

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

In re:  hhgregg, Inc., <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 17-01302-11  (Joint Administration Requested)
---	--

**DEBTORS' FIRST DAY MOTION FOR ENTRY OF ORDERS (A) AUTHORIZING THE DEBTORS TO PAY AND HONOR CERTAIN PREPETITION WAGES, BENEFITS AND OTHER COMPENSATION OBLIGATIONS AND (B) AUTHORIZING AND APPROVING THE PAYMENT OF CERTAIN AMOUNTS IN CONNECTION WITH THE DEBTORS' STORE CLOSING SALES, AND (C) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS**

hhgregg, Inc. and its above-captioned affiliated debtors and debtors in possession (each, a “Debtor” and, collectively, the “Debtors”) hereby submit this motion (the “Motion”) for the entry of interim and final orders, substantially in the forms attached hereto as Exhibit A and Exhibit B, respectively (the “Interim Order” and the “Final Order”), pursuant to sections 105(a), 363(b), 507(a)(4) and 507(a)(5) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), (a) authorizing the Debtors to pay and honor certain prepetition wages, benefits, and other compensation obligations, (b) authorizing the Debtors to pay certain bonus amounts in connection with the Debtors’ store closing sales, and (c) authorizing financial institutions to honor and process checks and transfers related to such obligations. The facts and circumstances supporting this Motion are set forth in the concurrently filed *Declaration of Kevin*

---

<sup>1</sup>The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: hhgregg, Inc. (0538); Gregg Appliances, Inc. (9508); hhg Distributing, LLC (5875). The location of the Debtors’ corporate headquarters is 4151 E. 96th Street, Indianapolis, Indiana 46240.

*J. Kovacs in Support of the Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration").<sup>2</sup> In further support of this Motion, the Debtors respectfully state as follows:

### **JURISDICTION**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105, 363, 503, 507, 1107, and 1108 of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

### **BACKGROUND**

#### **I. General**

2. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Concurrently with this Motion, the Debtors have also filed certain other motions and applications seeking certain "first day" relief.

3. The Debtors have continued in possession of their properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No request has been made for the appointment of a trustee or examiner and no official committee has been established in these chapter 11 cases.

---

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

5. Additional information about the Debtors' business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

## **II. The Employees**

6. The Debtors have a current workforce of approximately 4,700 employees in the nineteen (19) states in which they conduct their operations. Approximately 900 of those employees are employed on a salaried basis; 1,800 employees are on an hourly basis; and nearly 2,000 employees are paid almost exclusively on sales commissions. The Debtors' workforce includes approximately: (i) 350 corporate support personnel who are primarily based in, or report to, the Debtors' headquarters located in Indianapolis, IN (the "Headquarters Employees"); (ii) 550 store managers and other operations management personnel (the "Ops Management Employees") at the Debtors' various stores; (iii) 390 distribution center Employees (the "Distribution Employees"); and 3,400 retail employees in the Debtors' various retail stores (the "Retail Employees", and, collectively with the Headquarters Employees, Ops Management Employees and the Distribution Employees, the "Employees"). Retail Employees are generally composed of two groups: sales associates who, in all but one region (eight stores), are paid on a 100% commission basis (with a minimum wage draw backstop), while others such as cashiers and customer service associates are paid hourly.

7. The Employees possess the institutional knowledge, experience, and skills necessary to support the Debtors' business operations during the chapter 11 process and to support a successful sale of the Debtors' business operations. These Employees rely on their compensation from the Debtors to pay their daily living expenses. The Debtors also incur a number of obligations related to the Employees, such as paid vacation and other time off, federal

and state withholding taxes and other withheld amounts, health and welfare benefits, life and accidental death and dismemberment insurance, long-term disability coverage, 401(k) contributions, expense reimbursements, and other benefits and programs that the Debtors have historically provided in the ordinary course of business. The Debtors' compensation and benefit programs are referred to herein as the "Employee Programs" and the obligations to the Employees thereunder are referred to herein as the "Employee Obligations" and are more fully described below.<sup>3</sup>

8. The Debtors need the Employees' continued commitment and support; therefore, the Debtors are requesting the relief set forth in this Motion to minimize any hardship to the Employees resulting from the commencement of the Debtors' chapter 11 cases. The Debtors must take all necessary steps to retain the Employees and bolster their morale to preserve and maximize the value of the Debtors' estates.

9. Accordingly, by this Motion, the Debtors seek authority to pay and honor their prepetition Employee Obligations and to continue their Employee Programs, as further detailed below.

### **III. Temporary Employees and Independent Contractors**

10. The Debtors also employ temporary employees ("Temporary Employees") largely to assist with distribution center operations and staffing. The number of Temporary Employees varies based on seasonality and regular supplemental staffing needs. The vast majority of

---

<sup>3</sup> The summary of the Employee Obligations provided herein is qualified entirely by the Debtors' official policies or other practices, programs, or agreements, whether written or unwritten, evidencing an arrangement among the Debtors and their Employees (each, an "Official Policy"). In the event of any inconsistency or ambiguity between this summary and an Official Policy, the terms of such Official Policy shall govern, but, for the avoidance of doubt, in no event shall the Debtors make any payments or honor any prepetition obligations other than what is authorized by the Court after consideration of this Motion and subject to the requirements imposed on the Debtors under any order(s) of the Court approving the Debtors' debtor in possession financing facility and the use of cash collateral and any budget in connection therewith.

Temporary Employees are employed and paid through temporary agencies (the “Employment Agencies”) which are paid as an ordinary course vendor. The Temporary Employees at distribution centers largely assist with the transfer, movement, storage and loading of merchandise to or from the Debtors’ stores. Certain other Temporary Employees assist with administrative support functions. As of the Petition Date, the Debtors owe the Employment Agencies approximately \$357,000 on account of prepetition fees and wages for the applicable Temporary Employees.

11. Additionally, the Debtors engage independent contractors (the “Independent Contractors”). The Independent Contractors largely provide information technology support and services. As of the Petition Date, the Debtors owe the Independent Contractors approximately \$383,000 on account of prepetition fees and wages.

12. The Debtors rely heavily on the Temporary Employees and Independent Contractors, who are an essential and integral part of the Debtors’ business operations. Moreover, many of the Independent Contractors and Temporary Employees have worked with the Debtors over significant periods of time, and have gained institutional knowledge and training. If the obligations to the Employment Agencies are not met, the Employment Agencies may decide to allocate their employees to other companies. Further, if the Debtors do not meet their obligations to the Temporary Employees and Independent Contractors, in the event that any prepetition obligations exist, these parties may refuse to continue working for the Debtors. It would be incredibly burdensome and costly for the Debtors to replace that portion of their workforce comprised of the Temporary Employees and/or Independent Contractors.

13. The Debtors seek authority to continue to pay the Employment Agencies, Temporary Employees and Independent Contractors in the ordinary course of business, provided

that the Debtors will not pay more than \$12,850 on account of prepetition obligations with respect to any individual Temporary Employee or Independent Contractor.

#### **IV. The Employee Obligations and Employee Programs**

##### **A. Unpaid Wages**

14. Generally, in the ordinary course of business, the Debtors issue payroll to all Employees on a bi-weekly basis, with payroll being disbursed every other Friday. The Debtors pay monthly, on average, approximately \$10.3 million<sup>4</sup> in gross wages and salary, plus an additional \$3.3 million in commissions and \$0.5 million in incentives. Commissions are calculated weekly and paid biweekly.

15. The vast majority of the Debtors' payroll is distributed by direct deposit into the Employees' personal bank accounts. In some instances, largely for new employees, the employee may be paid via a debit card.

16. The Debtors estimate that up to approximately \$5,633,250<sup>5</sup> in prepetition wages, salaries and commissions are owed to Employees (or former Employees) (collectively, the "Unpaid Wages") for the prepetition period. Pursuant to this Motion, the Debtors seek authorization, but not direction, to pay and honor in the ordinary course of business the Unpaid Wages and Uncashed Paychecks and to continue to pay their Employees after the Petition Date in the ordinary course. If this Motion is granted, absent further order of the Court, the Debtors will not pay any individual Employee on account of prepetition Unpaid Wages amounts that, together with the other Employee Obligations, exceed \$12,850.

---

<sup>4</sup> This amount includes the Debtors' employer payroll taxes on the related wages.

<sup>5</sup> This amount does not include estimated employer payroll taxes of \$516,000 on the Employees' prepetition wages.

**B. Field and Support Personnel Incentive Programs**

17. The Debtors maintain various incentive programs, largely applicable to store management, distribution center management and select corporate employees below the executive level (the “Field and Support Personnel Incentive Programs”), which are paid in addition to regular wages. The incentive programs are performance-based and vary depending on the employee’s role and, to the extent applicable, store volume. For example, the store management incentive program considers gross sales, gross margin, customer satisfaction, and inventory integrity. Distribution center management criteria includes “Return to Vendor” management, inventory integrity and P&L management. Additionally, selected corporate employees at the Manager level (i.e., below the Executive Management level) are eligible for the corporate bonus program which is based on the Debtors’ financial performance (“Adjusted EBITDA”). The incentives are calculated and accrued monthly, with the payment timing either monthly, quarterly or annually depending on the structure. The annual payments paid under the Field and Support Personnel Incentive Programs are approximately \$6.4 million. The Debtors estimate that as of the petition date, the total amount outstanding under the Field and Support Personnel Incentive Programs is \$756,000.

**C. Executive Performance Incentive Program**

18. The Debtors maintain an annual incentive program for Directors and above (the “Executive Performance Incentive Program”). Amounts accrued under this program are solely dependent on the Debtors’ financial performance, specifically Adjusted EBITDA.<sup>6</sup> The Adjusted EBITDA target is determined by the Compensation Committee and approved by the

---

<sup>6</sup> Adjusted EBITDA is defined as “Net income before net interest expense, income tax expense (benefit), depreciation and amortization, without giving effect to certain non-recurring items, which may include, but are not limited to, asset impairment charges, insurance proceeds, restructuring charges and gain/loss related to early extinguishment of debt.”

Board of Directors annually near the beginning of each fiscal year. Amounts owed under the Executive Performance Incentive Program are paid in May. There were no amounts accrued under the Executive Performance Incentive Program for fiscal years 2012, 2013, 2014 or 2015. The amount accrued and paid for fiscal year 2016 was \$1.7 million. The total amount forecast to be accrued in fiscal year 2017 (ending March 31, 2017), which would be paid in May 2017, is \$0. As noted below, the Debtors are not seeking to make bonus or severance payments to senior management or insiders of the Debtors under this Motion.

**D. Payment of Store Closing Bonuses**

19. Contemporaneously herewith, the Debtors are filing a motion (i) authorizing the Debtors to assume a Consulting Agreement, dated as of February 27, 2017 (the “Consulting Agreement”), by and between Gregg Appliances, Inc. and its subsidiaries, on the one hand, and a contractual joint venture composed of Hilco Merchant Resources, LLC and Gordon Brothers Retail Partners, LLC (together, the “Consultant”), on the other hand, (ii) authorizing the Debtors to continue store closing or similar themed sales in accordance with the Agreement (the “Store Closing Sales”) and the terms of the store closing sale guidelines, with such sales to be free and clear of all liens, claims, and encumbrances; and (iii) granting certain related relief (the “Consulting Agreement Assumption Motion”).

20. The Consulting Agreement contemplates the payment of certain bonuses (the “Store Closing Bonuses”) to store-level and certain field employees who remain in the employ of the Debtors during the Store Closing Sales. The Debtors believe that the Store Closing Bonuses will motivate employees during the Store Closing Sales and will enable the Debtors to retain those employees necessary to successfully complete the Store Closing Sales.

21. The individual amount of each Store Closing Bonus will vary depending on a number of factors, but the total aggregate cost of the Store Closing Bonus program will not exceed 10% of the base payroll, including taxes and typical benefits, for all employees working at the Debtors' closing locations.

22. Accordingly, the Debtors hereby seek the authority, but not the obligation, to pay the Store Closing Bonuses.

**E. Accrued Vacation**

23. The Debtors maintain two vacation policies. For salaried employees, each pay cycle an employee accrues approximately one-half vacation day, such that the employee will earn two to three weeks of vacation by the end of a year. Salaried employees may carry over one week of vacation from the current year to the next, resulting in a maximum of four weeks' vacation per year. For hourly employees, vacation begins to accrue after six months of employment, with up to one week accruing during the second half of their first year. Subsequently, the hourly employee will accrue two weeks' vacation per year, incrementing each pay cycle. Select employees who have seniority of service with the company may be eligible for an additional accrual.

24. The Debtors request that, to the extent applicable, they be authorized to honor the accrued prepetition vacation obligations of their salaried and hourly employees (collectively, the "Accrued Vacation Obligations") and to continue their accrued vacation and paid holiday and sick programs postpetition in accordance with their prepetition policies.

**F. Workers' Compensation Insurance**

25. Under the laws of various states in which the Debtors operate, the Debtors are required to maintain workers' compensation liability insurance and to provide Employees with

workers' compensation coverage for claims arising from or related to their employment with the Debtors. The Debtors historically have self-insured their workers' compensation obligations and additionally maintain workers' compensation insurance with Zurich for the Employees at the statutorily-required level (the "Workers' Compensation Policy" and such program, the "Workers' Compensation Program") and will continue to do so as required postpetition.<sup>7</sup> The Debtors also maintain a stop-loss workers' compensation insurance in the state of Ohio with Zurich. The Workers' Compensation Policy is renewable annually, and the next renewal period is November 1, 2017. The aggregate annual premium for the Workers' Compensation Policy is approximately \$396,000, which is financed through The Lockton Companies and is paid in monthly installments. The Debtors maintain a \$300,000 per claim self-insured retention obligation. The approximate amount of due and owing outstanding premiums under the Workers' Compensation Policy as of the Petition Date is approximately \$147,000.

26. Additionally, the Debtors have outstanding workers' compensation policy payment obligations in connection with future amounts that will be payable on past losses. As of the Petition Date, the Debtors owe approximately \$1.4 million on account of recognized prepetition obligations, with an additional estimated \$2.6 million in Incurred But Not Reported ("IBNR") claims. To secure these payment obligations, the Debtors have posted letters of credit in an amount equal to \$4,950,000, which remain undrawn as of the Petition Date. The Debtors intend to leave this security in place post-petition. In addition, in the ordinary course of business, the Debtors make certain collateral installment payments in lieu of posting letters of credit.

---

<sup>7</sup> The Debtors' three workers' compensation insurance policies (including the excess Ohio policy) provide coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policies covers the employer's statutory liabilities under workers' compensation laws, and Part Two of the policies covers liability arising out of employees' work-related injuries that do not fall under the workers' compensation statute.

27. The Debtors hereby request authority, but not direction, in their discretion, to continue to maintain the Workers' Compensation Program in the ordinary course of business, and to pay prepetition amounts related thereto, including, without limitation, outstanding premiums and potential retroactive premium adjustments under the Workers' Compensation Policy and payments for workers' compensation claims, deductibles and fees for administrative costs and other amounts required in connection with the program, as such amounts become due in the ordinary course of the Debtor's business. The Debtors, however, are not currently seeking authority to increase the collateral package for any previous policy year.

**G. Employee Benefits**

28. The Debtors have established various plans and policies to provide eligible Employees with various medical, dental, prescription drug, vision, life insurance, severance, and other benefits (collectively, the "Employee Benefits," and amounts owed under these plans, the "Employee Benefit Obligations"), which they intend to continue after the Petition Date in the ordinary course of business, subject to any adjustments or modifications that they determine are necessary, prudent, and in the best interests of their estates.<sup>8</sup> The Debtors seek the authority, but not the direction, to satisfy all outstanding amounts related to Employee Benefit Obligations that arose prior to the Petition Date including, without limitation, any payments for claims, premiums and fees owed for administrative costs, and other amounts required in connection with the Employee Benefit Obligations, as such amounts become due in the ordinary course of the Debtors' business. The Employee Benefits include, but are not limited to, the following:

---

<sup>8</sup> Where required under applicable non-bankruptcy law, including COBRA, the Debtors provide eligible Employees with the opportunity to continue participating in the applicable Employee Benefits programs following their termination by the Debtors. The Debtors intend for the relief requested herein to apply to such former Employees consistent with the Debtors' prepetition practices and the requirements of applicable law.

**i. Medical, Dental, and Vision Benefits**

29. The Debtors offer a self-insured plan (the “Health Plan”) to full-time employees who have completed 60 days of employment. The Debtors also offer similar benefits to part-time employees who have completed certain employment requirements. There are approximately 1,800 Employees enrolled in the Health Plan, with total member coverage of 3,100. The Health Plan includes a variety of coverage options and is administered by Anthem Blue Cross / Blue Shield. There are four different plans available to employees: 1) a Health Reimbursement Arrangement (“HRA”), pursuant to which the Debtors provide subsidies to the employees; 2) a High Deductible Health Plan (the “Low Premium HDHP”), which has lower premiums but provides less coverage for certain medical expenses; 3) a second High Deductible Health Plan (the “High Premium HDHP”, and together with the Low Premium HDHP, the “HDHPs”), which has higher premiums but greater coverage for certain medical expenses; and 4) a traditional PPO with co-pays, co-insurance and deductibles. Additionally, the Debtors maintain a stop-loss policy (the “Stop-Loss Policy”). The Stop-Loss Policy limits the Debtors’ liability on account of any one claim to \$300,000.

30. The HDHPs require covered individuals to pay a high out-of-pocket deductible for medical care. The Low Premium HDHP has a minimum deductible of \$4,000, and the High Premium Deductible has a minimum deductible of \$3,000, that, in either case, must be paid by the insured before any costs will be paid by the plan. Per IRS requirements, participation in a HDHP is required for individuals to use a health savings account (or an “HSA”). An HSA is a part of an employee’s health plan, into which deposits can be made by the employer or the employee. These funds can then be used to pay for a variety of the individual’s medical expenses. HRA funds, on the other hand, are allocated by the Debtors and are applied towards

satisfying the Employee's annual deductible. After the annual deductible is met, participants pay a percentage of the cost ("co-insurance") for eligible health expenses and the Debtors pay for the remainder.

31. The eligible Employees pay a portion of their health coverage through pre-tax payroll deductions, which amount also is dependent on the parties being covered, and also are entitled to make pre-tax payroll contributions to their HSA up to certain statutory caps (unless the employee selected the HRA or PPO plan). The Debtors subsidize the remainder of the health program and also make contributions to the eligible Employees' HSAs. The amount of Employee deductions for their share of health care costs are approximately \$515,000 per month.

32. The Debtors pay on average approximately \$780,000 per month in premiums and claim payments and approximately \$85,000 per month in administrative fees related to the Health Plan. As of the Petition Date, the Debtors owe approximately \$1,623,374 on account of their prepetition obligations under the Health Plan, including administrative fees.

**ii. Life Insurance, Disability Plans and EAP**

33. The Debtors offer to Ops Management Employees, Headquarters Employees, and Distribution Employees: (i) employer-paid basic life and accidental death and dismemberment insurance ("Life Insurance"); (ii) short-term and long-term disability insurance (the "Disability Plan"); and (iii) an Employee Assistance Program ("EAP"), in each case through Reliance Standard. Eligible Employees may also elect to purchase, at their own cost, additional voluntary Life Insurance for themselves and their families.

34. The Disability Plan is composed of two parts, the short term portion and the long term portion. The short-term disability portion of the Disability Plan provides that for non-exempt employees who enroll, coverage begins on the eighth day of disability and continues up

to 12 weeks. For employees with less than one year of employment, this program replaces weekly earnings up to a weekly maximum of \$600. For employees with over one year of employment, the program replaces up to 60% of prior year W-2 earnings up to a weekly maximum of \$600. Coverage for exempt employees begins on the first day of disability for up to a maximum of 12 weeks: during the first six weeks, the program pays at 100% of current salary, with the remaining six weeks at 50%. The long-term disability portion of the Disability Plan provides that, for both exempt and non-exempt employees, coverage begins after the exhaustion of short-term disability. Long-term disability benefits may continue until the employee is eligible for social security disability benefits. Long-term disability payments replace 60% of prior year's W-2 earnings up to a monthly maximum of \$6,000.

35. The EAP program is provided at no cost to eligible Employees and their family members, and includes assessment, counseling, and referrals for additional services.

36. The Debtors' pay approximately \$110,000 per month to Reliance Standard on account of the Life Insurance, Disability Plan and EAP programs (the vast majority being the employee contribution portion), and owe approximately \$5,000 on account of prepetition obligations under these programs.

**iii. Severance**

37. Historically, the Debtors have paid a minimum of two weeks, based on position level, of severance (the "Severance Pay"). The minimum for managers is four weeks, with an additional amount possible based on tenure. The Severance Pay for an eligible, terminated Employee is payable over the number of weeks equal to the number of weeks of Severance Pay to which that Employee is entitled. Due to reductions in force and other terminations that occurred prior to these Chapter 11 Cases, the Debtors currently are paying various Severance

Pay obligations. The Debtors intend to cease payment of pre-petition Severance Pay obligations of management-level employees, but hereby request authorization, but not an order, to pay minor severance amounts to rank-and-file employees as a matter of convenience in administering the estate. As of the Petition Date, excluding management-level employees and insiders, the Debtors owe approximately \$170,000 to 24 employees in Severance Pay, approximately \$148,000 of which is at or below \$12,850 per employee. The Debtors owe an additional \$1.4 million of Severance Pay to seven management-level employees, which amounts the Debtors do not currently seek authority to pay.

38. Severance Pay is typically conditioned on a release of the Debtors and their affiliates, successors, assigns, and employees from any and all claims, liabilities, causes of action, and expenses, of any nature whatsoever pertaining or related to the Employee's employment with or separation from the Debtors.

39. The Debtors may desire, going-forward, to continue to provide eligible non-insider Employees who are involuntarily terminated without cause with Severance Pay (for the avoidance of doubt, such Employees include the 24 employees described above). Obtaining authorization to pay Severance Pay is critical to sustaining Employee morale and will help ensure that the Employees work towards the Debtors' chapter 11 goals. For the avoidance of doubt, the Debtors are not asking for authority in this Motion to pay severance obligations to the management-level employees described above, to any current or former officer of the Debtors or others who may be considered insiders within the meaning set forth in the Bankruptcy Code.

40. Given the critical need to continue their severance program, the Debtors are requesting interim approval to pay out Severance Pay to eligible Employees (with payment being made on the Debtors' regular payroll cycle) and to honor Severance Pay obligations. The

Debtors will not pay any individual Severance Pay that, together with other Employee Obligations, exceeds \$12,850.

**iv. 401(k) Plan and Retirement Savings**

41. The Debtors maintain a retirement savings plan (the “401(k) Plan”), administered by The Principal Group, that meets the requirements of section 401(k) of the Internal Revenue Code of 1986. For eligible Employees, the Debtors automatically enroll new employee in the 401(k) Plan, with a deduction and contribution of 4% of each paycheck. Eligible Employees also can elect to make additional contributions to the 401(k) Plan through payroll deductions. The Debtors collect contributions from eligible, participating Employees each payroll cycle and transfer those contributions into the 401(k) Plan as directed by the Employees, typically on the same day payroll is paid. Some of these amounts collected from Employees may not have been transferred into the 401(k) Plan prior to the Petition Date. The Debtors pay quarterly amounts of \$38,000 in the aggregate in administrative fees relating to the 401(k) Plan (\$20 per employee annually).

42. By this Motion, the Debtors seek authority, but not direction, to honor their obligations under the 401(k) Plan and to continue the 401(k) Plan in the ordinary course of their business.

43. In addition, the Debtors offer certain executive-level Employees a deferred compensation plan (the “Deferred Compensation Plan”), which permits these Employees to reduce income taxes through income tax deferral, as well as the opportunity to take advantage of tax-favored investing. The Deferred Compensation Plan largely benefits highly compensated employees and allows employees to elect to defer receipt of current compensation in order to provide retirement and other benefits on behalf of such employee. A portion of the Deferred

Compensation Plan contribution is matched by the Debtors. The Debtors are not requesting the authority to pay any amounts owed to participants under the Deferred Compensation Plan at this time, or to continue matching such amounts. The Debtors are only requesting the authority, but not the direction, to continue to administer the Deferred Compensation Plan in the ordinary course of business, and reserve all rights to seek later relief from the Court with respect to the Deferred Compensation Plan.

**H. Employee Payroll Garnishments, Other Payroll Deductions, and Employer-Paid Taxes**

44. The Debtors deduct from their Employees' paychecks certain taxes, such as payroll and social security taxes, required to be withheld by certain federal, state, and local taxing authorities, garnishments and other deductions (the "Payroll Deductions"). The Debtors forward certain of these withheld amounts, as well as the necessary employer contributions, to the appropriate governmental authorities. The Debtors seek authority to continue to forward any Payroll Deductions not forwarded as of the Petition Date.

45. Occasionally, the Debtors are presented with garnishment or child support orders requiring the withholding of an Employee's wages to satisfy such Employee's obligations. Finally, certain Employees have voluntary deductions for items such as additional life insurance. In these instances, payments of these obligations are made from amounts otherwise payable to the Employees and ultimately are not an incremental cost obligation of the Debtors' estates.

46. The Debtors seek authority to continue making such Payroll Deductions and to pay over such amounts to third parties as requested or required. The Debtors also to continue to obtain reimbursements for such amounts from the applicable Employees.

47. Finally, the Debtors are subject to certain taxes, fees, and expenses, including federal wage and social security taxes and unemployment taxes and contributions (the

“Employer Taxes and Fees”). The Employer Taxes and Fees are determined, for the most part, based on the gross wages and salaries that the Debtors pay to their Employees, and are required to be paid on a periodic basis. As set forth in Footnote 5 above, the Employer Taxes and Fees that were incurred (or relate to compensation earned) prior to the Petition Date are approximately \$650,000. The Debtors hereby seek authorization, but not direction, to remit these amounts to the applicable authorities consistent with the Debtors’ prepetition practices.

**I. Reimbursable Business Expenses**

48. As is customary with most large businesses, the Debtors reimburse their employees who incur and pay a variety of approved business-related expenses in the ordinary course of performing their duties, including payment for an Employee’s use of his or her personal vehicle for company-related business, reimbursement to certain Employees for business cell phones, and reimbursement to certain Employees for health, wellness and business development expenses. Some Employees initially incur and pay such expenses by using personal credit cards or cash, but are subsequently reimbursed by the Debtors after submission and approval of expense or mileage reimbursement requests. The Debtors estimate that their average monthly payment to reimburse Employees for out-of-pocket business expenses is approximately \$80,000. The Debtors estimate that, as of February 28, 2017, approximately \$10,000 is owed on account of reimbursable out-of-pocket expenses, including reimbursable mileage and cell phone payments.

49. The Debtors also provide certain Employees with access to company-paid credit cards (the “Company Charge Cards”) and other credit accounts through Wells Fargo to pay for reimbursable business expenses (the “Company Expense Program”), including business travel, hotels, and the payment to various vendors for goods and services provided to the Debtors. As

of the Petition Date, the Debtors estimate that approximately \$30,000 is due and owing under the Company Charge Cards.

50. The Company Expense Program, together with the reimbursement of out-of-pocket expenses, allows the Debtors to ensure that the Employees are able to fulfill financial obligations that arise in the ordinary course conduct of the Debtors' business without putting a direct, financial strain on the Employee's own finances. In the ordinary course, obligations arising from the use of the Company Expense Program are paid directly by the Debtors. However, the Employees who use the Company Charge Cards may be personally liable for unpaid prepetition obligations under the Company Expense Program. As such, authority to pay the prepetition obligations for use of the Company Charge Cards is necessary to avoid financial hardship for the relevant Employees and to maintain Employee dedication and morale. Furthermore, the administrative benefit of continuing to utilize the Company Expense Program and avoiding having to request that Employees finance the costs of the Debtors' operations merits the continuation and maintenance of the Company Expense Program, with such reasonable modifications as the Debtors may agree to postpetition in the exercise of their discretion and sound business judgment.

51. Finally, certain Employees are paid in advance for mileage such Employees are expected to drive in their personal vehicles in connection with the Debtors' business. These amounts are paid monthly and the relevant Employees are taxed annually for any unpaid portion of this advance. The average monthly payment on account of these advance mileage payments is approximately \$41,500. As of February 25, 2017, the Debtors estimate they owe approximately \$5,000 on account of these mileage advances.

**RELIEF REQUESTED**

52. To minimize the personal hardship the Employees will suffer in connection with the filing of these cases, the Debtors request entry of an order (i) authorizing, but not directing, the Debtors to pay, in their discretion, the Employee Obligations as described in this Motion, (ii) authorizing, but not directing, the Debtors to maintain and continue to honor the Employee Programs as they were in effect as of the Petition Date, as may be modified, amended or supplemented from time to time in the ordinary course of business, (iii) authorizing and approving the payment of certain amounts in connection with the Debtors' Store Closing Sales and (iv) authorizing the applicable banks and other financial institutions (the "Banks") to receive, honor, process, and pay any and all checks presented for payment and all electronic payment requests made by the Debtors related to the Employee Obligations, whether such checks were presented or electronic payment requests were submitted before or after the Petition Date.

**BASIS FOR RELIEF**

**I. Authority to Honor the Employee Obligations and Continue the Employee Programs Is Warranted Under the Facts of These Chapter 11 Cases**

**A. Authority to Honor the Employee Obligations Is Authorized Under Sections 363(b) and 1108 of the Bankruptcy Code**

53. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession 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). Consistent with the debtor's fiduciary duties, courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code. Section 363 of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business,

property of the estate.” 11 U.S.C. § 363(b)(1). Under section 363(b), courts require only that the debtor “show that a sound business purpose justifies such actions.” *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (requiring that the debtor show a “sound business purpose” to justify its actions under section 363 of the Bankruptcy Code) (internal citations omitted); *see also Fulton State Bank v. Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (noting that a debtor may sell property outside the ordinary course of business if it can provide “articulated business justification”) (internal citations omitted); *In re Commercial Mortg. and Fin.Co.*, 414 B.R. 389, 394 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession “has the discretionary authority to exercise his business judgment in operating the debtor’s business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation.”). The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *In re Abbott Labs. Derivative S’holders Litig.*, 325 F.3d 795, 807 (7th Cir. 2003). Moreover, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *In re Johns Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”).

54. As described above, the Employees are essential to the continued operation of the Debtors’ business. The Debtors believe their enterprise value will be materially impaired by workforce instability or attrition at this critical juncture. The relief requested in this motion is,

therefore, a necessary and critical element of the Debtors' efforts to preserve value for their stakeholders. Absent approval of the relief requested in this motion, the Employees may face significant financial hardship and other risks and could be obliged to seek alternative employment opportunities or will become demoralized and less productive. Additionally, the maximization of value of the Debtors' estates is intrinsically tied to their workforce. The Debtors cannot readily replace their human capital without significant efforts—which may not be successful given the overhang of these chapter 11 cases and the widespread and disparate workforce that the Debtors have across the United States. Paying the Employee Obligations is necessary for the Debtors to avoid unnecessary recruitment and related costs, to avoid certain operating risks, to ensure high quality customer service in the Debtors' retail stores, and to minimize the disruption to their operations during these chapter 11 cases. The costs of the Employee Obligations are far outweighed by the benefit of preserving the Debtors' operations as a going concern and far outweigh the potential destruction in value that would occur if the Debtors were unable to operate their business.

55. Indeed, where debtors have shown that the payment of prepetition claims is critical to the success of their chapter 11 cases, courts in this district and others have authorized debtors to pay prepetition employee obligations. *See e.g., In re Nightingale Home Healthcare, Inc.*, No. 15-10099 (Bankr. S.D. Ind. 2015); *In re S&S Steel Services, Inc.*, No. 15-07401 (Bankr. S.D. Ind. 2015); *In re Dave's Detailing, Inc.*, No. 13-08077 (Bankr. S.D. Ind. 2013); *In re ITR Concession Co.*, No. 14-34284 (Bankr. N.D. Ill. 2014); *In re Edison Mission Energy*, No. 12-49219 (Bankr. N.D. Ill. 2013); *In re Corus Bankshares, Inc.*, No. 10-26881 (Bankr. N.D. Ill. 2010).

56. Accordingly, as authorized by sections 363(b) and 1108 of the Bankruptcy Code, the Debtors seek authority to pay the Employee Obligations that become due and owing during the pendency of these cases and to continue at this time their practices, programs, and policies with respect to the Employees, as such practices, programs, and policies were in effect as of the Petition Date. The Debtors submit that the relief requested herein is essential and critical to their ability to maximize value for their creditors.

**II. This Motion Should Only Affect the Timing of Payment for Certain Employee Obligations**

57. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code entitle the Unpaid Wages and a number of other prepetition Employee-related obligations to priority treatment. Likewise, section 507(a)(8) of the Bankruptcy Code affords statutory priority to many of the Employer Taxes and Fees. To confirm a chapter 11 plan, the Debtors must pay priority claims in full. *See* 11 U.S.C. § 1129(a)(9)(B) and (C) (requiring payment in full under a plan of certain allowed unsecured claims for (a) wages, salaries, or commissions, including vacation or sick leave pay, earned by an individual, (b) contributions to an employee benefit plan, and (c) priority tax obligations). Thus, granting the relief sought herein would only affect the timing of payments of Employee Obligations that are entitled to priority treatment under sections 507(a) of the Bankruptcy Code.

**III. Payment of Certain Employee Obligations Is Required by Law and the U.S. Trustee's Operating Guidelines.**

58. Additionally, the failure to pay tax-related Payroll Deductions and the Employer Taxes and Fees could result in tax liabilities and penalties for both the Employees and the Debtors, and potentially for the Debtors' directors and officers. Likewise, the failure to transmit garnishments and other similar deductions can cause hardship to certain Employees and an

administrative burden for the Debtors. Indeed, if the Debtors were to be prohibited from transmitting such deductions, the Debtors would expect inquiries from garnishors regarding the Debtors' failure to submit, among other things, child support and alimony payments that are not the Debtors' property, but, rather, have been withheld from Employees' paychecks on such parties' behalves. Further, if the Debtors cannot remit these amounts, the Employees may face legal action due to the Debtors' failure to submit such payments.

59. Moreover, maintaining the Workers' Compensation Policy is justified because applicable state law and the Chapter 11 Operating Guidelines (the "Guidelines") promulgated by the Office of the United States Trustee ("U.S. Trustee") require that the Debtors maintain appropriate insurance, including workers' compensation insurance. If the Debtors fail to maintain the Workers' Compensation Policy, state laws may prohibit the Debtors from operating in those states and the U.S. Trustee may also take action against the Debtors as a result of their failure to adhere to the Guidelines. Payment of all amounts that may be owed under the Workers' Compensation Policy, therefore, is important to the Debtors' continued operations and the success of the Debtors' efforts in these chapter 11 cases.

#### **IV. The Court Has the Authority to Approve the Payment of Store Closing Bonuses.**

60. The Court has the authority, pursuant to sections 105 and 363(b) of the Bankruptcy Code, to authorize the Debtors to pay the Store Closing Bonuses. Store Closing Bonuses are a typical practice in many store liquidations, and courts have also approved such payments when debtors choose to enter into consulting agreements with liquidators. *See In re Draw Another Circle, LLC*, No. 16-11452 (Docket No. 536) (Bankr. D. Del. Aug. 5, 2016); *In re Golfsmith Int'l Holdings, Inc.*, No. 16-12033 (Docket No. 267) (Bankr. D. Del. Oct. 13, 2016); *In re Ultimate Acquisition Partners, LLP*, No. 11-10245 (Docket No. 179) (Bankr. D. Del. Feb.

11, 2011); *In re KB Toys*, No. 08-13269 (Docket No. 102) (Bankr. D. Del. Dec. 18, 2008). In this case, payment of the Store Closing Bonuses in connection with the Store Closing Sales will aid in maximizing the value of the Debtors' estates by inducing employees who are needed to manage and complete the Store Closing Sales to remain in the employ of the Debtors and maximize the returns from such sales.

**V. The Severance Pay Program Is Reasonable and a Sound Exercise of Business Judgment.**

61. The Debtors further request that they be allowed to continue the Severance Pay program in the ordinary course of business and, subject to section 507(a) of the Bankruptcy Code, to pay to rank-and-file Employees such amounts that become due during the course of these chapter 11 cases. The Debtors submit that these programs should be reviewed under section 363(c)(1) of the Bankruptcy Code because these programs are simply a preexisting program that the Debtors have maintained in the ordinary course, and seek to make outstanding payments to the Employees on a postpetition basis. *See In re Blitz U.S.A. Inc.*, 475 B.R. 209, 215 (Bankr. D. Del. 2012). The Debtors are not seeking to make bonus or severance payments to members of senior management, some of whom may be insiders as defined in the Bankruptcy Code, under this Motion; therefore, any limitations imposed by section 503(c) of the Bankruptcy Code are not applicable.

62. The Debtors submit that continuing to maintain the Severance Pay Program, and honor related obligations as set forth herein, is a sound exercise of their business judgment and in the best interests of the estates. The Severance Pay is a long-standing business practice of the Debtors that helps to facilitate the orderly wind-down of closing stores and allows the Debtors to retain valuable Employees to assist in the transition that typically accompanies a reduction in force. The Debtors therefore believe that it is necessary to continue this program on a

postpetition basis, and honor their obligations thereunder, in order to ensure that the Employees are not exposed to significant financial constraints due to these chapter 11 cases and to continue to provide the Employees with the appropriate motivation and compensation to help the Debtors succeed.

63. Accordingly, the Debtors seek authority to continue the Severance Pay program with respect to rank-and-file Employees in the ordinary course of business, including, subject to section 507(a) of the Bankruptcy Code, payment of prepetition obligations related thereto, if any, as set forth herein.

**VI. The Banks Should Be Authorized to Honor and Pay Checks and Electronic Payment Requests in Connection with the Employee Obligations.**

64. In addition, by this Motion, the Debtors request that the Banks be authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to the prepetition obligations described herein, whether such checks were presented or fund transfer requests were submitted before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors represent that these checks are drawn on identifiable disbursement accounts and can be readily identified as relating directly to the authorized payment of obligations described herein. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

65. For the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interests of their estates and creditors.

**VII. Request for a Finding of Satisfaction of Bankruptcy Rule 6003(b)**

66. Under Bankruptcy Rule 6003, the Court may authorize the Debtors to satisfy the prepetition Employee Obligations because such relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001(c)(2)).

67. As described above and in the First Day Declaration, the continuity and viability of the Debtors' business operations depends upon a stable work force. Thus, any significant number of Employee departures or deterioration in morale at this time will substantially and adversely impact the Debtors' business and result in immediate and irreparable harm to the estates and their creditors. There is a real, immediate risk that, if the Debtors are not authorized to continue to satisfy Employee Obligations in the ordinary course, Employees would no longer support and maintain the operations of the Debtors, thereby crippling the Debtors' business operations and instantly destroying the prospects of a successful reorganization. Consequently, it is critical that the Debtors continue in their ordinary course personnel policies, programs and procedures that were in effect prior to the Petition Date, except as otherwise set forth herein, for all of their Employees.

68. Accordingly, the Debtors respectfully submit that the relief requested herein is necessary to avoid immediate and irreparable harm and that, therefore, Bankruptcy Rule 6003 is satisfied.

**VIII. Request for a Waiver of Bankruptcy Rule 6004(h)**

69. 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 throughout this Motion, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), as any delay in satisfying the Employee Obligations would jeopardize the Debtors’ business operations and their efforts in connection with these chapter 11 cases, to the detriment of their estates and creditors.

70. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

**IX. Reservation of Rights**

71. Authorization to pay any amounts under this Motion shall not be deemed to constitute postpetition assumption or adoption of any contract, program, or policy pursuant to section 365 of the Bankruptcy Code. The Debtors reserve all of their rights under the Bankruptcy Code with respect thereto. Moreover, authorization to pay all amounts under this Motion shall not affect the Debtors’ right to contest the amount or validity of any Employee Obligations, including without limitation the Payroll Deductions or Employer Taxes and Fees that may be due to any taxing authority.

**NOTICE AND NO PREVIOUS REQUEST**

72. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) the Office of the United States Attorney for the Southern District of Indiana; (iii) the Internal Revenue Service; (iv) the Debtors’ thirty (30) largest unsecured creditors; (v) the Prepetition Secured

Parties; and (vi) counsel to the Agent for the Debtors' prepetition secured lenders and the lenders providing debtor in possession financing, c/o Sean M. Monahan, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule B-9013-3(d). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

73. No previous request for the relief sought herein has been made to this or any other Court.

### **CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter the orders substantially in the forms annexed hereto as Exhibit A and Exhibit B granting the relief requested herein and such further relief as may be just and proper under the circumstances.

Respectfully submitted,

**MORGAN, LEWIS & BOCKIUS LLP**

Neil E. Herman (*pro hac vice* pending)

Rachel Jaffe Mauceri (*pro hac vice* pending)

Katherine L. Lindsay (*pro hac vice* pending)

101 Park Avenue

New York, New York 10178

Telephone: (212) 309-6000

[Neil.Herman@morganlewis.com](mailto:Neil.Herman@morganlewis.com)

[Rachel.Mauceri@morganlewis.com](mailto:Rachel.Mauceri@morganlewis.com)

[Katherine.Lindsay@morganlewis.com](mailto:Katherine.Lindsay@morganlewis.com)

-and-

/s/ Jeffrey A. Hokanson

**ICE MILLER LLP**

Jeffrey A. Hokanson (No. 14579-49)

Sarah L. Fowler (No. 30621-49)

One American Square, Suite 2900

Indianapolis, IN 46282-0200

Telephone: (317) 236-2100

[Jeff.Hokanson@icemiller.com](mailto:Jeff.Hokanson@icemiller.com)

[Sarah.Fowler@icemiller.com](mailto:Sarah.Fowler@icemiller.com)

Telephone: (317) 236-2100

*Proposed Counsel to the Debtors and Debtors in Possession*