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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re : Chapter 11
Chrysler LLC, et al., :
Debtors. : Case No. 09-50002 (AJG)
: (Jointly Administered)
: :
-----X

**CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT
OF MOTIONS OF DEBTORS AND DEBTORS IN POSSESSION FOR
ORDERS AUTHORIZING THEM TO PAY CERTAIN PREPETITION CLAIMS**

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TO THE HONORABLE
UNITED STATES BANKRUPTCY JUDGE:

Chrysler LLC and 24 of its domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), respectfully submit this consolidated memorandum of law in support of the following motions (collectively, the "Motions") filed contemporaneously herewith:

- (i) Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 363(c) of the Bankruptcy Code, for Interim and Final Orders Authorizing Them to Honor or Pay Prepetition Obligations to or for the Benefit of Their Dealers and Other Customers, and for Related Relief (the "Customer Obligation Motion");
- (ii) Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 363(b) and 503(b)(9) of the Bankruptcy Code, for Interim and Final Orders Authorizing Them to Pay the Prepetition Claims of Certain Essential Suppliers and Administrative Claimholders, Continuing the Debtors' Troubled Supplier Program and Granting Certain Related Relief (the "Essential Supplier Motion");
- (iii) Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, for an Order Authorizing Them to Pay the Prepetition Claims of Certain Potential Lienholders (the "Lienholder Motion"); and
- (iv) Motion of Debtors and Debtors in Possession Pursuant to Sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Authorizing Them to Pay Certain Prepetition Taxes (the "Prepetition Tax Motion").

Background

1. On the date hereof (the "Petition Date"), the Debtors commenced these cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Information regarding the background of the Debtors is contained in the Motions, the Affidavit of Ronald E. Kolka (the "Kolka Affidavit"), the Declaration of Scott R. Garberding (the "Garberding Declaration"), the Declaration of Peter Grady (the "Grady

Declaration") and the Declaration of Frank Ewasyshyn (the "Ewasyshyn Declaration").

Capitalized terms not otherwise defined herein have the meanings given them in the Motions.

2. As set forth in the Motions, the Debtors are pursuing the expedited approval and consummation of the Fiat Transaction or a similar going concern transaction with a competing bidder (any such transaction, a "Sale Transaction"). Pending such a sale, the Debtors intend to idle most operations as they conserve their resources, while at the same time ensuring that (a) the facilities are prepared to resume normal production schedules quickly upon the consummation of a Sale Transaction and (b) consumers are not impacted by the filing (e.g., by continuing operations at parts depots to provide an uninterrupted supply of parts to service the Debtors' vehicles). To promote these ends, the Debtors must (a) ensure that their various vendor constituencies — many of whom are struggling to withstand the same economic pressures that have precipitated the filing of these cases — remain financially able to provide the Debtors with indispensable goods and services when requested in these chapter 11 cases and (b) maintain the loyalty of their dealerships and end consumers, including retail customers, and preserve the financial viability of their valuable dealer network.

3. Accordingly, the Debtors are seeking authority (in their sole discretion as dictated by their business judgment and on the terms and conditions set forth in the Motions) to honor or pay a discrete group of prepetition claims to, or on behalf of, their dealership, consumer and other customers; essential suppliers; certain potential lienholders; and certain taxing authorities. By honoring or paying these prepetition claims, the Debtors believe that, among other things, they can avoid the deterioration of both their supplier base and dealer network and, thus, substantially enhance their ability to preserve and maximize (a) the going concern value of their assets, brands and businesses, (b) the value of any Sale Transaction and (c) stakeholder

recoveries. Absent these payments, dealer and supplier failures and other adverse consequences could irretrievably impair going concern value and the ability to consummate a Sale Transaction, all to the detriment of stakeholders.

4. As explained in detail in the Customer Obligations Motion, continued loyalty from both the Debtors' dealerships and the end consumers of Chrysler, Jeep and Dodge brand vehicles plainly is essential to the Debtors' ability to maximize the value of any Sale Transaction consummated in these chapter 11 cases. As a result, to avoid the deterioration of their dealer network as well as any loss of goodwill among their various customer constituencies, the Debtors are seeking authority to honor or pay certain outstanding prepetition obligations to their dealers and to end consumers (collectively, the "Customer Obligations"), which otherwise would be honored in the ordinary course of the Debtors' businesses. By ensuring that these Customer Obligations will be satisfied, the Debtors believe that they can best preserve the key customer relationships necessary to preserve and maximize the value of their estates through the chapter 11 process.

5. The Debtors further believe that it is essential to their efforts to maintain and enhance value for all stakeholders that they be granted authority to pay the prepetition claims of certain essential suppliers and certain potential lienholders (collectively, the "Vendor Claims"), many of whom are themselves fighting for their financial survival. The Vendor Claims, as described in greater detail in the Essential Supplier Motion, the Lienholder Motion, the Garberding Declaration and the Ewasyshyn Declaration, include the claims of: (a) any supplier that provides the Debtors' businesses with goods and services that, as a practical matter, are available only from such supplier because, in many cases, they are manufactured to the Debtors' exact specifications; (b) vendors that provide goods and services that will be

indispensable to key manufacturing and assembly facilities once operations recommence; (c) vendors located in certain low-cost countries; and (d) potential lienholders (including possessory lienholders) that may refuse to release goods in their possession unless and until their prepetition claims are satisfied.

6. As set forth in the Prepetition Tax Motion, in the ordinary course of their business, the Debtors collect or remit certain taxes (collectively, the "Prepetition Taxes") owed to certain taxing authorities (collectively, the "Taxing Authorities"). Although the Debtors believe that they have prepaid the Prepetition Taxes, they nevertheless seek, out of an abundance of caution, authority to pay any unpaid Prepetition Taxes to the Taxing Authorities because:

(a) certain of the Prepetition Taxes do not constitute property of the Debtors' chapter 11 estates; (b) the failure to pay certain of the Prepetition Taxes may impact the Debtors' ability to complete necessary postpetition transactions, including the Fiat Transaction or other Sale Transaction; (c) the Debtors' directors, managers, officers or employees may face personal liability if certain of the Prepetition Taxes are not paid; and (d) substantially all of the Prepetition Taxes constitute priority claims. Absent payment of these amounts, the Debtors may face serious distractions as they seek to maximize stakeholder recoveries through the implementation of a Sale Transaction.

7. The Debtors' ability to maintain crucial customer relationships, preserve their valuable dealer network, forestall the financial collapse of a significant percentage of their supplier base and preserve their access to indispensable goods and services as may be required in these chapter 11 cases (and thereby enhance the value ultimately received by stakeholders as a result of a successful Sale Transaction) will be enhanced greatly by obtaining authority to pay or honor the prepetition claims described in the Motions. In fact, at this critical juncture, the Debtors submit that paying these prepetition claims offers the only means to avoid an immediate

loss of going concern value. It is the Debtors' business judgment that their ability to maximize estate value through a Sale Transaction hinges upon obtaining authority to promptly make the payments described in the Motions. Accordingly, the Court should grant the Motions in their entirety.

Argument

I. Courts Have Recognized a Debtor's Authority to Make Postpetition Payments of Essential Prepetition Claims Under a Variety of Rationales

A. Ample Precedent in This District and Elsewhere Supports the Postpetition Payment of Certain Essential Prepetition Claims Under the "Necessity of Payment" Doctrine

8. Recognizing that "court[s] ha[ve] a duty to maintain the estate for the benefit of all creditors," bankruptcy courts commonly have employed their equitable powers to authorize the payment of prepetition debt. In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (acknowledging that bankruptcy courts have the authority to authorize the payment of prepetition claims) (citing Miltenberger v. Logansport, Crawfordsville and Sw. Ry. Co., 106 U.S. 286 (1882)). Indeed, it is well established under the "doctrine of necessity" that bankruptcy courts have the equitable power to authorize the payment of prepetition claims where such payments are necessary to preserve the going concern value of a debtor's business. See, e.g., Miltenberger, 106 U.S. at 311 (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 pre-existing debts of certain classes, out of the earnings of the receivership . . ."); Mich. Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 285-87 (S.D.N.Y. 1987) (finding that a court's equitable powers include authorizing a debtor to pay prepetition debts); In re C.A.F. Bindery, Inc., 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996) (stating that "the 'doctrine of necessity' . . . permits the bankruptcy court to

authorize the payment of prepetition claims prior to confirmation."); 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 omitted). "[T]he key to determining whether a prepetition . . . claim may be paid post-petition under the Necessity Doctrine is . . . whether payment of the claim will be in the best interests of the estate and/or the other creditors." In re UNR Indus., Inc., 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992), rev'd on other grounds, 173 B.R. 149 (N.D. Ill. 1994).

9. The bankruptcy court's exercise of its authority under the "doctrine of necessity" is appropriate to carry out specific statutory provisions of the Bankruptcy Code — specifically, sections 1107(a) and 363(b)(1) — that authorize a debtor in possession to maintain the debtor's business and use estate property outside of the ordinary course of business. Indeed, a debtor in possession has a duty to protect and preserve the going concern value of its business, and prepetition claims may be paid if necessary to perform the debtor's duty. See In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) ("Implicit in the duties of a . . . debtor in possession . . . is the duty of such a fiduciary to protect and preserve the estate, including an operating business's going concern value. There are occasions when this duty can only be fulfilled by the preplan satisfaction of a prepetition claim."); In re NextWave Personal Commc'ns Inc., 244 B.R. 253, 276 (Bankr. S.D.N.Y. 2000) (observing that payment of prepetition debt could be supported by the rationales of sections 363 and 1107 of the Bankruptcy Code, "but only after notice and a hearing"); In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (finding that a debtor is entitled to pay certain prepetition creditors upon a

showing that the payment is "essential to the continued operation of the business") (citations omitted).

10. The doctrine of necessity applies here. The doctrine's underlying rationale — the maximization of estate value for all creditors — directly supports the relief sought in the Motion. This is particularly the case here, where the Debtors have requested relief tailored to (a) prevent the irretrievable loss of the going concern value of their chapter 11 estates and (b) increase the value of their estates by promoting the Debtors' ability to complete a value-maximizing transaction. The requested payments are eminently reasonable exercises of the Debtors' business judgment. Moreover, such payments are entirely consistent with, if not compelled by, the Debtors' fiduciary duties to protect, preserve and maximize the value of their estates for all stakeholders, the fulfillment of which duties supports the application of the "doctrine of necessity" to the relief requested in the Motions.

11. Other Bankruptcy Code provisions imply that such payments may be authorized. Section 549(a) of the Bankruptcy Code, which governs postpetition transfers, provides that "the trustee may avoid a transfer of property of the estate . . . that occurs after the commencement of the case . . . that is not authorized . . . by the court."¹ Thus, by necessary implication, a bankruptcy court may authorize appropriate postpetition payments to satisfy prepetition obligations. See Dubuque Packing Co. v. Stonitsch (In re Isis Foods, Inc.),

¹ Section 549(a) of the Bankruptcy Code provides as follows:

Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

- (1) that occurs after the commencement of the case; and
- (2) (A) that is authorized only under section 303(f) or 542(c) of [the Bankruptcy Code]; or
(B) that is not authorized under [the Bankruptcy Code] or by the court.

11 U.S.C. § 549(a).

37 B.R. 334, 336 n.3 (W.D. Mo. 1984), appeal dismissed, Stonitsch v. LMJ Container Corp., 738 F.2d 445 (8th Cir. 1984) ("[P]roposed transfers [to pay prepetition claims may] be presented in advance to a bankruptcy court for its approval and would thereafter be insulated from attack."); NextWave, 244 B.R. at 276 (noting that the ability to make payments on prepetition debt is conditioned upon "notice and court approval" and noting the ability to recover unauthorized payments pursuant to section 549 of the Bankruptcy Code).

12. Moreover, recently implemented changes to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") confirm that the Court may authorize the postpetition satisfaction of prepetition claims by reference to standards mirroring those articulated by courts with respect to the doctrine of necessity. Specifically, Bankruptcy Rule 6003(b) provides, in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding . . . a motion to pay all or part of a claim that arose before the filing of the petition." The Rule plainly implies that where the failure to grant any such requested relief *would* result in immediate and irreparable harm to the Debtors' estates, the Court *may* allow the Debtors to pay (prior to the twenty-first day following the Petition Date) all or part of a prepetition claim. Although few court decisions have been rendered on this Rule, the "immediate and irreparable harm" standard established by Bankruptcy Rule 6003(b) appears to be essentially congruent with the "necessary and indispensable to . . . the preservation of property" standard established by the Supreme Court in Miltenberger (as described above). See Miltenberger, 106 U.S. at 311; see also In re Frontier Airlines Holdings, Inc., No. 08-11298 (RDD) (Bankr. S.D.N.Y. Apr. 14, 2008) (finding that debtors had satisfied the standard of Bankruptcy Rule 6003(b) where "immediate relief [was] necessary to avoid irreparable harm"

and ordering that the debtor could make expenditures related to certain prepetition customer obligations). Accordingly, Bankruptcy Rule 6003(b), in addition to providing independent grounds for the authorization of payment of prepetition claims, serves to complement the doctrine of necessity.

13. There is more than ample precedent for the postpetition satisfaction of the specific types of prepetition claims described in the Motions. For example, as indicated by the unreported orders cited herein and in each of the Motions, bankruptcy courts in numerous recent chapter 11 cases in this District and elsewhere have granted debtors relief substantially similar to that sought by the Motions. See, e.g., In re Steve and Barry's Manhattan, LLC, No. 08-12579 (ALG) (Bankr. S.D.N.Y. Jul. 10 & 29, 2008); In re Frontier Airlines Holdings, Inc., No. 08-11298 (RDD) (Bankr. S.D.N.Y. Apr. 14, 2008 and May 2 & 15, 2008); In re Interep Nat'l Radio Sales, Inc., No. 08-11079 (RDD) (Bankr. S.D.N.Y. April 22, 2008); In re Wellman, Inc., No. 08-10595 (SMB) (Bankr. S.D.N.Y. Feb. 25 & 26, 2008 & Apr. 10, 2008); In re Dana Corp., No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 7 & 29, 2006); In re Musicland Holding Corp., No. 06-10064 (SMB) (Bankr. S.D.N.Y. Jan. 17 & 27 and Feb. 1, 2006); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21 & 27, 2005); In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005); In re Delta Air Lines, Inc., No. 05-17923 (PCB) (Bankr. S.D.N.Y. Sep. 16, 2005); In re Northwest Airlines Corp., No. 05-17930 (ALG) (Bankr. S.D.N.Y. Sep. 15, 2005); In re Tower Automotive, Inc., 05-10578 (ALG) (Bankr. S.D.N.Y. Feb. 3 and Mar. 14, 2005); In re WorldCom, Inc., No. 02-13533 (AJG) (Bankr. S.D.N.Y. July 22 and Aug. 13 & 16, 2002); In re Williams Commc'ns Group, Inc., No. 02-11957 (SMB) (Bankr. S.D.N.Y. Apr. 24, 2002); In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Dec. 4, 2001); see also In re Cadence Innovation LLC, No. 08-11973 (KG)

(Bankr. D. Del. Aug. 27, 2008); In re Internet Corp., No. 08-11859 (KG) (Bankr. D. Del. Aug. 14, 2008); In re Dura Auto. Sys., Inc., No. 06-11202 (KJC) (Bankr. D. Del. Oct. 31, 2006 and Nov. 20, 2006); In re Collins & Aikman Corp., No. 05-55927 (SWR) (Bankr. E.D. Mich. May 17, 2005).²

B. Nonbinding Case Law From Outside the Second Circuit, Which Abandons the Necessity of Payment Doctrine for Essential Supplier Payments, Nevertheless Provides Further Support for Such Payments Here

14. The Seventh Circuit's well-publicized decision in In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004), criticized the use of the "necessity of payment" doctrine to authorize certain substantial prepetition supplier payments. Based on the evidentiary record presented in that case, the Seventh Circuit reversed the bankruptcy court's decision to permit Kmart's payment of prepetition claims based on the "necessity of payment" doctrine. The Kmart decision, however, does not alter the conclusion that essential supplier payments — and other proposed prepetition payments — are permissible here. In fact, that decision supports yet another ground for the approval of such payments.

15. As an initial matter, as only persuasive authority, the Seventh Circuit's decision does not impact the jurisprudence of this District (or other Districts within the Second Circuit) in which courts have held that essential supplier payments are permissible under the "necessity of payment" doctrine described above. See, supra, Section I.A. Indeed, a review of the orders identified in paragraph 13 above, most of which were entered *after* the 2004 Kmart decision, demonstrates that courts in this District have either disregarded the Kmart decision or found that the decision did not constrain paying prepetition claims in appropriate circumstances.

²

Because of the voluminous nature of these unreported orders, they are not attached to this Motion. Copies of these unreported orders will be made available to the Court at or prior to the hearing on this Motion and are available to other parties upon request from counsel to the Debtors. Brief summaries of the orders entered in each of the foregoing cases that approved the payment of prepetition claims are set forth on Exhibit A attached hereto and are incorporated herein by reference.

Nonetheless, to the extent that this Court finds the decision in Kmart to be persuasive in whole or in part, the Debtors still would be authorized to pay the claims of essential suppliers under sections 363(b)(1) and 105(a) of the Bankruptcy Code, among others.

1. The Evidentiary Record Here Supports the Proposed Payments

16. It must be noted that here, unlike in Kmart, the evidentiary record supports the proposed payment of the prepetition claims. In Kmart, the debtor proposed to pay over \$300 million to over 2,000 of its vendors and suppliers but did not provide "any pertinent evidence." Kmart, 359 F.3d at 868. In finding essential supplier payments improper in that case, the Seventh Circuit focused on the fact that the only evidence was "some sketchy representations by counsel plus unhelpful testimony by Kmart's CEO," id. at 868, and noted repeatedly that the debtor had failed to present any evidence whatsoever that would support the notion that the payments in question were, in fact, critical and beneficial to all creditors. See id. at 872 ("*this* order was unsound no matter how one reads § 363(b)(1).") (emphasis in original).

17. That is not the case here. The Motions, the Kolka Affidavit, the Garberding Declaration, the Grady Declaration and the Ewasyshyn Declaration provide detailed, substantial factual backing for the necessity of the relief requested in the Motions and the potentially harmful consequences that could befall the Debtors absent such relief. Further, this evidence demonstrates that all creditors ultimately are likely to benefit from the payment of the claims to be paid pursuant to the Motions. As such, the perceived evidentiary deficiencies that prompted the Seventh Circuit's decision in Kmart do not exist here.

2. Section 363 of the Bankruptcy Code Provides a Means by Which the Postpetition Payment of Prepetition Claims May be Approved

18. In a bankruptcy case, the proposed uses of a debtor's cash are divided into two categories by section 363 of the Bankruptcy Code. Where the proposed use is "in the

ordinary course of business," the transaction may be undertaken by the debtor without bankruptcy court approval.³ Conversely, where the proposed use is "other than in the ordinary course of business," the debtor may only engage in the transaction "after notice and a hearing." 11 U.S.C. § 363(b)(1). Thus, under section 363 of the Bankruptcy Code, *any* possible use of a debtor's cash is permissible so long as it is approved by the court. See NextWave, 244 B.R. at 276 (noting that sections 363(b) and 363(c) of the Bankruptcy Code establish grounds for payment of prepetition claims provided court approval is obtained).

19. Under the rationale adopted in Kmart, the payments to essential suppliers and other essential prepetition creditors proposed in the Motions constitute a use of property of the estate outside of the ordinary course of the debtor's business. Id. at 872 ("satisfaction of a pre-petition debt in order to keep 'critical' supplies flowing is a use of property other than in the ordinary course of administering an estate in bankruptcy."). Because the Motions, the Kolka Affidavit, the Garberding Declaration, the Grady Declaration and the Ewasyshyn Declaration provide detailed explanations of the business reasons supporting the proposed use, the Debtors have met the requirement of applicable law, and the use of their cash in that manner should be approved by the Court.

3. Section 105(a) of the Bankruptcy Code Enhances a Bankruptcy Court's Authority Where, Like Here, There Is No Inconsistency with Other Bankruptcy Code Provisions

20. Further, section 105(a) of the Bankruptcy Code permits the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Although, under Second Circuit jurisprudence, the Court's equitable

³ See 11 U.S.C. § 363(c)(1) ("[T]he trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course without notice or a hearing.").

powers arising under section 105(a) of the Bankruptcy Code may only be exercised within the confines of the Bankruptcy Code, they may be exercised in any manner not "inconsistent with the commands of the Bankruptcy Code." Fed. Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d 57, 59 (2d Cir. 1992) (quotation omitted); In re Nichols, 362 B.R. 88, 93 (Bankr. S.D.N.Y. 2007) (noting the court's ability to exercise equitable powers under section 105(a) of the Bankruptcy Code "within the confines of the Bankruptcy Code") (quotation omitted); In re Flores, 291 B.R. 44, 54 (Bankr. S.D.N.Y. 2003) (noting that, although section 105(a) of the Bankruptcy Code grants "the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction," it "cannot be used in a manner inconsistent with the commands of the Bankruptcy Code.") (quotations omitted). Allowing the payment of prepetition claims only after court approval is not inconsistent with any provision in the Bankruptcy Code.

21. Indeed, it is clear that there is no absolute bar on the payment of prepetition claims found in the Bankruptcy Code. One of the core functions of the federal bankruptcy system is to provide for an orderly system of payment of prepetition claims. Bankruptcy courts typically do this when they enter orders confirming plans of reorganization, which provide a mechanism for the postpetition satisfaction of prepetition claims. Although the plan of reorganization is undoubtedly the primary mechanism for the satisfaction of such claims in chapter 11, it is not the only one. Other examples of Bankruptcy Code provisions that provide for or permit the postpetition payment of prepetition claims include (a) the payment of adequate protection to prepetition creditors, pursuant to sections 362, 363 or 364 of the Bankruptcy Code, (b) paying prepetition contractual claims upon the assumption of an executory contract or unexpired lease, pursuant to section 365 of the Bankruptcy Code, (c) uses of cash under

section 363 of the Bankruptcy Code that are made pursuant to a settlement approved under Rule 9019 of the Federal Rules of Bankruptcy Procedure or (d) the payment of retiree health benefits under section 1114 of the Bankruptcy Code.

22. Many of the payments proposed by the Motions are justified because the claims of the prepetition creditors in question are *entitled* to preferential treatment in bankruptcy. For example, the tax claims proposed to be paid pursuant to the Prepetition Taxes Motion would in many cases be entitled to payment in full as priority claims under section 507(a)(8) of the Bankruptcy Code (or, with respect to trust fund taxes, the cash at issue is not even property of the Debtors' estates under section 541 of the Bankruptcy Code) and many of the potential Lienholders would be entitled to be paid in full as fully secured creditors. Additionally, certain of the claims would be entitled, in whole or in part, to priority treatment as administrative claims under section 503(b)(9) of the Bankruptcy Code or might potentially be paid as reclamation claims under section 546(c) of the Bankruptcy Code. Accordingly, the relief requested in the Motions is not contrary to the other provisions of the Bankruptcy Code, but entirely consistent with them.

23. Accordingly, section 363(b)(1) of the Bankruptcy Code, read in conjunction with section 105(a) of the Bankruptcy Code, supplies yet another rationale for why the payment of prepetition claims is permissible where, like here, such payments are supported by the evidentiary record. While the "necessity of payment" doctrine remains the applicable legal standard in this District, the Debtors also would be justified in making the essential supplier payments described herein even if the "necessity of payment" doctrine were inapplicable.

II. The Debtors Are Justified in Paying the Prepetition Claims Described in the Motions Because the Payment of These Claims Is Essential to the Debtors' Ability to Preserve and Maximize the Value of Their Estates

24. Under the "necessity of payment" doctrine articulated in the cases described above and implemented in the unreported orders cited herein or, alternatively, under other provisions of the Bankruptcy Code, as described above, the Debtors' selective payment of certain prepetition claims in order to maximize the value of any Sale Transaction consummated in these chapter 11 cases is manifestly warranted. With respect to each of the Motions, the grounds that establish the necessity of payment in each instance are supported by at least one detailed affidavit or declaration. Thus, by reference to those documents, and as briefly summarized in the Background section of this Memorandum of Law, it is plain that the requisite factual showing has been made by the Debtors.

25. In addition, to assist in achieving the purposes of the relief requested in the Motions and maximize the benefits to the Debtors' estates, the Debtors should be permitted the discretion to select whether (and on what conditions, subject to the terms described in the Motions) to pay the prepetition claims of individual creditors within the groups of creditors for which relief is granted and the discretion to pay less than 100% of a claim. This discretion, which routinely has been granted in other cases in this District and others,⁴ will allow the Debtors to exercise their judgment, on a case-by-case basis, as to whether payment of any particular individual creditor will help to preserve and enhance the Debtors' going concern value and, if necessary, place appropriate conditions on any payments to best achieve these goals.

⁴ See cases cited infra at ¶ 13.

Conclusion

26. If the requested relief is not granted, there is a substantial risk that the going concern value of the Debtors' assets would be immediately and irreparably undermined and the value of any Sale Transaction substantially diminished or, more likely, lost. It is the Debtors' business judgment, therefore, that authority to pay immediately the prepetition claims described in the Motions is absolutely essential to the Debtors' efforts to maximize the ultimate recoveries of their stakeholders. Accordingly, for all of the reasons set forth herein and in the Motions, the Kolka Affidavit, the Garberding Declaration, the Grady Declaration and the Ewasyshyn Declaration, the relief requested in the Motions should be granted in full.

Dated: April 30, 2009
New York, New York

Respectfully submitted,

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PROPOSED ATTORNEYS FOR DEBTORS
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EXHIBIT A

SUMMARY OF RELIEF GRANTED IN UNREPORTED ORDERS

1. In re Steve and Barry's Manhattan, LLC, No. 08-12579 (ALG) (Bankr. S.D.N.Y. Jul. 10 & 30, 2008) (interim and final orders, entered July 10, 2008 and July 30, 2008, respectively, authorizing the debtors to (a) pay prepetition sales and use taxes and (b) honor prepetition customer programs).
2. In re Frontier Airlines Holdings, Inc., No. 08-11298 (RDD) (Bankr. S.D.N.Y. Apr. 14, 2008 & May 2 & 15, 2008) ((a) orders entered April 14, 2008 authorizing debtors to (i) pay, among other taxes, prepetition sales and use taxes and (ii) honor prepetition obligations to customers, (b) order entered May 2, 2008 authorizing the debtors to pay prepetition claims of foreign creditors and (c) order entered May 15, 2008 authorizing the debtors to pay prepetition claims of critical vendors and prepetition claims entitled to administrative priority pursuant to section 503(b)(9) of the Bankruptcy Code).
3. In re Interep Nat'l Radio Sales, Inc., No. 08-11079 (RDD) (Bankr. S.D.N.Y. Apr. 1, 2008) (order entered April 1, 2006 authorizing the debtors to pay prepetition client and customer obligations).
4. In re Wellman, Inc., No. 08-10595 (SMB) (Bankr. S.D.N.Y. Feb. 25, 2008, Feb. 27, 2008 & Apr. 10, 2008) ((a) order entered Feb. 25, 2008 authorizing the debtors to honor prepetition obligations related to customer programs, (b) order entered Feb. 27, 2008 authorizing the debtors to pay prepetition claims of shippers, warehousemen and miscellaneous lien claimants and (c) order entered April 10, 2008 authorizing debtors to pay use taxes, franchise taxes, license fees and other similar charges and assessments).
5. In re Dana Corp., No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 6 & 29, 2006) ((a) interim and final orders entered Mar. 3 & 29, 2006 authorizing the debtors to pay (i) prepetition claims of foreign vendors, (ii) prepetition claims of potential lienholders and (iii) prepetition claims of essential suppliers; and (b) interim and final orders entered Mar. 6 & 29, 2006 authorizing the debtors to pay (i) prepetition taxes and (ii) prepetition workers' compensation premiums, claims and related expenses).
6. In re Musicland Holding Corp., No. 06-10064 (SMB) (Bankr. S.D.N.Y. Jan. 18 & 27, 2006 and Feb. 1, 2006) ((a) order entered Jan. 18, 2006 authorizing the debtors to pay prepetition sales and use taxes and (b) order entered Jan. 27, 2006 authorizing the debtors to honor prepetition obligations to customers and continue customer programs).
7. In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21 & 27, 2005) ((a) order entered on Dec. 21, 2005 authorizing the debtors to pay prepetition claims of essential suppliers; and (b) orders entered on Dec. 27, 2005 authorizing

the debtors to (i) pay prepetition property taxes and (ii) pay prepetition sales, use and franchise taxes.)

8. In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13 & 14, 2005) ((a) orders entered on Oct. 13, 2005 authorizing the debtors to (i) continue vendor rescue program and payment of prepetition claims of financially distressed sole source suppliers and vendors without contracts and (ii) pay prepetition claims of contractors and service providers in satisfaction of liens; and (b) orders entered on Oct. 14, 2005 authorizing the debtors to (i) honor prepetition obligations to customers and continue customer programs, (ii) pay prepetition obligations to foreign creditors and (iii) pay prepetition sales, use, trust fund and other taxes).
9. In re Delta Air Lines, Inc., No. 05-17923 (PCB) (Bankr. S.D.N.Y. Sep. 16, 2005) (orders authorizing the debtors to (a) honor prepetition customer obligations and continue customer programs, (b) pay prepetition claims of essential suppliers, (c) pay prepetition obligations owed to foreign creditors and (d) pay prepetition sales and use taxes, employment taxes and other similar taxes).
10. In re Northwest Airlines Corp., No. 05-17930 (ALG) (Bankr. S.D.N.Y. Sep. 15, 2005) (orders authorizing the debtors to (a) honor prepetition obligations to customers and (b) honor prepetition obligations to foreign vendors).
11. In re Tower Automotive, Inc., 05-10578 (ALG) (Bankr. S.D.N.Y. Feb. 3 and Mar. 14, 2005) ((a) orders entered on Feb. 3, 2005 authorizing the debtors to (i) pay prepetition obligations to customers and to continue customer programs, (ii) pay prepetition claims of shippers and other lien claimants and (iii) pay prepetition sales, use and franchise taxes; and (b) order entered Mar. 14, 2005 authorizing the debtors to pay prepetition claims of essential suppliers and services providers).
12. In re WorldCom, Inc., No. 02-13533 (AJG) (Bankr. S.D.N.Y. July 23 and Aug. 13 & 19, 2002) ((a) orders entered on July 23, 2002 authorizing the debtors to (i) honor prepetition customer obligations and continue prepetition customer related practices and (ii) pay prepetition claims of essential suppliers; (b) order entered on Aug. 13, 2002 authorizing the debtors to pay prepetition obligations owed to foreign creditors; and (c) order entered on Aug. 19, 2002 authorizing the debtors to pay prepetition sales and use taxes and regulatory fees).
13. In re Williams Commc'ns Group, Inc., No. 02-11957 (SMB) (Bankr. S.D.N.Y. Apr. 24, 2002) — order authorizing the debtors to pay certain prepetition non-property taxes.
14. In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Dec. 4, 2001) (orders entered authorizing the debtors to (a) pay prepetition claims of common carriers, warehousemen and foreign creditors and (b) pay prepetition sales and use taxes).
15. In re Cadence Innovation LLC, No. 08-11973 (KG) (Bankr. D. Del. Aug. 27, 2008) (orders entered August 27, 2008 authorizing the debtors to pay

(a) prepetition claims of shippers, (b) prepetition claims of warehousemen and miscellaneous lien claimants and (c) prepetition claims of critical vendors).

16. In re Internet Corp., No. 08-11859 (KG) (Bankr. D. Del. Aug. 15, 2008) (orders entered Aug. 15, 2008 authorizing the debtors to pay (a) sales, use, excise, franchise and certain other governmental taxes as well as fees, licenses and other similar charges and assessments, (b) prepetition claims of essential trade vendors, (c) prepetition claims of shippers and warehousemen and (d) prepetition claims of miscellaneous lien claimants).
17. In re Dura Auto. Sys., Inc., No. 06-11202 (KJC) (Bankr. D. Del. Oct. 31, 2006 and Nov. 21, 2006) (orders entered (a) Oct. 31, 2006 authorizing the debtors to pay prepetition sales, use and franchise taxes and certain other government charges and (b) Nov. 21, 2006 authorizing the debtors to pay (i) the prepetition claims of shippers, warehousemen and other potential lien claimants, (ii) the prepetition claims of certain critical vendors and prepetition claims entitled to administrative priority pursuant to section 503(b)(9) of the Bankruptcy Code, (iii) the prepetition claims of certain foreign vendors; and (iv) prepetition obligations to customers).
18. In re Collins & Aikman Corp., No. 05-55927 (SWR) (Bankr. E.D. Mich. May 17, 2005) (orders authorizing the debtors to (a) honor prepetition obligations to customers and continue customer programs; (b) pay prepetition claims of shippers and other lien claimants; and (c) pay sales, use and franchise taxes).