

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----X  
:
  
In re: : Chapter 11
  
:
  
THQ INC., *et al.*, : Case No. 12 - 13398 ( )
  
:
  
Debtors.<sup>1</sup> : (Joint Administration Requested)
  
:
  
-----X

**DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS  
(I) AUTHORIZING THE DEBTORS TO PAY CERTAIN EMPLOYEE  
OBLIGATIONS AND MAINTAIN AND CONTINUE EMPLOYEE BENEFITS  
AND PROGRAMS AND (II) AUTHORIZING AND DIRECTING APPLICABLE  
BANKS AND OTHER FINANCIAL INSTITUTIONS TO HONOR AND  
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS**

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”), hereby file this motion (the “**Motion**”) for entry of interim and final orders, substantially in the forms annexed hereto as **Exhibit A** and **Exhibit B**, respectfully,

(i) authorizing, but not directing, the Debtors to (a) pay prepetition wages, salaries, and other compensation, taxes, withholdings, and related costs, and reimbursable employee expenses, (b) upon entry of a final order, pay Quarter Sales Bonuses (as defined in paragraph 32 below) and Outstanding Profit Sharing Bonus (as defined in paragraph 35 below), (c) pay and honor obligations relating to employee medical, insurance, and other benefit programs, and (d) continue their employee medical, insurance, and other benefits programs on a postpetition basis; and (ii) authorizing and directing applicable banks and other financial institutions to honor and process checks and transfers related to such obligations. In support of the Motion, the Debtors submit the *Declaration of Brian J. Farrell in Support of the Debtors' Chapter 11 Petitions and*

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.



*Requests for First Day Relief* (the “**Farrell First Day Declaration**”), which was filed contemporaneously herewith. In further support of this Motion, the Debtors respectfully represent:

### **JURISDICTION**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363(b), and 507 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 9013-1 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”).

### **BACKGROUND**

2. On the date hereof (the “**Petition Date**”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are continuing to manage their financial affairs as debtors in possession.

3. Contemporaneously herewith, the Debtors filed a motion seeking joint administration of their chapter 11 cases (the “**Chapter 11 Cases**”) pursuant to Bankruptcy Rule 1015(b), and Local Rule 1015-1. No trustee, examiner, or official committee of unsecured creditors has been appointed in these cases.

4. Information regarding the Debtors’ history and business operations,

capital structure and primary secured indebtedness, and the events leading up to the commencement of these Chapter 11 Cases can be found in the Farrell First Day Declaration.

### **RELIEF REQUESTED**

5. By this Motion, the Debtors request entry of interim and final orders authorizing, but not directing, the Debtors, in their sole discretion, to (i) pay all prepetition claims and honor obligations incurred or related to Compensation Obligations, Withholding Obligations, Reimbursable Expense Obligations, Quarterly Sales Bonuses, the Profit Sharing Bonus, and Employee Benefit Obligations (each as defined below, and collectively, the “**Employee Obligations**”) and all fees and costs incident to the foregoing, including amounts owed to third-party administrators; and (ii) maintain and honor, in the ordinary course of business, existing employee benefit plans and programs.

6. To enable the Debtors to carry out the relief requested, the Debtors also request that the Court authorize and direct all applicable banks, financial institutions, and Automatic Data Processing, Inc. (“**ADP**”), the Debtors’ payroll processor, to receive, process, honor, and pay all checks presented for payment and all electronic payment requests made by the Debtors relating to the Employee Obligations, whether such checks were presented or electronic-payment requests were submitted prior to or after the date hereof.<sup>2</sup>

### **The Debtors’ Workforce and Related Obligations**

7. In connection with their operations, the Debtors currently employ approximately 462 full-time employees (the “**Employees**”). The Debtors also regularly engage temporary employees (the “**Temporary Employees**”) and independent contractors (the “**Independent Contractors**”) to provide clerical, marketing, accounting, product

---

<sup>2</sup> Concurrently herewith, the Debtors have filed a motion for authority to, among other things, continue their cash management system (the “**Cash Management Motion**”).

development, information technology, as well as other services for the Debtors. The Debtors' Employees, Temporary Employees, and Independent Contractors are collectively referred to herein as the "**Debtors' Workforce.**"

8. The Debtors' Employees are the lifeblood of their business and their value cannot be overstated. The management, marketing, sales, technical, and software development skills of their Employees are essential to the Debtors' ability to develop and bring high-quality, competitive products to market. To a significant extent, the Debtors' success depends upon their ability to attract and retain key personnel. Competition for employees in the interactive entertainment software industry is fierce. If the Debtors cannot assure their Employees that the Debtors will promptly pay all prepetition Employee Obligations and continue to honor Employee Benefits, there is no doubt that Employees may seek employment elsewhere, potentially from the Debtors' competition. The loss of Employees at this precarious time will undoubtedly have a material adverse impact on the Debtors' businesses and ability to operate as a going concern.

9. Moreover, the Independent Contractors and Temporary Employees fill critical and immediate business needs of the Debtors. In such capacity, certain of the Temporary Employees and Independent Contractors play key roles in the development process of the Debtors' games, while others have become intimately familiar with the Debtors' business operations, such as their financial affairs, books and records, marketing strategies, and administration. Thus, as with the Debtors' regular Employees, if the Debtors fail to honor their prepetition compensation obligations to the Independent Contractors and Temporary Employees, it is likely that the Debtors will lose such individuals' valuable services to the detriment of the Debtors' ongoing business operations.

10. In particular, the expertise and continuity of the teams at the Debtors' development studios are critical to maximizing the value of the Debtors' assets. There are fewer than one hundred game development teams worldwide that have the skills to develop "AAA" core console games, like those developed by the Debtors. Each of the studios has specific talent and expertise in a game's genre and the related intellectual property, and once a project is started with a development team, it is nearly impossible to transition the development to a new team, as each team develops and uses a proprietary set of tools and techniques to develop the respective game. Thus, retaining the members of these teams is critical to realizing value from the Debtors' ongoing development business.

11. In the ordinary course of business, the Debtors incur payroll and other compensation obligations for their Workforce. The Debtors also provide other benefits to their Employees for the performance of services. These benefits and obligations are described in more detail below.

#### **A. Workforce Compensation Obligations**

##### **1. Employee Compensation Obligations**

12. In the ordinary course of business, the Debtors incur payroll obligations to their Employees, comprised generally of salaries and wages. Approximately 354 Employees are paid a fixed salary (the "**Salaried Employees**") and approximately 108 Employees are paid on an hourly basis (the "**Hourly Employees**"). The Debtors pay Salaried Employees on a current, bi-weekly basis, on Fridays. The Debtors pay Hourly Employees on a bi-weekly basis, on Fridays, in arrears. Any adjustments are processed in the next pay period. The last date Employees were compensated prior to the Petition Date was December 14, 2012, which

primarily included all salaries earned through December 15, 2012 and all wages earned through December 9, 2012.

13. Approximately ninety-eight percent (98%) of the Debtors' payroll is made by direct deposit, with the remainder issued via checks. The Debtors utilize ADP to process their payroll and coordinate the payment of Withholding Obligations (defined below). Employees are paid from one of the Debtors' disbursement accounts maintained at Union Bank (the "**Payroll Account**").<sup>3</sup> In the case of Employees paid by direct deposit, ADP transfers the appropriate amounts from the Payroll Account to such Employees' respective designated accounts. For Employees receiving checks, ADP issues individual checks against the Payroll Account, and the Debtors then distribute those checks to such Employees.

14. The ongoing services of ADP are imperative to the smooth functioning of the Debtors' payroll system. The Debtors pay ADP approximately \$6,000 per month for its services. As of the Petition Date, the Debtors estimate that they owe ADP approximately \$2,822 in outstanding fees in connection with its payroll services (the "**ADP Obligations**").

15. The next scheduled payroll date for Employees is December 28, 2012 and will include salaries and wages earned prepetition. The Debtors estimate that, as of the Petition Date, they owe approximately \$415,403 on account of accrued and unpaid prepetition salaries and wages (the "**Employee Compensation Obligations**"). To the best of the Debtors' understanding, no Employee is owed more than \$11,725 in accrued and unpaid prepetition wages or salaries.

16. The Debtors seek authorization, but not direction, to pay any unpaid Employee Compensation Obligations and any prepetition amounts owed to ADP in connection

---

<sup>3</sup> As set forth in more detail in the Cash Management Motion, the Payroll Account is funded by Wells Fargo Capital Finance, LLC ("**Wells Fargo**").

with its payroll services. In addition, the Debtors seek authority to cause any prepetition checks or electronic payment requests that were given in payment of Employee Compensation Obligations to be honored and to reissue any check or electronic payment request that is not cleared by the applicable bank or other financial institution, to the extent necessary.

## **2. Temporary Employees Obligations**

17. In the ordinary course of business, the Debtors utilize the services of various staffing agencies to engage a supplemental workforce of Temporary Employees. Approximately seventy-eight (78) Temporary Employees are currently working for the Debtors, although the exact number varies as the Debtors' business needs change. The Debtors do not pay wages, withhold taxes, or provide benefits for the Temporary Employees. Rather, the Debtors remit compensation for the Temporary Employees to the staffing agencies through the Debtors' accounts payable system. As of the Petition Date, the Debtors estimate that approximately \$253,354 has accrued in respect of the prepetition services of the Temporary Employees (the "**Temporary Employee Obligations**").

18. The Temporary Employees are integral components of the Debtors' Workforce and provide services to the Debtors as critical to the Debtors' operations as those provided by its Employees. Thus, similar to their Employees, any delay in payments to the staffing agencies, and, in turn, to the Temporary Employees, would likely cause the Debtors to lose the benefit of the Temporary Employees' services, which could significantly disrupt various aspects of the Debtors' operations. Accordingly, the Debtors request authority to pay any unpaid Temporary Employee Obligations.

### 3. Independent Contractor Obligations

19. The Debtors also regularly employ Independent Contractors in the ordinary course of business. The Independent Contractors are skilled persons who provide services that are critical to the development of the Debtors' interactive entertainment software and daily operations.

20. As of the Petition Date, the Debtors estimate that the aggregate amount owing to Independent Contractors for services performed prior to the Petition Date is approximately \$94,036 (the "**Independent Contractor Obligations**" and collectively with Employee Compensation Obligations, the ADP Obligations, and Temporary Employee Obligations, the "**Compensation Obligations**"). Because the Debtors would be irreparably harmed without the services of the Independent Contractors, the Debtors request authority to honor and pay any unpaid Independent Contractor Obligations.

21. To the best of the Debtors' knowledge, as of the Petition Date, one Independent Contractor is owed more than \$11,725 in accrued but unpaid Independent Contractor Obligations. Such Independent Contractor is owed approximately \$25,000 for services rendered within 90 days of the Petition Date in connection with the development of the *Saints Row 4* game, for which he is currently composing music. This same Independent Contractor also provided similar services to the Debtors in connection with the *Saints Row 3* game and, thus, is familiar with the *Saints Row* brand. As a result, the Debtors believe that it would be difficult, if not impossible to replace him given the Debtors' present circumstances. If the Debtors fail to promptly pay such Independent Contractor the unpaid prepetition compensation he is owed, it is likely that he will cease working for the Debtors, which would cause a significant disruption in the development of the *Saints Row 4* game. To retain the



services of such Independent Contractor in connection with the *Saints Row 4* game and any future games, the Debtors request that they be able to pay to him any unpaid prepetition compensation he is owed, even though doing so will result in such Independent Contractor receiving more than the statutory cap.

#### 4. Withholding Obligations

22. For each applicable pay period, the Debtors routinely deduct, directly, certain amounts from Employees' paychecks, including, without limitation, (a) garnishments, child support and service charges, and similar deductions and (b) other pre- and after-tax deductions payable pursuant to certain of the Employees' benefit plans discussed herein (such as an Employee's share of health care benefits and insurance premiums and 401(k) contributions), legally ordered deductions, and miscellaneous deductions (collectively, the "**Deductions**"). Year-to-date, on average, the Debtors have withheld approximately \$421,309 per month from Employees' wages on account of Deductions, which the Debtors remit to the appropriate third-party recipients.

23. In connection with the salaries and wages paid to Employees, the Debtors are required by law to withhold from their Employees' wages amounts related to federal, state, and local income taxes, as well as social security and Medicare taxes (collectively, the "**Employee Withholding Taxes**") and to remit the same to the applicable taxing authorities. In addition, the Debtors are required to make matching payments from their own funds for, among other things, social security and Medicare taxes and to pay, based on a percentage of gross payroll, state and federal unemployment insurance, employment training taxes, and state disability insurance contributions (the "**Employer Payroll Tax Obligations**," and together with Employee Withholding Taxes, the "**Payroll Tax Obligations**"). Each pay cycle the Debtors

withhold any applicable Employee Withholding Taxes from the Employees' wages, and ADP remits the same to the applicable taxing authorities. At the same time, ADP also remits any Employer Payroll Tax Obligations to the applicable taxing authorities. Year-to-date, on average, the Debtors have withheld approximately \$1,419,297 per month in Employee Withholding Taxes. The Debtors' average monthly payment for Employer Payroll Tax Obligations has been approximately \$431,001.

24. The Debtors seek authorization, but not direction, to pay the Deductions and the Payroll Tax Obligations (collectively, the "**Withholding Obligations**") and to remit amounts withheld on behalf of third parties postpetition in the ordinary course of business.

#### **5. Reimbursable Expense Obligations**

25. Prior to the Petition Date and in the ordinary course of business, the Debtors reimbursed Employees for approved, legitimate expenses incurred on behalf of the Debtors in the scope of the Employee's employment (the "**Reimbursable Expense Obligations**"). The Reimbursable Expense Obligations typically include expenses for, among other things, air travel, meals, parking, automobile mileage, office supplies, cellular telephones, and business development. All such expenses are incurred with the understanding that they will be reimbursed by the Debtors in accordance with the Debtors' reimbursement policy, as described in more detail below. In some cases, Employees pay for such expenses directly from their own funds and are reimbursed upon the submission of an expense reimbursement form itemizing the business expenses. Reimbursement is thus contingent on the Debtors' determination that the charges are for legitimate, reimbursable business expenses.

26. The Debtors also maintain a corporate credit card program with American Express (the "**Corporate Card Program**"). Under such program, certain Employees have been

issued American Express Corporate Cards (the “**Employee Corporate Cards**”) and incur reasonable expenses for goods and services purchased for, or incidental to, the Debtors’ business on such cards. In most cases, the Debtors make payments for expenses incurred on Employee Corporate Cards directly to American Express. However, Employees are personally and primarily liable to American Express for all charges on the Employee Corporate Cards.

27. Under the Corporate Card Program, the Debtors also maintain corporate credit cards known as procurement cards (the “**P Cards**”) and business travel account cards (the “**BTA Cards**” and together with the P Cards and Employee Credit Cards, the “**AMEX Cards**”). Certain departments within the Debtors’ business have been issued P Cards to use to procure supplies or to make other purchases relevant to the respective department. Certain departments have also been issued BTA Cards to use for the travel expenses of their respective Employees. The Debtors are primarily liable for expenses incurred on the P Cards and BTA Cards and the Debtors remit payment for such expenses directly to American Express. However, if the Debtors fail to pay American Express for expenses incurred on such cards, American Express might attempt to seek repayment from the individual who signed for the applicable transaction(s).

28. The Debtors process expense and reimbursement claims on a rolling basis. It is difficult for the Debtors to determine the exact amount of Reimbursable Expenses Obligations outstanding as of the Petition Date because Employees may have expenses that they have yet to submit to the Debtors for reimbursement. As of the Petition Date, the Debtors estimate that the total amount of unpaid prepetition Reimbursable Expense Obligations is approximately \$2,604.10. This amount represents expenses the Debtors’ Employees paid for directly from their own funds for which they have not yet been reimbursed. As of the Petition

Date, the Debtors estimate, but cannot be certain, that no amounts are owing to American Express on account of Reimbursable Expense Obligations incurred on the AMEX Cards. However, to the extent that there are prepetition amounts owing to American Express on account of Reimbursable Expense Obligations incurred on the AMEX Cards, the Debtors request authority to pay such amounts.

29. Employees incurred Reimbursable Expense Obligations as business expenses on the Debtors' behalf and with the understanding that they would be reimbursed or that the Debtors would pay American Express directly. To avoid harming Employees who incurred the Reimbursable Expense Obligations, the Debtors request authority to satisfy all prepetition Reimbursable Expense Obligations, including those incurred on the AMEX Cards. The Debtors intend to continue their reimbursement policy, including the Corporate Card Program, in the ordinary course during the administration of these cases.

## **B. Incentive Programs**

30. In the ordinary course of business, the Debtors have typically maintained discretionary incentive and bonus programs for their Employees (collectively, the "**Incentive Programs**"). The Incentive Programs under which amounts are owed to Employees as of the Petition Date are described below.

### **1. Sales Incentive Bonus Plan**

31. The Debtors offer a sales incentive bonus plan (the "**Sales Incentive Bonus Plan**") to their five sales Employees in the United States (the "**Sales Employees**"). The Sales Incentive Bonus Plan consists of two components – the quarterly incentive and the annual incentive. The annual incentive is comprised of the Debtors' applicable fiscal year performance goal(s) and the annual budgeted team revenue established at the beginning of the fiscal year, and

is paid following the close of the Debtors' fiscal year.<sup>4</sup> The quarterly incentive is comprised of team revenue and various individual targets for the Sales Employees and is paid quarterly.

32. The next quarterly bonus is scheduled to be paid in the fourth quarter of the Debtors' current fiscal year, likely in February, and will cover bonuses earned during the third quarter (i.e., October – December 2012) (the “**Quarterly Sales Bonuses**”). Although the exact amounts of the Quarterly Sales Bonuses will be determined at the end of the third quarter, the Debtors anticipate that such bonuses will be in the aggregate approximate amount of \$65,195. Assuming each of the Sales Employees hits 100% of his or her individual targets, the Debtors estimate that certain of the Sales Employees will be entitled to receive a Quarterly Sales Bonus in an amount that exceeds \$11,725.

33. The Debtors believe that the Sales Incentive Bonus Plan represents an integral component of the Sales Employees' cash compensation. Accordingly, the Debtors' failure to honor amounts owed under the Sales Incentive Bonus Plan would detrimentally affect the applicable Employees motivation and morale, impacting sales results and productivity levels, and thereby jeopardizing the Debtors' ability to realize value from their ongoing business operations. Accordingly, the Debtors request authority to pay and honor the Quarterly Sales Bonuses, irrespective of whether doing so will result in payments on account of prepetition obligations in an amount exceeding \$11,725 per Employee, upon the entry of a final order with respect to this Motion.

## **2. Product Development Profit Sharing Bonus Plan**

34. In November 2012, a new product development profit sharing bonus plan (the “**New Profit Sharing Plan**”) was approved for studio Employees, both the Employees developing product and the related support staff. Under the New Profit Sharing Plan, once a

---

<sup>4</sup> The Debtors' fiscal year is April 1 – March 30.

released game has reached a certain profitability threshold established by the Debtors, the Debtors will share 15-20% of the profits that exceed such threshold with the applicable studio Employees. When a bonus pool is funded under the New Profit Sharing Plan, the Debtors will pay bonuses to the eligible Employees over the next four quarters. As of the Petition Date, the Debtors have not yet implemented the New Profit Sharing Plan and, accordingly, no amounts are owed by the Debtors on account thereof.

35. However, the New Profit Sharing Plan replaced an old profit sharing plan for studio Employees (the “**Old Profit Sharing Plan**”). Prior to the Petition Date, a certain game developed by the Employees of Volition Inc. (“**Volition**”) reached the profitability threshold under the Old Profit Sharing Plan, and, as a result, the Debtors determined to pay the Employees of Volition a bonus under the Old Profit Sharing Plan (the “**Profit Sharing Bonus**”). The Debtors estimated that the bonus pool would be in the aggregate amount of \$2.6 million based on the game’s profitability to-date and the projected profitability over the lifetime of the game. In May 2012, the Debtors paid out \$1.3 million of the Profit Sharing Bonus. At or around the same time, the Debtors announced that the remaining amount of the Profit Sharing Bonus would be payable in the fourth quarter of the Debtors’ fiscal year 2013 (i.e., January – March 2013) (the “**Outstanding Profit Sharing Bonus**”). Although the exact amount of the Outstanding Profit Sharing Bonus will be determined closer to the payment date, the Debtors estimated that it would be approximately \$1.3 million.

36. The general manager of the Volition studio will allocate the Outstanding Profit Sharing Bonus amongst the 184 Volition Employees. The amount that each Employee will receive depends on a variety of factors, such as an Employee’s contribution to the game and retention concerns. The Debtors’ executive management approves the allocations prior to

distribution. Because the Debtors do not know the exact amount of the Outstanding Profit Sharing Bonus or the final allocations amongst the Volition Employees, the Debtors cannot determine whether any Employees will receive amounts in excess of \$11,725. However, the Debtors anticipate that approximately 15-20 Employees may receive an amount greater than \$11,725.

37. As mentioned above, the expertise and continuity of the development teams at Volition is critical to maximizing the value of the Debtors' assets and realizing value from the Debtors' ongoing development business. Successful game development teams are ones that can recruit and retain highly skilled personnel. The Debtors are in constant competition with their competitors for the best employees. Team members work closely with each other under intense deadlines to make and perfect each game, which takes approximately (18) to thirty-six (36) months to develop. Recruiting new development talent is an expensive and time consuming process, and the Debtors continually strive to maximize retention of their studio Employees using mechanisms such as the Profit Sharing Bonus.

38. The Debtors' failure to honor and pay the Profit Sharing Bonus would detrimentally affect the applicable Employees' motivation and morale, impacting productivity levels and jeopardizing the Debtors' ability to retain such critical Employees. The loss of a development team member could cause immediate and irreparable damage to the development process. Accordingly, the Debtors request authority to pay and honor the Profit Sharing Bonus, irrespective of whether doing so will result in payments on account of prepetition obligations in an amount exceeding \$11,725 per Employee, upon the entry of a final order with respect to this Motion.

### **C. Employee Benefit Programs**

39. In the ordinary course of business, the Debtors have established various benefit plans and policies for their Employees that can be divided into the following categories: (i) prescription and medical benefits, dental care, vision care (the “**Health Plans**”); (ii) basic life and accidental death and dismemberment insurance, supplemental life insurance, short- and long-term disability insurance, and other voluntary insurance plans (collectively, the “**Income Protection Plans**”); (iii) Vacation and PTO; (iv) the 401(k) Plan (defined below); and (v) the Flexible Spending Account Plan (as defined below and, together with the Health Plans, Income Protection Plans, Vacation and PTO, and the 401(k) Plan, the “**Employee Benefits Plans**”). In certain instances, the Debtors deduct specified amounts from the participating Employees’ wages in connection with the Employee Benefits Plans. All obligations with respect to the Employee Benefits Plans are hereinafter referred to as the “**Employee Benefits Obligations.**”

#### **1. Health Plans**

40. The Debtors offer their Employees a range of Health Plans. All premiums for such plans are paid on a cost-sharing basis between the Debtors and the Employees.

41. The Debtors offer Employees and eligible dependents medical and prescription drug benefits administered by Anthem BlueCross (“**Anthem**”), Kaiser Permanente (“**Kaiser**”), Health Alliance (“**Health Alliance**”), depending on the location of the Employee. Approximately 95% of Employees participate in such benefits plan. The Debtors pay the premiums for such benefits on the first of the month for the same month, with appropriate adjustments in subsequent months. The estimated monthly payment by the Debtors to Anthem, Kaiser, and Health Alliance is approximately: \$191,067; \$14,491; and \$113,901, respectively, which amounts are inclusive of the participating Employees’ contributions.



42. The Debtors also offer their Employees a dental benefits plan administered by Metropolitan Life Insurance Company (“**MetLife**”) and a vision benefits plan administered by and Vision Service Plan Company (“**VSP**”). Approximately 95% of Employees participate in the dental benefits plan and 92% of Employees participate in the vision benefits plan. Premiums are paid on the first of the month for the same month, with appropriate adjustments in subsequent months. The estimated monthly payment by the Debtors to MetLife and VSP is approximately \$30,386 and \$3,625, respectively, which amounts are inclusive of the participating Employees’ contributions.

43. Employee contributions to the Health Plans have been and are collected through payroll deductions from participating Employees. The Debtors believe that it is necessary and appropriate to continue to honor their obligations to existing employees under the Health Plans. The Debtors believe that they are current with all obligations with respect to Health Plans. However, to the extent that there remain any prepetition amounts due, the Debtors request authority, but not direction, to pay all such prepetition amounts. The Debtors also request authorization, but not direction, to continue to offer the Health Plans and honor their obligations thereunder in the ordinary course during the administration of these Chapter 11 Cases.

## **2. Income Protection Plans**

### **i. Life and AD&D Insurance**

44. The Debtors maintain primary life and accidental death and dismemberment coverage (the “**Life and AD&D Insurance**”) through Standard Insurance Company (“**Standard**”). Life and AD&D Insurance covers one times annual earnings up to a maximum coverage of \$250,000 for Employees below the Vice President level; two times annual

earnings up to a maximum coverage of \$500,000 for Vice Presidents; and three times annual earnings up to a maximum of \$1,000,000 for Senior Vice Presidents and Executive Vice Presidents. Life and AD&D Insurance costs the Debtors approximately \$3,700 per month. As of the Petition Date, the Debtors estimate that there are no outstanding prepetition amounts due on account of the Life and AD&D Insurance.

45. Employees can purchase supplemental life insurance coverage at their own expense (“**Supplemental Life Insurance**”). Participating Employees pay 100% of the premiums for the Supplemental Life Insurance. The Debtors estimate that approximately 109 Employees have elected to purchase Supplement Life Insurance. The Debtors believe that there are no accrued Employee contributions for Supplement Life Insurance that have not been transferred to Standard as of the Petition Date.

ii. Short- and Long- Term Disability Benefits

46. The Debtors provide Employees with short- and long-term disability benefits through Standard (the “**STD Plan**” and the “**LTD Plan**,” respectively). The maximum monthly benefit under the STD Plan is 60% of salary up to \$2,080 per week. The maximum monthly benefit under the LTD Plan is 66.67% of salary up to \$20,000 per month. The STD Plan costs the Debtors \$2,779 per month and the LTD costs the Debtors \$4,199 per month. As of the Petition Date, the Debtors estimate that there are no outstanding prepetition amounts due on account of the STD Plan or the LTD Plan.<sup>5</sup>

47. In addition to the LTD Plan, the Debtors provide Employees at or above the Vice President level an individual executive long-term disability policy through Massachusetts Mutual Life Insurance Company (the “**Executive LTD Plan**”). The Executive

---

<sup>5</sup> The Debtors also offer eligible Employees an employee assistance program (i.e., counseling and referral services) and a travel assistance program. Such programs are bundled with the LTD Plan and do not cost the Debtors additional amounts per month.

LTD Plan provides additional income replacement up to \$8,000 per month. From October 2011 through October 2012, the Executive LTD Plan cost the Debtors approximately \$5,869 per month. As of the Petition Date, the Debtors estimate that there are no outstanding prepetition amounts due on account of the Executive LTD Plan.

iii. Supplemental Healthcare Reimbursement Program

48. The Debtors also offer Employees at or above the Senior Vice President level a supplemental healthcare reimbursement program (the “**Supplemental Healthcare Reimbursement Program**”) administered by Exec-u-care. The Supplemental Healthcare Reimbursement Program supplements the Debtors’ primary health plans by reimbursing certain qualified healthcare expenses incurred by the eligible Employees and their dependents that are not covered by the Debtors’ primary health plans. The Debtors pay for monthly reimbursements to the executives, quarterly administrative fees and per-claim processing fees. From January 2012 through November 2012, the Debtors paid \$81,272 on account of the Supplemental Healthcare Reimbursement Program. As of the Petition Date, the Debtors estimate that there are no outstanding prepetition amounts due on account of the Supplemental Healthcare Reimbursement Program.

49. In sum, the Debtors believe that they are current with all obligations with respect to the Income Protection Plans. However, to the extent that there remain any prepetition amounts due, the Debtors request authority, but not direction, to pay all prepetition amounts under the Income Protection Plans as and when they come due. The Debtors also request authorization, but not direction, to continue to offer the Income Protection Plans and honor their obligations thereunder in the ordinary course during the administration of these chapter 11 cases.

### 3. Vacation and PTO

50. Employees are eligible for certain amounts of paid vacation time per year (“**Vacation Time**”). The rate at which an Employee accrues Vacation Time varies depending on the Employee’s position and length of employment. An Employee is only entitled to a cash payment for accrued Vacation Time in the event that such Employee is terminated from the Debtors’ employment or leaves the Debtors’ employment, in either case, prior to using accrued Vacation Time. Accrued but unused Vacation Time is carried over between calendar years. The maximum accrual balance of Vacation Time varies depending on an Employee’s position and length of employment. As of the Petition Date, the Debtors estimate that the value of accrued and unused or unpaid Vacation Time is approximately \$2,638,849.

51. In addition to Vacation Time, Employees are entitled to a certain amount of other paid time off per year for sick days, personal days and holidays (“**PTO**”). Accrued but unused PTO does not carry over between calendar years and Employees are not entitled to cash payments in the event they do not take PTO. Thus, as of the Petition Date, the Debtors owed no amount in connection with PTO.

52. The Debtors request that they be authorized, but not directed, to continue to honor Vacation Time and PTO that accrued prepetition solely to the extent that Employees may use prepetition Vacation Time and PTO throughout the administration of these cases in accordance with prepetition policies. For the avoidance of doubt, the Debtors are not requesting relief to make cash distributions on account of accrued prepetition Vacation Time in the event that an Employee leaves or is terminated from the Debtors’ employment.

#### 4. The 401(k) Plan

53. The Debtors maintain a retirement savings plan for eligible Employees pursuant to section 401 of the Internal Revenue Code (the “**401(k) Plan**”). Fidelity Management Trust Company (“**Fidelity**”) serves as the trustee and record keeper of the 401(k) Plan.

54. Employees participating in the 401(k) Plan may contribute up to the federal statutory cap of \$17,000 per year and an additional \$5,500 if they are over the age of 50. Approximately 295 Employees currently participate in the 401(k) Plan, and the total approximate monthly amount withheld from the participating Employees’ paychecks for 401(k) contributions (the “**Employee Contributions**”) is \$151,430.

55. The 401(k) Plan also provides that the Debtors may, in their sole discretion, make a matching contribution equal to 100% of the first 4% of funds contributed to the 401(k) Plan by each participating Employee (the “**401(k) Match**”). The Debtors have historically made matching contributions each pay cycle. In addition, the Debtors pay additional amounts to CAPTRUST Financial Advisors, as investment advisor for the 401(k) Plan, for advisory services when forfeited funds in the 401(k) Plan are not sufficient to cover such fees.

56. The Debtors intend to use forfeiture funds rather than cash to make the 401(k) Match for the December 28, 2012 payroll. The Debtors also estimate that there are no outstanding administrative fees relating to the 401(k) Plan as of the Petition Date. However, to the extent that there remain any prepetition amounts due, the Debtors request authority, but not direction, to pay all prepetition amounts under in respect of the 401(k) Plan as and when they come due and to continue to honor their obligations thereunder in the ordinary course during the administration of these Chapter 11 Cases.

## 5. The Flexible Spending Account Plan

57. Under the Flexible Spending Account Plan, the Debtors offer their Employees the ability to contribute a portion of their pre-tax compensation to flexible spending accounts to pay for eligible out-of-pocket health care and dependent care premiums and expenses. On average, Employees participating in the Flexible Spending Account Plan designate approximately \$10,000 in the aggregate per pay period to be withheld through payroll deductions. The Debtors also pay a monthly fee to Flex-Plan Services, Inc. (“**Flex-Plan**”) to administer the Flexible Spending Account Plan.

58. Regardless of an Employee’s contributions for the health care portion of the Flexible Spending Account Plan, an Employee may seek reimbursement or payment directly to a health care provider for all amounts up to the designated annual contribution at any point during the year.<sup>6</sup> However, an Employee may only seek reimbursement or direct payments to a provider for dependent care expenses up to the actual amount in his or her dependent care spending account. Any unspent amounts in health care or dependent care accounts at the end of the plan year do not roll over to the following year, although Employees may submit reimbursement or payment requests for the preceding year until March 31 of the following year.

59. As of the Petition Date, the Debtors estimate that they hold approximately \$9,914 on account of designated Flexible Spending Account Plan contributions. In addition, the Debtors estimate that they owe Flex-Plan approximately \$215 in outstanding fees as of the Petition Date in connection with the Flexible Spending Account Plan. The Debtors request

---

<sup>6</sup> If an Employee seeks reimbursement in an amount greater than what the Employee has contributed during the plan year, Flex-Plan bears the responsibility of reimbursing the Employee up to such Employee’s designated annual contribution. Following the end of a plan year and the March 31 cut-off for claims for the preceding plan year, Flex-Plan will reconcile disbursement against contributions. If there were more contributions than disbursements, Flex-Plan will pay the Debtors the difference. If there were more disbursements than contributions, Flex-Plan will invoice the Debtors for the difference.

authority, but not direction, to honor their obligations under the Flexible Spending Account Plan and pay any prepetition amounts due thereunder in the ordinary course of business.

### **BASIS FOR RELIEF REQUESTED**

60. The interactive entertainment software industry is a highly-specialized industry and the success of the Debtors' business rises and falls with the skills of their Workforce. As stated above, competition for qualified employees in the interactive entertainment software industry is intense. Thus, it is essential to assure the Debtors' Workforce that the Debtors will honor the Employee Obligations in the ordinary course of business throughout these Chapter 11 Cases. A failure to promptly do so will create concern and discontent among the Workforce and could lead to unmanageable resignations. Loss of even a few key personnel would immediately and irreparably harm the Debtors' ability to maintain operations to the detriment of the Debtors' going concern value.

61. The Debtors therefore seek authority to pay, in their sole discretion, the Employee Obligations in the ordinary course of business in the exercise of their business judgment. The relief is necessary to not only preserve Workforce morale, but to retain the Debtors' Workforce, the loss of whom would disable the Debtors' business operations.

#### **A. Sufficient Cause Exists to Authorize the Debtors to Honor Employee Obligations.**

62. Courts generally acknowledge that it is appropriate to authorize the payment or other special treatment of prepetition obligations in appropriate circumstances, such as when it is necessary to preserve the going concern value of a debtor's business. *See, e.g., Miltenberger v. Logansport, Crawfordsville & Sw. Ry. Co.*, 106 U.S. 286, 311 (1882) (holding that "[m]any circumstances may exist which may make it necessary and indispensable to . . . the preservation of the property, for the receiver to pay preexisting debts of certain classes, out of the

earnings of the receivership . . .”); *see also In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (noting that the “‘necessity of payment’ doctrine . . . permit[s] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid”) (citations and internal quotations omitted); *In re Chateaugay Corp.*, 80 B.R. 279, 285-87 (S.D.N.Y. 1987) (finding that a court’s equitable powers include the authority to authorize a debtor to pay prepetition debts). In authorizing payments of certain prepetition obligations, courts rely on several legal theories rooted in sections 1107(a), 1108, 363(b), and 105(a) of the Bankruptcy Code.

63. The Debtors believe that payment of the Employee Obligations is critical to the ongoing operation of the Debtors’ businesses. If the Employee Obligations are not paid, the Debtors will risk tangible and intangible loss of the value of their businesses, including, among other things, losses relating to the cost of replacing Employees who seek alternative employment and losses related to the disruption of, and lower productivity in, the Debtors’ business operations resulting from low Employee morale and high turnover.

64. Moreover, as stated above, the Debtors are currently developing various games. Development of “AAA” core games requires substantial up-front expenditures and, thus, a significant amount of time, cash, and cash equivalents have already been expended on the development of these games. The Employees developing the games each have unique roles in the process such that the resignation of one Employee would seriously jeopardize the Debtors’ ability to release these games to market on schedule at a tremendous cost to the Debtors’ estates.



**1. A Significant Portion of the Employee Obligations are Entitled to Priority Treatment.**

65. Section 507(a)(4)(A) of the Bankruptcy Code grants a priority of up to \$11,725 for employee claims for “wages, salaries, or commission, including vacation, severance, and sick leave pay” earned within 180 days before the Petition Date. 11 U.S.C. § 507(a)(4)(A). Similarly, section 507(a)(5) of the Bankruptcy Code grants priority claims for contributions to employee benefit plans, up to an aggregate amount of \$11,725 multiplied by the number of employees covered, less any amounts paid to such employees under section 507(a)(4).

66. The Debtors believe that the substantial portion of the Employee Obligations relating to the period prior to the Petition Date constitute priority claims under sections 507(a)(4) and (5) of the Bankruptcy Code. To confirm a chapter 11 plan, the Debtors must pay priority claims in full. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for (a) wages, salaries or commissions, including vacation, severance, and sick leave pay earned by an individual, and (b) contributions to an employee benefit plan). Thus, granting the vast majority of the relief sought herein only affects the timing of payments to Employees, and does not negatively impact recoveries for general unsecured creditors. Indeed, the Debtors submit that payment of Employee Obligations at this time enhances value for the benefit of the Debtors and all interested parties.

67. Amounts that are paid on account of priority claims for the majority of the Employee Obligations would not otherwise be available for distribution to unsecured creditors. Therefore, no prejudice would be caused to the Debtors’ unsecured creditors by permitting priority obligations to be satisfied in the ordinary course of business during the Debtors’ chapter 11 cases rather than at the conclusion of the cases pursuant to a plan of reorganization.

**2. Payment of Certain of the Employee Obligations is Required by Law.**

68. The Debtors also seek authority to pay the Withholding Obligations to the appropriate entities. These amounts principally represent the Employees' earnings that governments, the Employees, and judicial authorities have designated for deduction from the Employees' paychecks. Indeed, certain Withholding Obligations are not property of the Debtors' estates because the Debtors have withheld such amounts from Employees' paychecks on another party's behalf. *See* 11 U.S.C. § 541; *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) (observing the "well-settled principle that debtors do 'not own an equitable interest in property . . . [they] hold[] in trust for another,' and that therefore funds held in trust are not 'property of the estate.'") (quoting *Begier v. IRS*, 496 U.S. 53, 59 (1990)). Further, federal and state laws require the Debtors to withhold certain tax payments from Employees' paychecks and to pay such amounts to the appropriate taxing authority. *See* 26 U.S.C. §§ 6672 and 7501(a); *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95–97 (3d Cir. 1994) (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes). Because the Withholding Obligations are not property of the Debtors' estates, the Debtors request that the Court authorize them to remit these amounts to the appropriate parties in the ordinary course of business.

**3. The Court May Authorize Payment of the Employee Obligations Pursuant to Section 363 of the Bankruptcy Code.**

69. Courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages); *see also Armstrong World*

*Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay prepetition claims of some suppliers who were potential lien claimants because payments were necessary for general contractors to release funds owed to the debtors). In addition, section 363(c) allows a debtor in possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips*, 29 B.R. at 395 n.2 (“Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.”).

70. The majority of the Debtors’ Employees rely exclusively on their compensation, benefits, and reimbursement of expenses to satisfy their daily living expenses and maintain their health and well-being. Consequently, these Employees will be exposed to significant financial difficulties if the Debtors are not permitted to honor the Employee Obligations. Moreover, if the Debtors were unable to satisfy such obligations, Employee morale and loyalty would be jeopardized at a time when Employee support is critical. Furthermore, if the Court does not authorize the Debtors to honor their various obligations under the Employee Benefits Plans, the Employees’ health coverage could be threatened, potentially burdening individual Employees with the costs of health care. At minimum, the loss of health care coverage, or uncertainty regarding coverage, would result in considerable anxiety for Employees at a time when the Debtors need their Employees to perform their jobs at peak efficiency.

71. For all of the foregoing reasons, a sound business purpose exists to pay the Employee Obligations. In the absence of such payments, the Debtors believe that their Employees may seek alternative employment opportunities, perhaps with the Debtors’ competitors. Such a development would deplete the Debtors’ workforce, hinder the Debtors’

ability to develop quality product and meet scheduled release dates, and likely diminish creditors' confidence in the Debtors. Moreover, the loss of valuable Employees and the recruiting efforts that would be required to replace such Employees would be a massive and costly distraction at a time when the Debtors should be focusing on continuing to strengthen their operations and maximizing their going concern value. Accordingly, the Debtors must be able to pursue all reasonable measures to retain the Employees by, among other things, continuing to honor all wages, benefits, and related obligations, including those that accrued prior to the Petition Date.

72. In addition, because the Debtors pay the Employee Obligations in the ordinary course of business, the Debtors submit that Court approval to continue its existing policies, programs, and related payments postpetition is not necessary because of the authority granted to it by section 363(c) of the Bankruptcy Code. Nonetheless, for the avoidance of doubt, the Debtors request that the Court grant the relief requested herein and enter an order authorizing them to pay the Employee Obligations, as consistent with their compensation, vacation, and other benefit policies and plans, and to permit, but not require, the Debtors, in their discretion, to continue their practices, programs, policies, and plans for their Employees as those practices, programs, policies, and plans were in effect as of the Petition Date, as may be modified, terminated, amended, or supplemented from time to time hereafter.

**4. The Debtors Should Be Authorized to Pay the Employee Obligations Under Sections 1107(a) and 1108 of the Bankruptcy Code.**

73. 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, LLC*, 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.*

74. Courts have noted that there are instances in which a debtor-in-possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted that preplan satisfaction of prepetition claims is 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 is 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.

75. Payment of the Employee Obligations as set forth herein meets each element of the *CoServ* court’s standard. As described above, the Employees likely maintain priority claims against the Debtors for certain of the Employee Obligations. In addition, any failure by the Debtors to pay the Employee Obligations as set forth herein would negatively impact the morale of the Debtors’ Workforce at a critical time for the Debtors and their businesses when the Debtors’ Workforce is most needed. The Debtors’ Workforce is also critical to the Debtors’ ability to maintain their operations in the ordinary course of business consistent with past practices pending the closing of a sale, which would be impossible without the continued efforts of the Debtors’ Workforce. The damage to the value of the Debtors’ assets and, hence, the costs to creditors as a whole, would be immediate and irreparable. In short, the

potential harm and economic disadvantage that would stem from the failure to pay the Employee Obligations as set forth herein is grossly disproportionate to the amount of any prepetition claims that may be paid.

76. The Debtors have determined that to avoid significant disruption of the Debtors' business operations there exists no practical or legal alternative to payment of the Employee Obligations as set forth herein. Therefore, the Debtors can meet their fiduciary duties as debtors-in-possession under Sections 1107(a) and 1108 of the Bankruptcy Code only by payment of the Employee Obligations as set forth herein.

**5. The Court May Authorize Payment of the Employee Obligations Pursuant to Section 105(a) of the Bankruptcy Code and the Doctrine of Necessity.**

77. The Debtors' proposed payment of the Employee Obligations should also be authorized pursuant to section 105(a) of the Bankruptcy Code and the "doctrine of necessity." Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs*, 98 B.R. at 175. "Under [section] 105 the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177); accord *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) ("To invoke the necessity of payment doctrine, a debtor must show that payment of the pre-petition claims is 'critical to the debtor's reorganization.'") (quoting *In re Fin. News Network, Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991)); see also *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify payment of a pre-petition

unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”); *In re Chateaugay Corp.*, 80 B.R. at 279 (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

78. The “doctrine of necessity” functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation); *In re Just for Feet*, 242 B.R. at 824 (“[C]ourts have used their equitable power under section 105(a) of the Code to authorize the payment of prepetition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization.”). The doctrine is frequently invoked early in a chapter 11 case.

79. Taken together, the nature of the Employee Obligations, the substantial harm to the Debtors’ businesses that would be caused if those obligations were not honored, the related potential for loss of value in the Debtors’ estates, and the fact that a significant portion of the obligations in question relates to priority wage claims, lead to the conclusion that the Employee Obligations fall well within the scope of obligations whose payments may be authorized pursuant to the doctrine of necessity.

80. For all of the foregoing reasons, the relief requested herein will benefit the Debtors’ estates and creditors by allowing the Debtors’ business operations to continue without interruption. The importance of a debtor’s employees to its operations has been recognized by courts in this district in granting relief similar to the relief requested herein. *See, e.g., In re Friendly Ice Cream, Corp.*, No. 11-13167 (KG) (Bankr. D. Del. Oct. 6, 2011); *In re Barnes Bay*

*Dev., Ltd.*, No. 11-10792 (PJW) (Bankr. D. Del. Mar. 21, 2011); *In re Appleseed's Intermediate Holdings LLC*, No. 11 10160 (KG) (Bankr. D. Del. Feb. 18, 2011); *In re OTC Holdings Corp.*, No. 10-12636 (BLS) (Bankr. D. Del. Aug. 27, 2010); *In re Stallion Oilfield Servs. Ltd.*, No. 09 13562 (BLS) (Bankr. D. Del. Nov. 16, 2009); *In re Visteon Corp.*, No. 09 11786 (CSS) (Bankr. D. Del. May 29, 2009); *In re Masonite Corp.*, No. 09 10844 (PJW) (Bankr. D. Del. Apr. 14, 2009); *In re Portola Packaging, Inc.*, No. 08 12001 (CSS) (Bankr. D. Del. Aug. 29, 2008).<sup>7</sup>

**6. Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers.**

81. In connection with the foregoing, the Debtors respectfully request that the Court enter an order (i) authorizing all applicable banks and other financial institutions to receive, process, honor, and pay all checks and transfers issued by the Debtors in connection with payment of the claims the Debtors request authority to pay in this Motion, without regard to whether any check or transfer was issued before or after the Petition Date; (ii) providing that all banks and other financial institutions may rely on the representations of the Debtors with respect to whether any check or transfer issued or made by the Debtors before the Petition Date should be honored pursuant to this Motion, and such banks and other financial institutions shall not have any liability to any party for relying on such representations by the Debtors as provided for herein; and (iii) authorizing the Debtors to issue replacement checks or transfers, to the extent any check or transfer in relation to the claims the Debtors request authority to pay in this Motion is dishonored or rejected by the banks and other financial institutions.

82. As set forth in more detail in the Farrell First Day Declaration, the Debtors represent that they have sufficient cash to pay the amounts described herein in the ordinary course of business by virtue of cash advances provided by Wells Fargo. The Debtors have

---

<sup>7</sup> Because of the voluminous nature of the orders cited herein, such orders are not attached to this Motion. Copies of these orders are available upon request of the Debtors' counsel.



sufficient funds to remit the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to debtor in possession financing. Also, under the Debtors' existing cash management system, the Debtors represent that checks or wire transfer requests can be readily identified as relating to an authorized payment in respect of the Employee Obligations particularly because of the Debtors' use of ADP. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein.

#### **Reservation of Rights**

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

#### **Necessity for Immediate Relief and Effectiveness of Order**

84. Bankruptcy Rule 6003 provides that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant . . . (b) a motion to use, sell, lease, or otherwise incur an obligation

regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition . . . .” As set forth above and in the First Day Declaration, the Debtors submit that immediate payment of amounts owed to Employees is essential to prevent potentially irreparable damage to the Debtors’ operations and going concern value and, accordingly, submit that Bankruptcy Rule 6003 is satisfied.

85. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements under Bankruptcy Rule 6004(a).

86. Furthermore, to implement the foregoing immediately, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth above, the immediate payment of amounts owed to Employees is essential to prevent potentially irreparable damage to the Debtors’ operations, value, and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h).

#### **NOTICE**

87. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtors’ forty (40) largest unsecured creditors on a consolidated basis, as identified in their chapter 11 petitions; (c) counsel for Wells Fargo Capital Finance, LLC; (d) counsel to the ad hoc committee of the Debtors’ prepetition unsecured noteholders; (e) counsel to Clearlake Capital Group, L.P, the proposed “stalking horse” purchaser; (f) ADP; and (g) the Banks. Notice of this Motion and any order entered hereon will

be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: December 19, 2012  
Wilmington, Delaware



---

Michael R. Nestor (No. 3526)  
M. Blake Cleary (No. 3614)  
YOUNG CONAWAY STARGATT & TAYLOR, LLP  
Rodney Square  
1000 North King Street  
Wilmington, Delaware 19801  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

-and-

Oscar Garza (CA No. 149790)  
Jeffrey C. Krause (CA No. 94053)  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071-1512  
Telephone: (213) 229-7000  
Facsimile: (213) 229-7520

*Proposed Counsel to the Debtors  
and Debtors in Possession*

**EXHIBIT A**

**Interim Order**

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

-----X  
In re: : Chapter 11  
THQ INC., *et al.*, : Case No. 12 - 13398 (\_\_\_\_)  
Debtors.<sup>1</sup> : Jointly Administered  
: RE: Docket No. \_\_\_\_  
-----X

**INTERIM ORDER AUTHORIZING THE PAYMENT OF  
PREPETITION (A) WAGES, SALARIES, AND OTHER COMPENSATION,  
(B) REIMBURSABLE EMPLOYEE EXPENSES, AND  
(C) EMPLOYEE MEDICAL AND SIMILAR BENEFITS**

Upon the motion (the “**Motion**”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for entry of an order (i) authorizing, but not directing, the Debtors to (a) pay prepetition wages, salaries, and other compensation, taxes, withholdings, and related costs, and reimbursable employee expenses, (b) pay and honor obligations relating to employee medical, insurance, and other benefit programs, and (c) continue their employee medical, insurance, and other benefits programs on a postpetition basis; and (ii) authorizing and directing applicable banks and other financial institutions to honor and process checks and transfers related to such obligations; and upon the Farrell First Day Declaration; and this Court having found that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that the Motion is a core

---

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

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

proceeding pursuant to 28 U.S.C. § 157(b)(2); 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 this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion appearing adequate and appropriate under the circumstances; and this Court having found that no other or further notice need be provided; and this Court having reviewed the Motion and having heard statements in support of the Motion at a hearing held before this Court (the "**Hearing**"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and this Court having found that relief requested in the Motion is necessary to prevent immediate and irreparable harm; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefore,

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motion is granted on an interim basis until such time as the Court conducts a final hearing on this matter (the "**Final Hearing Date**").
2. Final Hearing Date shall be on \_\_\_\_\_, 2013 at \_\_: \_\_ a.m./p.m.( prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before seven business days prior to the Final Hearing Date and served on the parties required by Local Rule 2002-1(b).
3. Subject to the requirements of section 507(a)(4) of the Bankruptcy Code, the Debtors are authorized, but not directed, in the exercise of their reasonable business judgment, to pay and honor prepetition obligations associated with the Employee Obligations, exclusive of any Withholding Obligations, in an amount not to exceed \$850,000 during the

interim period from the date of this Interim Order until the date that a final order is entered in this matter, unless otherwise ordered by the Court; provided, however, that the Debtors may not pay, absent further order of the Court (i) any Employee, Temporary Employee, or Independent Contractor more than \$11,725, up to an aggregate maximum amount of \$835,000, on an interim basis, on account of prepetition Compensation Obligations nor (ii) any amounts related to the Quarterly Sales Bonuses or Outstanding Profit Sharing Bonus.

4. The Debtors and any applicable third parties are authorized to continue to allocate and distribute Deductions and Payroll Tax Obligations to the appropriate third-party recipients or taxing authorities in accordance with the Debtors' stated policies and prepetition practices.

5. The Debtors are authorized, but not directed, to continue to honor their Reimbursable Expense Obligations, including any prepetition obligations, to Employees and applicable third-parties under the Corporate Card Program, including, but not limited to, American Express, for Reimbursable Expenses in accordance with the Debtors' stated policies and prepetition practices; provided, however, that the Debtors may not pay in excess of \$5,000 on account of prepetition Reimbursable Expenses.

6. The Debtors are authorized, but not directed, to honor the Employee Benefit Plans, including, without limitation, (a) the Health Plans, (b) the Income Protection Plans, (c) Vacation and PTO, (d) the 401(k) Plan, and (e) the Flexible Spending Account Plan; and to make any necessary contributions to such programs and pay any unpaid premium, claim, or amount owed as of the Petition Date with respect thereto, provided, however, that the Debtors may not pay in excess of \$450,000 on account of Employee Benefit Plans and the Employee Benefits Obligations, exclusive of any Withholding Obligations.

7. The Debtors are authorized, but not directed, to pay all processing and administrative fees associated with and all costs and expenses incidental to payment of the Employee Obligations, the Employee Benefits Obligations, including the ADP Obligations.

8. Nothing herein or in the Motion shall be deemed (i) to authorize the payment of any amounts that may be subject to section 503(c) of the Bankruptcy Code nor (ii) to violate or permit a violation of section 503(c) of the Bankruptcy Code.

9. In accordance with this order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the prepetition or postpetition obligations the Debtors are authorized to pay pursuant to this order is authorized to honor checks presented for payment and all fund transfer requests made by the Debtors related to such obligations to the extent that sufficient funds are on deposit in such accounts.

10. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these Chapter 11 Cases with respect to prepetition amounts owed in connection with any Employee Obligations and Employee Benefits Obligations authorized to be paid by this order.

11. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

12. The requirements set forth in Bankruptcy Rule 6004(a) are satisfied by the contents of the Motion.

13. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this order shall be immediately effective and enforceable upon its entry.



14. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order in accordance with the Motion.

Dated: December \_\_\_\_, 2012  
Wilmington, Delaware

---

United States Bankruptcy Judge

**EXHIBIT B**

**Final Order**

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

-----X  
 :  
 In re: : Chapter 11  
 :  
 THQ INC., *et al.*, : Case No. 12 - 13398 (\_\_\_\_)  
 :  
 Debtors.<sup>1</sup> : Jointly Administered  
 :  
 : RE: Docket Nos. \_\_\_\_  
 -----X

**FINAL ORDER AUTHORIZING THE PAYMENT OF PREPETITION (A) WAGES,  
SALARIES, AND OTHER COMPENSATION, (B) QUARTERLY SALES BONUSES  
AND OUTSTANDING PROFIT SHARING BONUS, (C) REIMBURSABLE EMPLOYEE  
EXPENSES, AND (D) EMPLOYEE MEDICAL AND SIMILAR BENEFITS**

Upon the motion (the “**Motion**”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for entry of an order (i) authorizing, but not directing, the Debtors to (a) pay prepetition wages, salaries, and other compensation, taxes, withholdings, and related costs, and reimbursable employee expenses, (b) pay and honor obligations relating to employee medical, insurance, and other benefit programs, and (c) continue their employee medical, insurance, and other benefits programs on a postpetition basis; and (ii) authorizing and directing applicable banks and other financial institutions to honor and process checks and transfers related to such obligations; and upon the Farrell First Day Declaration; and this Court having found that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that the Motion is a core

---

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

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

proceeding pursuant to 28 U.S.C. § 157(b)(2); 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 this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion appearing adequate and appropriate under the circumstances; and this Court having found that no other or further notice need be provided; and this Court having reviewed the Motion and having heard statements in support of the Motion at a hearing held before this Court (the "**Hearing**"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and this Court having found that relief requested in the Motion is necessary to prevent immediate and irreparable harm; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefore,

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motion is granted as set forth herein.
2. The Debtors are authorized, but not directed, in the exercise of their reasonable business judgment, to pay and honor prepetition obligations associated with the Employee Obligations (exclusive of Withholding Obligations, Quarterly Sales Bonuses, and Outstanding Profit Sharing Bonus) in an amount not to exceed \$1 million, unless otherwise ordered by the Court; provided, however, that the Debtors may not pay, absent further order of the Court any Employee, Temporary Employee, or Independent Contractor more than \$11,725, up to an aggregate maximum amount of \$975,000, on account of prepetition Compensation Obligations, except as provided herein.
3. The Debtors are authorized, but not directed, in the exercise of their

reasonable business judgment, to pay and honor prepetition obligations associated with the Quarterly Sales Bonuses in an amount not to exceed \$75,000 in the aggregate, irrespective of whether doing so will result in payments on account of prepetition obligations in an amount exceeding \$11,725 per Employee.

4. The Debtors are authorized, but not directed, in the exercise of their reasonable business judgment, to pay and honor prepetition obligations associated with the Outstanding Profit Sharing Bonus to non-insider Employees in an amount not to exceed \$1.4 million in the aggregate, irrespective of whether doing so will result in payments on account of prepetition obligations in an amount exceeding \$11,725 per Employee.

5. The Debtors are authorized, but not directed, in the exercise of their reasonable business judgment, to pay and honor prepetition obligations to the certain Independent Contractor, in excess of \$11,725, associated with the Independent Contractor Obligations related to the development of the *Saints Row 4* game, as more fully described in the Motion; provided, however, that such amounts shall not exceed \$27,000.

6. The Debtors and any applicable third parties are authorized to continue to allocate and distribute Deductions and Payroll Tax Obligations to the appropriate third-party recipients or taxing authorities in accordance with the Debtors' stated policies and prepetition practices.

7. The Debtors are authorized, but not directed, to continue to honor their Reimbursable Expense Obligations, including any prepetition obligations, to Employees and applicable third-parties under the Corporate Card Program, including, but not limited to, American Express, for Reimbursable Expenses in accordance with the Debtors' stated policies and prepetition practices; provided, however, that the Debtors may not pay in excess of \$10,000

on account of prepetition Reimbursable Expenses.

8. The Debtors are authorized, but not directed, to honor the Employee Benefit Plans, including, without limitation, (a) the Health Plans, (b) the Income Protection Plans, (c) Vacation and PTO, (d) the 401(k) Plan, and (e) the Flexible Spending Account Plan; and to make any necessary contributions to such programs and pay any unpaid premium, claim, or amount owed as of the Petition Date with respect thereto, provided, however, that the Debtors may not pay in excess of \$500,000 on account of Employee Benefit Plans and the Employee Benefits Obligations, exclusive of Withholding Obligations.

9. The Debtors are authorized, but not directed, to pay all processing and administrative fees associated with and all costs and expenses incidental to payment of the Employee Obligations, the Employee Benefits Obligations, including the ADP Obligations.

10. Nothing herein or in the Motion shall be deemed (i) to authorize the payment of any amounts that may be subject to section 503(c) of the Bankruptcy Code nor (ii) to violate or permit a violation of section 503(c) of the Bankruptcy Code.

11. In accordance with this order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the prepetition or postpetition obligations the Debtors are authorized to pay pursuant to this order is authorized to honor checks presented for payment and all fund transfer requests made by the Debtors related to such obligations to the extent that sufficient funds are on deposit in such accounts.

12. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these Chapter 11 Cases with respect to prepetition amounts owed in connection with any Employee Obligations and Employee Benefits Obligations

authorized to be paid by this order.

13. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

14. The requirements set forth in Bankruptcy Rule 6004(a) are satisfied by the contents of the Motion.

15. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this order shall be immediately effective and enforceable upon its entry.

16. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this order in accordance with the Motion.

Dated: \_\_\_\_\_, 2013  
Wilmington, Delaware

---

United States Bankruptcy Judge