performance period. For both time-based and performance-based Stock Units, vesting occurs only if a participant is employed by the Debtors as of the applicable vesting date. On or before the 30<sup>th</sup> calendar day following the vesting of the Stock Units, such Stock Units are settled through the delivery of shares of Hi-Crush Inc. Common Stock., while the related DERs are paid out in cash.

26. The Debtors use Certent, Inc. (“**Certent**”) to provide eligible Employees with certain information technology and other related administrative services in connection with any stock holdings received pursuant to the LTIP.

27. The Debtors project that approximately 279,000 Stock Units will vest in 2020 and 2021 and be settled in shares of common stock. In addition, the Debtors project that approximately \$74,000 in previously unvested DERs will vest in 2020 and 2021, but the Debtors do not seek authority to settle such DERs in cash at this time.<sup>11</sup>

28. While the Debtors do not intend to make any further grants under the LTIP during the Chapter 11 Cases, pursuant to this Motion, the Debtors request authority to honor the LTIP Awards previously granted and continue the vesting of Stock Units and DERs in the ordinary course of business and consistent with historical practice, both for insider and non-insider Employees. For the avoidance of doubt, the Debtors do not request by this Motion authority to make any cash payments under the LTIP (whether on account of DERs or otherwise) without further order of the Court.

29. When a vesting event occurs with respect to the Stock Units, the Debtors are required to withhold income and employment taxes and to pay the employer portion of employment taxes associated with the income recognized by the Employee (the “**Equity Taxes**”), which are *de minimis*. As of the Petition Date, the Debtors do not have any obligations on account of the Equity Taxes. Nevertheless, out of an abundance of caution, the Debtors seek authority to continue to pay the Equity Taxes associated with the LTIP in the ordinary course of business.

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<sup>11</sup> Prior to the Petition Date, the vesting of certain Stock Units and related DERs for certain non-insider Employees was accelerated, resulting in an aggregate cash payment of approximately \$68,130 to such non-insider Employees. The Debtors do not seek authority to make any additional cash payments under the DERs through this Motion.

c. **The Prepetition KERP Payments**

30. Prior to the Petition Date, the Debtors made certain retention payments to 36 of their non-insider key Employees and 4 insider Employees (the “**Prepetition KERP Payments**”). The Prepetition KERP Payments, which amounted to approximately \$5,817,000 in the aggregate, are subject to certain claw-back provisions triggered if the recipients of Prepetition KERP Payments terminate their employment with the Debtors prior to June 30, 2021, or in the case of the 4 insider Employees, the earlier of June 30, 2021 or the effective date of the emergence from these Chapter 11 Cases. As such, the Prepetition KERP Payments were structured to incentivize the Debtors’ key Employees not to seek alternative employment in advance of or during these Chapter 11 Cases, ultimately to the benefit of the Debtors, their estates and stakeholders, and their restructuring efforts. By this Motion, the Debtors are not seeking approval of the Prepetition KERP Payments, but are disclosing them herein out of an abundance of caution.

C. **Employee Reimbursement Programs**

31. In the ordinary course of business, the Debtors reimburse eligible members of their Workforce by making various payments in connection with: (i) reimbursement of business expenses, (ii) payment of Per Diem Stipends (as defined below) (iii) reimbursement or payment of Mobile Expenses (as defined below), (iv) reimbursement of certain Tuition Expenses (as defined below), (v) payment and reimbursement of the fees and expenses of the Debtors’ Directors (as defined below), (vi) payment of Lodging Expenses (as defined below), and (vii) reimbursement of Relocation Expenses (as defined below, and together with (i) – (vi), the “**Employee Reimbursement Programs**” and, any obligations thereunder, the “**Employee Reimbursement Obligations**”). The Employee Reimbursement Programs are described in further detail below.

**(i) Business Expenses**

32. The Debtors, in the ordinary course of their business, reimburse Employees for a variety of ordinary, necessary, and reasonable business-related expenses that Employees incur within the scope of their job duties. These include expenses for business travel (including airfare, lodging, taxi costs, automobile rentals, gas and car mileage for personal vehicles, and meals), and other general business-related expenses. Employees are expected to use sound judgment and good business sense when incurring expenses.

33. Approximately 113 Employees are furnished with corporate credit cards (the "**P-Cards**") maintained through Amegy Bank of Texas ("**Amegy**"). These Employees use the P-Cards to make authorized business purchases on behalf of the Debtors. The Debtors pay the balances that accrue under the P-Cards directly to Amegy on a monthly basis. The Debtors are liable for the amounts charged on the P-Cards in the first instance, but the Employees holding P-Cards are ultimately personally liable for amounts owed under the P-Cards in the event the Debtors fail to make any payments under the P-Cards. The continued use of the P-Cards is critical to the Debtors' business operations insofar as it is one of the mechanisms by which Employee expenses incurred in the ordinary course of employment are efficiently paid.

34. Amegy also provides some Employees with "virtual cards" (the "**Virtual Cards**") in connection with certain business-related purchases. Virtual Cards are typically single to low-use corporate credit card programs offered by Amegy alongside the P-Cards. Virtual Cards consist of a credit card number or token used to pay vendors and other business expenses through a normal credit card network. Once such payments have been made up to a certain amount, the credit card number is terminated for security purposes.

35. All Employees, irrespective of whether they have been issued P-Cards or Virtual Cards, are required to submit expense reports. Expense reports include supporting receipts and

are approved by Employees' supervisors in order to be reimbursed. Employees are to submit their expense data within a reasonable time after incurring business expenses. However, because Employees may not always promptly furnish their receipts, it is difficult for the Debtors to determine the exact amount outstanding at any particular time.

36. On average, for the twelve months prior to the Petition Date, the Debtors' Employees incurred approximately \$1,053,600 per month in the aggregate on account of reimbursable business expenses (inclusive of amounts charged to the P-Cards and the Virtual Cards). Over that period, approximately 77 percent of these reimbursable business-related expenses consisted of operational expenses, and approximately 23 percent consisted of corporate and G&A expenses.<sup>12</sup> Taking into account potential lag time in expense report submissions, the Debtors estimate that, as of the Petition Date, their obligations to Employees for accrued, reimbursable business-related expenses (submitted and un-submitted) total approximately \$3,700, inclusive of amounts owed in connection with the P-Cards and the Virtual Cards.

**(ii) Per-Diem Stipends**

37. The Debtors provide certain Employees with a per-diem stipend (the "**Per-Diem Stipend**") when such Employees are required to travel in connection with their employment with the Debtors. The Per-Diem Stipend typically consists of a flat rate per day that depends on the location of the Employee in question. Employees in North Dakota receive \$50 per day, those in Wyoming receive \$35 per day, and those in the Northeastern United States receive \$25 per day. The Debtors' aggregate average monthly Per-Diem expenditure, based on the twelve months prior

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<sup>12</sup> As a consequence of RIFs, the amounts listed in this paragraph are expected to decrease going forward to reflect the Debtors' reduced headcount.

to the Petition Date, is approximately \$35,900.<sup>13</sup> As of the Petition Date, the Debtors estimate that they owe approximately \$5,900 in connection with the Per-Diem Obligations.

**(iii) Mobile Expenses**

38. Certain of the Debtors' Employees use mobile phones for business purposes. Related expenses (the "**Mobile Expenses**") are either paid directly by the Debtors or reimbursed when Employees pay such expenses out of pocket. The Debtors estimate that, as of the Petition Date, approximately \$1,500 of Mobile Expenses are accrued and unpaid.

**(iv) Tuition Reimbursement Program**

39. The Debtors also reimburse their Employees for tuition incurred on account of specific classes and courses that enhance qualified Employees' work-related skills (the "**Tuition Expenses**"). The total amount of reimbursements paid by the Debtors on account of Tuition Expenses was \$12,000 for the twelve months prior to the Petition Date. As of the Petition Date, the Debtors estimate that there are no amounts accrued but unpaid on account of Tuition Expenses.

**(v) Director Fees and Expenses**

40. In the ordinary course of business, the Debtors pay the fees for and reimburse the expenses of the three non-Employee directors of the Debtors (the "**Directors**"). The Director who serves as the lead Director of the Debtors' board is paid approximately \$15,000 per quarter and the other two non-Employee Directors are each paid approximately \$12,000 per quarter, in each case for services to be conducted during the next quarter.

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<sup>13</sup> As a consequence of RIFs, this amount is expected to decrease going forward to reflect the Debtors' reduced headcount.



41. The Directors' service is necessary for the continued management of the Debtors and, accordingly, it is essential that the Debtors be authorized to pay all Directors' fees and any business related expenses incurred by the Directors that have accrued as of the Petition Date. As of the Petition Date, the Debtors believe that there are no outstanding amounts on account of Directors expenses. Nonetheless, the Debtors request the authority to reimburse any unpaid Director expenses incurred prior to the Petition Date and to continue to pay Director expenses in the ordinary course of business on a postpetition basis.

**(vi) Lodging Expenses**

42. In the ordinary course of business, the Debtors pay for the lodging expenses of Employees that are required to work on sites that are remote from where those Employees live (such expenses, the "**Lodging Expenses**"). The Debtors pay the Lodging Expenses directly to hotels and similar lodging providers. These lodging providers may deny the Debtors' Employees access to their accommodations if the Debtors are not current in paying Lodging Expenses, which in turn would cause significant hardship to the Employees and would impair the Debtors' ability to direct Employees to work in removed areas. As of the Petition Date, the Debtors estimate that they owe approximately \$297,800 on account of Lodging Expenses.

**(vii) Relocation Expenses**

43. In the ordinary course of business, the Debtors reimburse Employees required to transfer at the request of the Debtors for various expenses incurred in connection with such transfer, including, but not limited to, expenses associated with broker registration, home marketing, home sale, home finding, home purchase, temporary accommodation, household goods' shipment, moving, tax expenses, and other miscellaneous expenses up to one-month's base salary not to exceed \$6,250 (collectively, the "**Relocation Expenses**"). The Debtors' Relocation Expenses program is administered by Weichert Workforce Mobility, Inc. ("**Weichert**").

The Debtors' reimbursement of Relocation Expenses is key to maintaining their ability to transfer their Employees to different job sites as needed.

44. During the six months prior to the Petition Date, the Debtors incurred approximately \$25,000 on average per month in connection with the Relocation Expenses. As of the Petition Date, the Debtors believe that there are no accrued but unpaid amounts in connection with the Relocation Expenses.

**D. Employee Benefit Programs**

45. In the ordinary course of business, the Debtors offer eligible Employees, their eligible spouses and dependents, and certain former Employees various employee benefits, including, without limitation: (i) medical, prescription drug, dental, and vision coverage, (ii) participation in the HSAs, FSAs, and the HRA (each as defined below), (iii) participation in the Income Protection Plans (as defined below), (iv) the ability to participate in the 401(k) Program (as defined below), (v) workers' compensation, (vi) the ability to participate in Supplemental Benefits Programs (as defined below), and (vii) the Benefits Reimbursement Arrangement (as defined below, and, together (i) – (vii), the “**Employee Benefits Programs**” and, any obligations thereunder, the “**Employee Benefits Obligations**”). The Employee Benefits Programs are described in further detail below.

**(i) Medical Benefits, Dental Benefits, and Vision Plan**

**a. Medical Benefits**

46. The Debtors offer eligible Employees and their family members the opportunity to obtain basic medical and prescription drug benefits (the “**Medical Benefits**”) under one of three plans that are each fully insured and administered by United Healthcare Services, Inc. (“**UHC**”): a high-deductible health plan combined with a health savings account (the “**Choice Plus HSA Plan**”), and two PPO plans (each a “**PPO Plan**” and, together with the Choice Plus HSA Plan, the

**“Medical Plans”**). The obligations incurred by the Debtors on account of the Medical Benefits fluctuate based on the number of Employees enrolled in the Medical Plans.<sup>14</sup> For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$497,100 in premiums per month in connection with the Medical Benefits. As of the Petition Date, the Debtors believe that there are approximately \$67,900 in premiums in accrued and unpaid amounts owing on account of the Medical Benefits.

47. In addition, as required under the Consolidated Omnibus Budget Reconciliation Act of 1985 (**“COBRA”**), the Debtors provide temporary continuation of healthcare benefits at group rates to former Employees after their termination, retirement, or disability leave through WageWorks, Inc. (**“WageWorks”**). The former Employees bear all costs associated with COBRA. While the Debtors do not expect to owe former Employees any amounts on account of this benefit, and do not expect any such amounts to arise, the Debtors request that former Employees and eligible dependents retain the right to coverage in accordance with COBRA requirements and request authorization to pay obligations (if any) arising under such plans, regardless of when such obligations accrued.

**b. Dental Benefits**

48. The Debtors also offer eligible Employees and their family members the opportunity to obtain basic dental coverage (the **“Dental Benefits”**). The Dental Benefits are administered by MetLife, Inc. (**“MetLife”**). For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$27,000 in premiums on average per month in connection with

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<sup>14</sup> Starting July 1, 2020, and as part of the Debtors’ cost-reduction efforts, the Medical Benefits, the Dental Benefits, and the Vision Benefits (each as defined herein) ceased to be fully provided by the Debtors at no cost to the Employees who only elect to be personally covered and forego coverage for family members. Instead, starting July 1, 2020, all Employees started contributing 25 percent of the cost of those benefits, with the remainder of the costs borne by the Debtors.

the Dental Benefits. As of the Petition Date, the Debtors believe that there are approximately \$3,600 in premiums owed in connection with the Dental Benefits.

**c. Vision Plan**

49. The Debtors provide all Employees with the option to enroll in a vision insurance plan (the “**Vision Plan**”) that is currently administered and insured by Metlife, but that was administered and insured by VSP Vision Care (“**VSP**”) up until July 1, 2020. The Vision Plan covers Employees’ routine eye exams, eyeglass frames and lenses, and contact lenses. For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$6,600 in premiums per month in connection with the Vision Plan. As of the Petition Date, the Debtors believe that there are approximately \$800 in premiums owed in connection with the Vision Plan.

**(ii) The HSAs, FSAs, and the HRA**

50. The Debtors offer all Employees participating in the Choice Plus HSA Plan the opportunity to contribute to health savings accounts (the “**HSAs**”) at HSA Bank to be used for healthcare-related expenses. Each participating Employee may contribute a portion of his or her eligible earnings each year on a pre-tax basis to his or her HSA, subject to limits imposed by federal law. A participating Employee may only use his or her HSA for eligible medical expenses. In addition to Employee contributions, the Debtors contribute to the HSAs on behalf of eligible Employees. In the aggregate, the Debtors spend an average of approximately \$32,000 per month in contributions to their Employees’ HSAs (based on the twelve months prior to the Petition Date).<sup>15</sup> However, as part of the Debtors’ cost reduction efforts, the Debtors’ contributions to the HSAs decreased by approximately 75 percent starting on July 1, 2020. Still, as of the Petition

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<sup>15</sup> As a consequence of RIFs and the Debtors’ cost-reduction initiatives, this amount is expected to decrease going forward.

Date, the Debtors estimate that they owe approximately \$3,900 in accrued but unpaid contributions to the HSAs.

51. The Debtors also offer Employees participating in the PPOs the opportunity to contribute, through pre-tax compensation deductions, to medical flexible spending accounts, dependent care flexible spending accounts, and limited purpose flexible spending accounts (collectively, the “**FSA**s”) at the Total Administrative Services Corporation (“**TASC**”) to be used exclusively for certain healthcare-related expenses. Unlike HSAs, the Debtors do not contribute to FSAs.

52. Finally, the Debtors offer Employees participating in the PPOs a health reimbursement arrangement (the “**HRA**”), administered by HSA Bank, whereby the Debtors make fixed contributions of \$375, \$750, or \$1,125 per year, depending on the Employee’s enrollment election (*i.e.*, Employee only, Employee and spouse or children, or family), towards such Employee’s deductible costs. However, as part of the Debtors’ cost reduction efforts, the HRA program was suspended starting on June 30, 2020, with a 30-day run-out period extending through July 31, 2020. The Debtors cannot know the exact amount they owe under the HRA program until the 30-day run-out period is concluded and all HRA claims have been submitted. However, the Debtors anticipate that there will be no more than approximately \$148,125 in prepetition amounts accrued but unpaid in connection with the HRA.

**(iii) Income Protection**

53. Eligible Employees receive, at the Debtors’ cost, short-term disability insurance, long-term disability insurance, accidental death and dismemberment insurance, and basic life insurance (such insurance plans, the “**Income Protection Plans**”). The Income Protection Plans are administered by Lincoln Financial Group (“**Lincoln**”).

54. For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$5,400 on average per month in connection with the Income Protection Plans.<sup>16</sup> As of the Petition Date, the Debtors believe that approximately \$400 is owed on account of premiums under the Income Protection Plans.

**(iv) 401(k) Plan**

55. The Debtors sponsor a 401(k) retirement savings plan (the “**401(k) Plan**”) for eligible Employees. The 401(k) Plan is administered by Lincoln and Prime Capital Investment Advisors, LLC (“**Prime Capital**”), who acts as co-fiduciary with the Debtors and as financial advisor for the Debtors and the Employees in order to help structure portfolios and monitor the fees and performance of 401(k) investments.

56. Under the 401(k) Plan, an eligible Employee may contribute a portion of his or her eligible earnings each year through either pre-tax contributions, Roth contributions, or a combination thereof, to the 401(k) Plan, subject to limits imposed by federal law. These contributions are deducted from the paychecks of participating Employees and paid to Lincoln (in such capacity, the “**401(k) Trustee**”) to be held in an account maintained by the 401(k) Trustee on the Employee’s behalf. In addition, the 401(k) Plan permits Employees to take loans against their individual 401(k) account, and the Debtors deduct loan payments from such Employee’s paycheck and remit such amounts to the 401(k) Trustee. The 401(k) Trustee’s administrative fees are deducted from 401(k) Plan assets. Currently, approximately 271 Employees participate in the 401(k) Plan.

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<sup>16</sup> This amount is expected to decrease going forward to reflect the Debtors’ current headcount. In addition, as part of the Debtors’ cost-reduction efforts, and due to significant premium cost increases and growing claims, as of July 1, 2020, short-term disability coverage at the current level ceased to be fully provided by the Debtors, and a portion thereof was shifted instead to a system based on voluntary employee buy-in.

57. The Debtors match Employee contributions up to 4% of the participating Employee's eligible compensation, subject to limits imposed by federal law. Matching contributions made on behalf of the Debtors' Employees to the 401(k) Plan average, on a monthly basis based on the twelve months prior to the Petition Date, approximately \$122,800. However, as part of the Debtors' cost-reduction efforts, the Debtors' matching contributions to the 401(k) Plan were suspended as of July 1, 2020. As of the Petition Date, the Debtors estimate that there are no accrued amounts outstanding on account of prepetition matching contributions related to the 401(k) Plan.

**(v) Workers' Compensation**

58. Under the laws of the various states in which they operate, the Debtors are required to maintain workers' compensation policies and programs, or participate in workers' compensation programs administered by state governments, to provide their Employees with workers' compensation coverage for claims arising from or related to their employment with the Debtors. The Debtors' Employees are covered under workers' compensation policies (the "**Workers' Compensation Policies**") that are either "monopolistic" (*i.e.* provided by a government-operated insurance provider) or "non-monopolistic" (*i.e.*, provided by a private sector insurance provider). The Debtors maintain one monopolistic Workers' Compensation Policy that is overseen by the Ohio Bureau of Workers Compensation (the "**Monopolistic Workers' Compensation Policy**"), and three non-monopolistic Workers' Compensation Policies (the "**Non-Monopolistic Workers' Compensation Policies**") issued by Starr Indemnity and Liability Company ("**Starr**").

59. The Debtors pay an annual premium of approximately \$25,787 on account of the Monopolistic Workers' Compensation Policy. The premiums paid on account of the Non-Monopolistic Workers' Compensation Policies are financed through a premium financing agreement (the "**PFA**"), as described more fully in the *Debtors' Emergency Motion for Entry of*

*an Order Authorizing Debtors to (I) Pay their Prepetition Insurance Obligations, (II) Pay their Prepetition Bonding Obligations, (III) Maintain their Postpetition Insurance Coverage, (IV) Maintain their Bonding Program, and (V) Maintain Postpetition Financing of Insurance Premiums*, filed concurrently herewith (the “**Insurance Motion**”). The Debtors have requested relief authorizing them to make payments under the PFA separately pursuant to the Insurance Motion.

60. Under the Workers’ Compensation Policies, upon the filing of a verified claim (“**Workers’ Compensation Claim**”) by an eligible Employee, the insurance provider (Starr or the Ohio Bureau of Workers Compensation, as applicable) pays the Workers’ Compensation Claim amount directly to the Employee.

61. It is critical that the Debtors be permitted to continue their workers’ compensation program and to make payments in connection with outstanding prepetition claims, taxes, charges, assessments, premiums, and third party administrator fees in the ordinary course of business because alternative arrangements for workers’ compensation coverage would most certainly be more costly, and the failure to provide coverage may subject the Debtors and/or their officers to severe penalties. To facilitate the ordinary course handling of Workers’ Compensation Claims, the Debtors further request authority, in their sole discretion, to lift the automatic stay of section 362 of the Bankruptcy Code to allow Workers’ Compensation Claims to proceed under the Workers’ Compensation Policy and to allow the Debtors, their affiliates, their insurance providers and/or their third party administrators to negotiate, settle and/or litigate Workers’ Compensation Claims, and pay resulting amounts, whether such claims arose before or after the Petition Date. As of the Petition Date, the Debtors have approximately \$26,060 in accrued but unpaid liability on account of the Workers’ Compensation Policy.



**(vi) Supplemental Benefits Programs**

62. The Debtors offer the following additional benefit programs to their Employees through Metlife and Lincoln (collectively, the “**Supplemental Benefits Programs**”): (i) accident insurance, (ii) critical illness insurance, (iii) hospital indemnity insurance, (iv) legal insurance, (v) supplemental life and, as of July 1, 2020, supplemental short-term disability insurance, and (vi) auto and home group insurance. All costs associated with the Supplemental Benefits Programs are paid by the enrolled Employees through bi-weekly paycheck Deductions.

**(vii) Benefits Reimbursement Arrangement**

63. In the ordinary course of business, the Debtors reimburse the healthcare and mobile phone expenses of their Chief Executive Officer instead of paying for such expenses directly (the “**Benefits Reimbursement Arrangement**”). By this Motion, the Debtors request authority to continue the Benefits Reimbursement Arrangement on a postpetition basis in the ordinary course of business and consistent with historical practice.

64. As of the Petition Date, there are no amounts accrued and due on account of the Benefits Reimbursement Arrangement. The Debtors anticipate reimbursement obligations under the Benefits Reimbursement Arrangement will be approximately \$5,250 per month on a postpetition basis.

**(viii) Benefits Management and Consultation**

65. In the ordinary course of business, the Debtors have in the past utilized Pearl Meyer & Partners, LLC (“**Pearl Meyer**”) and currently utilize Meridian Compensation Partners, LLC (“**Meridian**”) as compensation consultants. Meridian assists the Debtors on various projects, including designing executive and Directors’ compensation programs. During the twelve months prior to the Petition Date, the Debtors paid approximately \$87,700 to Pearl Meyer on account of

its services. As of the Petition Date, the Debtors believe there are no accrued and outstanding amounts owed to either Pearl Meyer or Meridian.

66. By this Motion, the Debtors seek authority to continue paying Meridian any postpetition amounts in the ordinary course of business and consistent with past practice, and, out of an abundance of caution, pay any prepetition amounts that may be accrued and outstanding to Meridian.<sup>17</sup> The failure to pay prepetition or postpetition amounts on account of Meridian's consulting services may disrupt the administration of the Employee Benefit Programs to the detriment of the certain of the Debtors' key personnel.

#### **E. Honoring of Prepetition Workforce Obligations**

67. The Debtors request authority to pay or provide, as they become due, all prepetition Workforce Obligations that are described in Sections B, C, and D of this Motion. The Debtors estimate that the aggregate amount of the prepetition Workforce Obligations described above is approximately \$2,837,785. Estimated outstanding amounts as of the Petition Date are summarized in further detail below:

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
<b><i>Workforce Compensation Programs</i></b>	
i. Employee payroll obligations (net of Deductions)	\$358,900
ii. Independent Contractors' compensation	\$96,700
iii. Deductions (payroll, Employee-funded benefits and insurance, etc.)	\$1,147,800
iv. PTO	\$609,700 <sup>18</sup>

<sup>17</sup> For the avoidance of doubt, the Debtors are not seeking at this time to assume or reject any contract with Meridian.

<sup>18</sup> The Debtors estimate that, as of the Petition Date, aggregate accrued but unpaid PTO liability for all Employees totals approximately \$609,700. This accrued amount, however, does not represent a true "cash" liability for the Debtors, as the Debtors anticipate that Employees will use most of their PTO in the ordinary course of business.

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
v. Employee Cash Incentive Programs	\$65,000
vi. LTIP	\$0
<b>TOTAL</b>	<b>\$2,278,100</b>
<b><i>Employee Reimbursement Programs</i></b>	
i. Business Expenses	\$3,700
ii. Per Diem Stipends	\$5,900
iii. Mobile Expenses	\$1,500
iv. Tuition Expenses	\$0
v. Director Fees and Expenses	\$0
vi. Lodging Expenses	\$297,800
vii. Relocation Expenses	\$0
<b>TOTAL</b>	<b>\$308,900</b>
<b><i>Employee Benefits Programs (Employer Costs)</i></b>	
i. Medical Benefits, Dental Benefits, and Vision Plan	\$72,300
ii. HSAs and HRA	
a. HSAs	\$3,900
b. HRA	\$148,125
iii. Income Protection Plans	\$400
iv. 401(k) Plan	\$0
v. Workers Compensation Policies	\$26,060
vi. Benefits Reimbursement Arrangement	\$0
<b>TOTAL</b>	<b>\$250,785</b>
<b>GRAND TOTAL</b>	<b>\$2,837,785</b>

68. Due to the disruption and uncertainty that typically accompanies a chapter 11 filing, the Debtors believe that the continuity and competence of their Workforce would be jeopardized if the relief requested herein is not granted. Specifically, if the Debtors fail to honor and pay prepetition Employee Compensation Obligations, Employee Reimbursement Obligations and

Employee Benefits Obligations, in the ordinary course of business, the Debtors' Workforce will suffer extreme personal hardship and, in some cases, may be unable to pay their basic living expenses. This hardship would have a highly negative impact on Workforce morale and productivity, thereby resulting in immediate and irreparable harm to the Debtors' continuing operations and their estates. Accordingly, the Debtors have determined that payment of these amounts is vital to preventing losses in the Debtors' Workforce during the pendency of the Chapter 11 Cases and to maintaining the continuity and stability of the Debtors' operations.

**F. Postpetition Continuation of Workforce Programs**

69. The Debtors also request confirmation of their right to continue to honor and perform their obligations with respect to all of the Workforce Programs. The Workforce Programs are essential to the Debtors' efforts to maintain Workforce morale, reward performance through certain incentives, minimize attrition, and preserve the continuity and stability of the Debtors' operations. The Debtors believe that the expenses associated with the Workforce Programs are reasonable and cost-efficient in light of the potential attrition, loss of morale, loss of productivity, and disruption of business operations that would occur if the Workforce Programs were discontinued. Notwithstanding the foregoing, the Debtors reserve the right to evaluate all Workforce Programs and to make such modifications, including terminating any particular plan, program, or policy, as may be necessary or appropriate during the pendency of the Chapter 11 Cases.

**G. Payments to Administrators**

70. With respect to the Employee compensation and benefits described above, the Debtors contract with several vendors to administer and deliver payments or other benefits to their Employees (the "**Administrators**"). The Debtors' Administrators include, but are not limited to, ADP, Certent, HSA Bank, Lincoln, Meridian, MetLife, Prime Capital, UHC, TASC, VSP,

WageWorks, and Weichert. The Debtors pay certain of these Administrators' fees and expenses incurred in connection with the administration of the Workforce Programs. Specifically, based on the twelve months prior to the Petition Date, the Debtors paid a monthly average of approximately: (i) \$20,600 to ADP in connection with payroll administration and tracking, (ii) \$800 to HSA Bank in connection with the administration of the HRA and the HSAs, (iii) \$300 to Lincoln in connection with the administration of the 401(k) Plan, (iv) \$1,500 to Prime Capital in connection with its services related to the 401(k) Plan, (v) \$7,250 to Meridian on account of its compensation consulting services, (vi) \$300 to WageWorks in connection with the administration of COBRA, (vii) \$5,500 to TASC in connection with the administration of the FSAs, (viii) \$2,100 to Certent in connection with services related to the Debtors' stock-based rewards, and (ix) \$19,400 to Weichert on account of services in connection with the Relocation Expenses program. As of the Petition Date, the Debtors estimate they owe approximately \$135,000 to the Administrators.

71. In conjunction with the Debtors' payment of prepetition Workforce Obligations and continued performance under the Workforce Programs, the Debtors believe that it is necessary to obtain specific authorization to pay any claims of the Administrators on a postpetition basis, including prepetition claims to the extent necessary, to ensure uninterrupted delivery of certain benefits to the Workforce. The Debtors believe that the Administrators may fail to adequately and timely perform or may terminate their services to the Debtors unless the Debtors pay the Administrators' prepetition claims for administrative services rendered and expenses incurred. A need to engage replacement Administrators postpetition likely would cause significant disruption to the payment of benefits and other obligations to the Workforce. Accordingly, the Debtors submit that the payment of claims owed to the Administrators is in the best interest of the Debtors' estates.

**H. Honoring of Prepetition Checks**

72. Prior to the Petition Date, the Debtors paid certain of their prepetition Workforce Obligations with checks that had not been presented for payment as of the Petition Date. In order to ensure the orderly payment of the prepetition Workforce Obligations, the Debtors request that the Court enter the Order authorizing the Debtors' banks to honor any such checks that are drawn on the Debtors' accounts, and authorizing the banks to rely on the representations of the Debtors as to which checks are subject to this Motion. To the extent that any such checks are nevertheless refused payment, the Debtors additionally request authority to replace any checks or electronic fund transfers that may be dishonored and to reimburse any related expenses that may be incurred as a result of any bank's failure to honor a prepetition check or electronic fund transfer.

**APPLICABLE AUTHORITY**

**A. Payment of the Priority Portion of Prepetition Workforce Obligations Should be Authorized Under Section 507(a) of the Bankruptcy Code**

73. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code require that certain claims for prepetition wages, salaries, and vacation pay be accorded priority in payment in an amount not to exceed \$13,650 for each individual. In chapter 11, priority claims must be paid in full. Accordingly, granting the relief requested with respect to the priority portion of prepetition Workforce Obligations will not adversely affect the Debtors' other unsecured creditors.

74. The Debtors believe that, as of the Petition Date, no Employees are owed wages or salary compensation in excess of the \$13,650 statutory cap pursuant to section 507(a)(4) of the Bankruptcy Code, and in any event, the Debtors do not seek to pay any such Employee wages or salary compensation in excess of such cap pursuant to this Motion. The amounts of certain prepetition Workforce Obligations, such as Employee Benefits Obligations, are unknown pending

submission of claims and, therefore, the Debtors do not know the exact amount due on account of each Employee for the prepetition period.

**B. The Proposed Payments Are Appropriate under Section 363(b) of the Bankruptcy Code**

75. Under section 363 of the Bankruptcy Code, a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business. *See* 11 U.S.C. § 363(b). In order to obtain approval for the use of estate assets outside the ordinary course of business, the debtor must articulate a valid business justification for the requested use. *See Institutional 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) (holding that Section 363(b) of the Bankruptcy Code requires that "there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business"); *see also ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) ("Section 363 of the Bankruptcy Code addresses the debtor's use of property of the estate and incorporates a business judgment standard. . . . The business judgment standard in section 363 is flexible and encourages discretion."). To the extent the payment of prepetition wages, expenses and benefits are deemed to be outside the ordinary course of business, the preservation and protection of a debtor's business, the retention of a debtor's currently working employees, and the maintenance of positive employee morale provide a sufficient business justification for such payment. *See id.* Accordingly, this Court should grant the requested relief under section 363(b) of the Bankruptcy Code.

**C. Payment of Certain of the Prepetition Workforce Obligations is Appropriate under Section 541 of the Bankruptcy Code**

76. The payment of the Employee contribution component of the 401(k) Plan or payment of garnished wages and other similar other Deductions will not prejudice the Debtors'

estates because such withholdings are derived from Employee funds and held in trust for the benefit of the related payees and, thus, do not constitute property of the Debtors' estates under section 541 of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58-59 (1990). *See also In re Contractor Tech., Ltd.*, 343 B.R. 573, 581 (Bankr. S.D. Tex. 2006) (noting that “the estate does not become the true owner of funds held in trust upon the filing of a bankruptcy case.”); *In re Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1059 (3d Cir. 1993) (concluding that property that debtor holds in trust – either express or constructive – for another does not become property of the estate when the debtor files for bankruptcy, and stating that “Congress clearly intended the exclusion by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust.”). Moreover, payments that are critical to the retention and morale of the Debtors' Workforce actually add value to the estates because an unplanned reduction in Employee retention or productivity could have disastrous effects on any potential recoveries to unsecured creditors.

**D. Payment of Prepetition Workforce Obligations is Authorized under Sections 1107 and 1108 of the Bankruptcy Code**

77. The Debtors, operating their businesses as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business's going-concern value.” *Id.*

78. According to the *CoServ* court, there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *See id.* The *CoServ* court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment “is the only means to effect a substantial



enhancement of the estate.” *Id.* The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

*Id.* at 498.

79. Payment of prepetition Workforce Obligations meets each element of the *CoServ* court’s standard. First, any failure by the Debtors to pay prepetition Workforce Obligations would have a severe negative impact on the morale of the Debtors’ Workforce at a critical time for the Debtors and their businesses. Moreover, as described above, the Employees likely maintain priority claims against the Debtors on account of many of the prepetition Workforce Obligations.

80. Second, the potential harm and economic disadvantage that would stem from the failure to pay prepetition Workforce Obligations is grossly disproportionate to the amount of any prepetition claim that may be paid. Absent payment of prepetition Workforce Obligations, Workforce morale would decrease dramatically, likely leading to the loss of key personnel and other severe business disruptions costing far in excess of the amount of such obligations.

81. Third, the Debtors have examined other options short of payment of prepetition Workforce Obligations and have determined that to avoid significant disruption of the Debtors’ business operations there exists no practical or legal alternative to payment of such obligations. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of prepetition Workforce Obligations.

**E. Section 105(a) of the Bankruptcy Code and the Doctrine of Necessity Support Payment of Prepetition Workforce Obligations**

82. The proposed payments of prepetition Workforce Obligations should be authorized pursuant to section 105(a) of the Bankruptcy Code, which authorizes this Court “to issue any order . . . necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105. For the reasons set forth herein, and in light of the critical need for the Debtors to preserve the going concern value of their businesses in order to effect a successful reorganization through, among other things, preservation of the Debtors’ Workforce and its morale and productivity, payment of prepetition Workforce Obligations as requested herein is proper in accordance with section 105(a) of the Bankruptcy Code.

83. Payment of prepetition Workforce Obligations is further supported by the doctrine of necessity. The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization.<sup>19</sup> *See In re Equalnet Commc’ns Corp.*, 258 B.R. 368, 369 (Bankr. S.D. Tex. 2000) (recognizing the “doctrine of necessity” and observing that “[t]he need to pay [prepetition wage claims] in an ordinary course of business time frame is simple common sense,” and that “[e]mployees are more likely to stay in place and to refrain from actions which could be detrimental to the case and/or the estate if their

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<sup>19</sup> The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport C & Sw. Ry. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry.*, 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious, jeopardy.”).

pay and benefits remain intact and uninterrupted.”); *see also In re CoServ, L.L.C.*, 273 B.R. at 497 (recognizing the “doctrine of necessity”); *In re CEI Roofing, Inc.*, 315 B.R. 50, 56, 60–61 (Bankr. N.D. Tex. 2004) (holding that payment of certain prepetition claims under the doctrine of necessity is “based on both common sense and the express provisions of the Bankruptcy Code.”); *In re Mirant Corp.*, 296 B.R. 427, 429 (Bankr. N.D. Tex. 2004) (authorizing the debtors to pay certain prepetition claims because “The court d[id] not wish Debtors’ businesses seriously damaged.”).

84. For the reasons discussed herein, it is evident that payment of prepetition Workforce Obligations is necessary to the achievement of the Debtors’ chapter 11 objectives. In particular, without payment of the prepetition Workforce Obligations, the Debtors’ businesses and operations will be detrimentally impacted through the reduction in Workforce morale and the potential loss of key personnel during a critical time for the Debtors and their businesses. Hence, this Court should exercise its equitable powers to grant the relief requested in this Motion.

**F. A Limited Waiver of the Automatic Stay for Workers’ Compensation Claims is Appropriate**

85. Section 362(a) of the Bankruptcy Code operates to stay “the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .” 11 U.S.C. § 362(a)(1).

86. Section 362 of the Bankruptcy Code, however, permits a debtor or other parties in interest to request a modification or termination of the automatic stay for “cause.” *Id.* at § 362(d)(1). Cause exists here to modify the automatic stay to permit the Employees to proceed with Workers’ Compensation Claims in the appropriate judicial or administrative forum. Staying

the Workers' Compensation Claims could have a detrimental effect on the financial well-being and morale of the Employees.

87. Similarly, state law requires the Debtors to maintain the Workers' Compensation Policies and related programs. If the Debtors fail to maintain the Workers' Compensation Policies, state law may prohibit the Debtors from operating in the various states in which they operate. Payment of all amounts relating to the Workers' Compensation Policy and related programs is therefore crucial to the Debtors' continued operations and the success of the Debtors' restructuring.

### **EMERGENCY CONSIDERATION**

88. Pursuant to Bankruptcy Local Rule 9013-1, the Debtors respectfully request emergency consideration of this Motion pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one (21) days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm." The Debtors believe an immediate and orderly transition into chapter 11 is critical to the viability of their operations and the success of the Chapter 11 Cases. As discussed in detail above and in the First Day Declaration, immediate and irreparable harm would result if the relief requested herein is not granted. The Debtors utilize their Workforce to support virtually all aspects of their operations. Therefore, failure to receive the applicable relief during the first twenty-one (21) days of the Chapter 11 Cases would severely disrupt the Company's operations at this critical juncture. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 as well as the requirements of Bankruptcy Local Rule 9013-1 and, therefore, respectfully request that the Court approve the relief requested in this Motion on an emergency basis.

### **BANKRUPTCY RULE 6004 SHOULD BE WAIVED**

89. To the extent that any aspect of the relief sought herein constitutes a use of property under section 363(b) of the Bankruptcy Code, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors request in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their businesses and preserve the value of their estates. The Debtors respectfully request that the Court waive the notice requirements imposed by Bankruptcy Rule 6004(a) and the fourteen day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

### **RESERVATION OF RIGHTS**

90. Nothing contained herein is or should be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to the proposed Order once entered. Nothing contained in the Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

### **NOTICE**

91. Notice of this Motion will be given to: (i) the United States Trustee for the Southern District of Texas; (ii) the parties included on the Debtors' consolidated list of the holders of the 30

largest unsecured claims against the Debtors; (iii) Simpson, Thacher & Bartlett LLP as counsel to the agent for the Debtors' prepetition and postpetition secured asset-based revolving credit facility (the "**ABL Agent**"); (iv) U.S. Bank National Association as indenture trustee for the Debtors' prepetition notes; (v) counsel to that certain ad hoc group of holders of prepetition senior notes (the "**Ad Hoc Group**") (a) Paul, Weiss, Rifkind, Wharton & Garrison LLP and (b) Porter Hedges LLP; (vi) Shipman & Goodwin LLP as counsel to the agent under the Debtors' postpetition term loan facility; (vii) the United States Attorney's Office for the Southern District of Texas; (viii) the Internal Revenue Service; (ix) the Securities and Exchange Commission; (x) the state attorneys general for states in which the Debtors conduct business; and (xi) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required or needed under the circumstances.

92. A copy of this Motion is available on (i) the Court's website: [www.txs.uscourts.gov](http://www.txs.uscourts.gov), and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, at [www.kccllc.net/hicrush](http://www.kccllc.net/hicrush).

*[Remainder of page intentionally left blank]*

**WHEREFORE**, the Debtors respectfully request that the Court enter the proposed Order, substantially in the forms attached hereto, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Signed: July 12, 2020  
Houston, Texas

Respectfully Submitted,

/s/ Timothy A. ("Tad") Davidson II  
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-and-

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*Proposed Counsel for the Debtors and Debtors in Possession*

**CERTIFICATE OF SERVICE**

I certify that on July 12, 2020, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices.

/s/ Timothy A. ("Tad") Davidson II  
Timothy A. ("Tad") Davidson II



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

	X	
In re:	:	Chapter 11
	:	
HI-CRUSH INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 20-33495 (DRJ)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

**ORDER (I) AUTHORIZING (A) PAYMENT OF PREPETITION  
WORKFORCE OBLIGATIONS AND (B) CONTINUATION  
OF WORKFORCE PROGRAMS ON A POSTPETITION BASIS, (II)  
AUTHORIZING PAYMENT OF PAYROLL TAXES, (III) CONFIRMING  
THE DEBTORS’ AUTHORITY TO TRANSMIT PAYROLL DEDUCTIONS,  
(IV) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OWING TO  
ADMINISTRATORS, AND (V) DIRECTING BANKS TO HONOR PREPETITION  
CHECKS AND FUND TRANSFERS FOR AUTHORIZED PAYMENTS**

[Relates to Motion at Docket No. \_\_\_\_ ]

Upon the emergency motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of an Order (i) authorizing the Debtors to (a) pay certain prepetition amounts for compensation, benefits, and reimbursable expenses owing to or for the benefit of the Debtors’ Workforce and (b) continue, postpetition, the Workforce Programs in the ordinary course of business, as such programs were in effect immediately prior to the filing of the Chapter 11 Cases; (ii) confirming that the Debtors are authorized to pay any and all local, state and federal withholding and payroll-related or similar

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Hi-Crush Inc. (0530), OnCore Processing LLC (9403), Hi-Crush Augusta LLC (0668), Hi-Crush Whitehall LLC (5562), PDQ Properties LLC (9169), Hi-Crush Wyeville Operating LLC (5797), D & I Silica, LLC (9957), Hi-Crush Blair LLC (7094), Hi-Crush LMS LLC, Hi-Crush Investments Inc. (6547), Hi-Crush Permian Sand LLC, Hi-Crush Proppants LLC (0770), Hi-Crush PODS LLC, Hi-Crush Canada Inc. (9195), Hi-Crush Holdings LLC , Hi-Crush Services LLC (6206), BulkTracer Holdings LLC (4085), Pronghorn Logistics Holdings, LLC (5223), FB Industries USA Inc. (8208), PropDispatch LLC, Pronghorn Logistics, LLC (4547), and FB Logistics, LLC (8641). The Debtors’ address is 1330 Post Oak Blvd, Suite 600, Houston, Texas 77056.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

taxes relating to prepetition periods; (iii) confirming that the Debtors are permitted, but not required, to continue to deduct and to transmit deductions from payroll checks as authorized by Employees, as required by any Workforce-related plan, program or policy, or as required by law; (iv) authorizing the Debtors to pay any prepetition claims owing to the Administrators; and (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors' prepetition checks and fund transfers on account of any obligations authorized to be paid pursuant thereto; and (vi) granting related relief; all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this 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 it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and all objections, if any, to entry of this Order having been withdrawn, resolved, or overruled; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in the Order, it is hereby

**ORDERED THAT:**

1. Subject to Paragraph 2 of this Order, the Debtors are authorized, but not directed, to pay or otherwise honor all prepetition Workforce Obligations to, or for the benefit of, the Workforce, including but not limited to, all prepetition amounts owed in connection with (i) the Workforce Compensation Obligations, (ii) the Employee Reimbursement Obligations, and (iii) the Employee Benefits Obligations, each as described in the Motion. Notwithstanding any other provision of this Order, such payments shall not exceed \$2,837,785 in the aggregate without

further order of the Court. Such Workforce Obligations are summarized in further detail in the chart below.

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
<b><i>Workforce Compensation Programs</i></b>	
vii. Employee payroll obligations (net of Deductions)	\$358,900
viii. Independent Contractors' compensation	\$96,700
ix. Deductions (payroll, Employee-funded benefits and insurance, etc.)	\$1,147,800
x. PTO	\$609,700
xi. Employee Cash Incentive Programs	\$65,000
xii. LTIP	\$0
<b>TOTAL</b>	<b>\$2,278,100</b>
<b><i>Employee Reimbursement Programs</i></b>	
viii. Business Expenses	\$3,700
ix. Per Diem Stipends	\$5,900
x. Mobile Expenses	\$1,500
xi. Tuition Expenses	\$0
xii. Director Fees and Expenses	\$0
xiii. Lodging Expenses	\$297,800
xiv. Relocation Expenses	\$0
<b>TOTAL</b>	<b>\$308,900</b>
<b><i>Employee Benefits Programs (Employer Costs)</i></b>	
vii. Medical Benefits, Dental Benefits, and Vision Plan	\$72,300
viii. HSAs and HRA	
a. HSAs	\$3,900
b. HRA	\$148,125
ix. Income Protection Plans	\$400
x. 401(k) Plan	\$0
xi. Workers Compensation Policies	\$26,060
xii. Benefits Reimbursement Arrangement	\$0

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
<b>TOTAL</b>	<b>\$250,785</b>
<b>GRAND TOTAL</b>	<b>\$2,837,785</b>

2. The Debtors shall provide five (5) days' advance notice to the U.S. Trustee, counsel to the ABL Agent, counsel to the Ad Hoc Group, and counsel to any statutory committee if any individual in the Workforce is anticipated to receive prepetition payments under this Order in excess of the priority caps set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code; *provided*, that if the U.S. Trustee, the ABL Agent, the Ad Hoc Group, or any statutory committee objects to such payment, the Debtors shall not make such payment in excess of the priority caps set forth in sections 507(a)(4) and 507(a)(5) without further order of the Court or written consent from the U.S. Trustee or any statutory committee, as applicable. For the avoidance of doubt, the Debtors shall not make any cash payments to "insiders" of the Debtors, as that term is defined in section 101(31) of the Bankruptcy Code, under any bonus, incentive, or retention plan, or any severance obligation without first (i) consulting with the advisors to the ABL Agent and the advisors to the Ad Hoc Group and (ii) seeking authority from the Court.

3. Except as otherwise expressly set forth in this Order, the Debtors are authorized to (i) continue each of the Workforce Programs, including but not limited to, the Workforce Compensation Programs, the Employee Reimbursement Programs, and the Employee Benefits Programs, each as described in the Motion, in the ordinary course of business during the pendency of the Chapter 11 Cases in the manner and to the extent that such Workforce Programs were in effect immediately prior to the filing of the Chapter 11 Cases, and (ii) continue to fund and to make payments in connection with the costs of and the expenses incurred in the administration of any Workforce Program, including but not limited to, the Workforce Compensation Programs, the

Employee Reimbursement Programs, and the Employee Benefits Programs, as described in the Motion, in the ordinary course of business.

4. The Debtors are authorized to honor the LTIP Awards granted prepetition and continue the vesting of Stock Units, on a postpetition basis, in the ordinary course and consistent with historical practice, both for insider and non-insider Employees; *provided* that no cash payments shall be made on account the LTIP without further order of the Court; *provided, further* that the Debtors are not authorized to make any further grants under the LTIP during the Chapter 11 Cases without further order of the Court. Before making any payments or transfers due under the Employee Cash Incentive Programs and LTIP in excess of \$25,000 to any individual, the Debtors shall provide five (5) days' advance notice to the U.S. Trustee, the Ad Hoc Group, and any statutory committee of (a) the title of the Claimant, (b) the amount of the payment or transfer of such Claimant, and (c) the proposed payment date. The Debtors shall maintain a matrix or schedule of amounts paid related to the Employee Cash Incentive Programs and LTIP subject to the terms and conditions of this Order, including the following information: (a) the name of the Claimant paid; (b) the amount of the payment to such Claimant; (c) the total amount paid to the Claimant to date; (d) the payment date; and (e) the purpose of such payment. The Debtors shall provide a copy of such matrix or schedule to the U.S. Trustee, the Ad Hoc Group, and any statutory committee appointed in these chapter 11 cases every 30 days beginning upon entry of this Order.

5. The Debtors are authorized to reimburse the Employees for all Employee Reimbursement Obligations incurred prior to the Petition Date. In addition, the Debtors are authorized to make direct payments to third parties on account of amounts owed in connection with the Employee Reimbursement Obligations.

6. The Debtors are authorized to continue their Workers' Compensation Policy and to pay any outstanding prepetition claims, taxes, charges, assessments, premiums, and third party administrator fees arising under the Workers' Compensation Policy and or programs in which they participate. In addition, the automatic stay of section 362(d) of the Bankruptcy Code is hereby lifted to allow the Debtors' Employees to proceed with any Workers' Compensation Claims they may have under the Workers' Compensation Policy and to allow the Debtors' insurance providers and/or third party administrators to negotiate, settle, and/or litigate such claims, and pay resulting amounts, whether such claims arose before or after the Petition Date.

7. The Debtors are authorized to withhold, pay and/or transmit any and all amounts attributable to the Deductions, including but not limited to, paying withholding and payroll-related taxes and fees related to the Workforce Obligations, social security taxes, and Medicare taxes, as required by any Workforce-related plan, program or policy, or as required by law, whether such amounts relate to the period before or after the Petition Date.

8. The Debtors are authorized to pay amounts owed in connection with claims of the Administrators in connection with administering and delivering payments or providing other services and benefits to the Workforce for prepetition services rendered and claims for reimbursement based on prepetition disbursements made by the Administrators.

9. The Debtors are authorized, but not directed, to pay any prepetition amounts owed to the Directors and may continue to make such payments on a postpetition basis in the ordinary course of business.

10. Notwithstanding anything herein to the contrary, nothing herein shall be deemed to authorize any prepetition or postpetition payments on account of an incentive plan, a retention plan (including the retention plans governing the Prepetition KERP Payments), or a similar plan, in

each case to the extent such payments violate section 503(c) of the Bankruptcy Code; *provided, however,* that nothing herein shall prejudice the Debtors' ability to seek authorization to make any payments that are subject to section 503(c) of the Bankruptcy Code, in consultation with the advisors to the ABL Agent and the advisors to the Ad Hoc Group, pursuant to a separate motion.

11. Authorization to pay, and the payment of, any amounts on account of prepetition Workforce Obligations, including any amounts on account of the Workforce Compensation Obligations, the Employee Reimbursement Obligations, and/or the Employee Benefits Obligations, shall not affect the Debtors' right to contest the amount or validity of any prepetition Workforce Obligation, including without limitation, any amounts that may be due to any taxing authority.

12. The Debtors will provide notice to the U.S. Trustee, counsel to the ABL Agent, counsel to the Ad Hoc Group, and any other statutory committee of any changes to the Workforce Obligations or of any new programs, policies, and benefits.

13. Neither the provisions of this Order, nor any payments made or not made by the Debtors pursuant to this Order, shall be deemed an assumption or rejection of any Workforce Program, agreement or contract, or otherwise affect the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract between the Debtors and any member of the Workforce, or other person.

14. Notwithstanding anything to the contrary in this Order, the Debtors retain their right, in consultation with the advisors to the ABL Agent and the advisors to the Ad Hoc Group, to modify or terminate any Workforce Program to the extent that such right exists under the terms of the Workforce Program or as may be required by applicable law; *provided, however,* that the

Debtors shall seek court approval, on notice, of any modification that would implicate any portion of section 503(c) of the Bankruptcy Code.

15. Notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Order shall create any rights in favor of, or enhance, limit or change the status of any claim held by, any member of the Workforce, or other person.

16. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, and pay any and all checks or electronic fund transfers drawn on the Debtors' bank accounts to pay all prepetition amounts owed to any party in connection with the Prepetition Workforce Obligations, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. Further, the Debtors are authorized to issue new postpetition checks and initiate new postpetition electronic fund transfers to replace any checks or electronic fund transfers that may be dishonored and to reimburse any related expenses that may be incurred as a result of any bank's failure to honor a prepetition check or electronic fund transfer.

17. The Debtors' banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for in this Order.

18. Nothing in the Motion or this Order, or the Debtors' payment of any claims pursuant to this Order, shall be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors'



rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Order. Nothing contained in this Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

19. Notwithstanding anything to the contrary contained herein, (i) any payment made or to be made or authorization contained hereunder shall be subject to the requirements imposed on the Debtors under any orders approving a postpetition financing facility or any order regarding the use of cash collateral approved by this Court in these Chapter 11 Cases (collectively, the "**DIP Orders**"), and (ii) to the extent there is any inconsistency between the terms of the DIP Orders and any action taken or proposed to be taken hereunder, the terms of the DIP Orders shall control. For the avoidance of doubt, the Debtors are not authorized to make any payments pursuant to this Order except as permitted by the Budget (as defined in the DIP Orders).

20. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, this Order shall be effective and enforceable immediately upon entry hereof.

21. The contents of the Motion satisfy the requirements of Bankruptcy Rules 6003(b) and 6004(a).

22. The Debtors are hereby authorized to take such actions and to execute such documents as may be necessary to implement the relief granted by this Order.

23. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed \_\_\_\_\_, 2020

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DAVID R. JONES  
UNITED STATES BANKRUPTCY JUDGE