

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

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In re	:	Chapter 11
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SEMCRUDE, L.P., et al.	:	Case No. 08-11525 (BLS)
	:	
Debtors.	:	Joint Administration Requested
	:	
	x	

**DEBTORS' MOTION PURSUANT TO SECTIONS 105(a) AND 363(b)
OF THE BANKRUPTCY CODE FOR AN ORDER (I) AUTHORIZING
PAYMENT OF WAGES, COMPENSATION, AND EMPLOYEE BENEFITS
AND (II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS**

SemCrude, L.P., its parent, SemGroup, L.P. ("SemGroup"), and certain direct or indirect subsidiaries of SemGroup, as debtors and debtors in possession (collectively, the "SemGroup Companies" or the "Debtors"),¹ respectfully represent:

Background

1. On the date hereof (the "Commencement Date"), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in this Court. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). The Debtors are authorized to

¹ The Debtors in these chapter 11 cases, along with the last four (4) digits of each Debtor's federal tax identification number, are: SemCrude, L.P. (7524), Chemical Petroleum Exchange, Incorporated (8866), Eaglwing, L.P. (7243), Grayson Pipeline, L.L.C. (0013), Greyhawk Gas Storage Company, L.L.C. (4412), K.C. Asphalt L.L.C. (6235), SemCanada II, L.P. (3006), SemCanada L.P. (1091), SemCrude Pipeline, L.L.C. (9811), SemFuel Transport LLC (6777), SemFuel, L.P. (1015), SemGas Gathering LLC (4203), SemGas Storage, L.L.C. (0621), SemGas, L.P. (1095), SemGroup Asia, L.L.C. (5852), SemGroup Finance Corp. (3152), SemGroup, L.P. (2297), SemKan, L.L.C. (8083), SemManagement, L.L.C. (0772), SemMaterials Vietnam, L.L.C. (5931), SemMaterials, L.P. (5443), SemOperating G.P., L.L.C. (5442), SemStream, L.P. (0859), SemTrucking, L.P. (5355), and Steuben Development Company, L.L.C. (9042).

continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

Jurisdiction and Venue

2. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

The SemGroup Companies' Business

3. The SemGroup Companies provide gathering, transportation, storage, distribution, marketing, and other midstream services primarily to independent producers and refiners of petroleum products located along the North American energy corridor from the Gulf Coast region to central Canada and along the West Coast of the United Kingdom. The SemGroup Companies' assets primarily consist of pipelines, gathering systems, processing plants, storage facilities, terminals, and other distribution facilities located between North American production and supply areas, including the Gulf Coast, Mid-Continent and Alberta, Canada and areas of high demand such as the Midwest region of the United States. The SemGroup Companies also have storage, terminal, and marine facilities in Milford Haven in the United Kingdom with pipeline connectivity to nearby refiners that enable the SemGroup Companies to supply product to the East Coast market of the United States.

4. Additional information regarding the SemGroup Companies' business, capital structure, and the circumstances leading to these chapter 11 filings are contained in the Declaration of Terry Ronan in Support of the Debtors' Chapter 11 Petitions and Request for First Day Relief (the "Ronan Declaration"), filed contemporaneously herewith.

Relief Requested

5. By this motion (the "Motion"), pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, the Debtors requests that the Court (I) authorize, but not require, the Debtors to (a) pay, in their sole discretion, all obligations incurred under or related to Wage Obligations, Payroll Taxes, Expense Reimbursements, and Employee Benefits (each as defined below, and collectively, the "Employee Obligations") and all costs incident to the foregoing, and (b) maintain and continue to honor their practices, programs, and policies for their employees as they were in effect as of the Commencement Date, and as such may be modified, amended, or supplemented from time to time in the ordinary course, and (II) authorize applicable banks and other financial institutions (collectively, the "Banks") to receive, honor, process, and pay any and all checks drawn on the Debtors' payroll and general disbursement accounts (collectively, the "Disbursement Accounts") and automatic payroll transfers, to the extent that such checks or transfers relate to any of the foregoing.

The Debtors' Prepetition Employee Obligations

6. In the ordinary course of their business, the Debtors incur payroll and various other obligations and provide other benefits to their employees for the performance of services. As of July 1, 2008, the Debtors employed approximately 1,688 individuals in the United States (of which approximately 1,595 are full-time regular employees, 70 are full-time temporary employees, 7 are part-time regular employees who are not eligible for 401(k) benefits, 10 are part-time regular employees who are eligible for 401(k) benefits, and 6 are part-time temporary employees) (collectively, the "Employees").

7. The Debtors have costs and obligations in respect of the Employees relating to the period prior to the Commencement Date. Certain of these costs and obligations

are outstanding and due and payable, while others will become due and payable in the ordinary course of business after the Commencement Date.

8. As described below, the Debtors estimate that the aggregate amount of the Employee Obligations, including, but not limited to, the Wage and Commissions Obligations, Payroll Taxes, Expense Reimbursements, and Employee Benefits and all costs incident to the foregoing does not exceed approximately \$4.75 million. This estimate does not include the Debtors' obligations under the PTO Plans, as these obligations are not cash pay obligations of the Debtors as of the Commencement Date.

Wages and Salaries

(i) Wage Obligations

9. The Debtors' Employees are substantially all employed by SemManagement, L.L.C., ("SemManagement"), a Debtor herein. SemGroup and certain of its subsidiaries have service contracts with SemManagement, whereby the SemManagement Employees provide services to SemGroup or a subsidiary. Prior to the Commencement Date, and in the ordinary course of business, SemManagement typically paid obligations relating to wages, salary, and compensation for their Employees (the "Wage Obligations") on a bi-weekly or semi-monthly basis, as the case may be, through direct deposits into Employees' accounts or by check. The Debtors' current estimated cumulative gross bi-weekly payroll for their Employees is approximately \$1,911,179.

10. The Debtors, through SemManagement, engage Automatic Data Processing, Inc. and certain of its affiliates (collectively, "ADP") to facilitate payment of the Wage Obligations. In the ordinary course of business, ADP pays the Employees their respective Wage Obligations on behalf of SemManagement and, subsequently, debits the full amount of the Wage Obligations from the Banks. For example, on or about July 11, 2008, ADP debited from

the Banks payroll for the bi-week period ending June 29, 2008. On or about July 15, 2008, ADP debited from the Banks account payroll for the semi-monthly period ending July 15, 2008. As of the Commencement Date, the Debtors estimate that approximately \$1,080,000 in Wage Obligations have accrued but remain unpaid.

Payroll Taxes/Garnishment

11. The Debtors are required by law to withhold from the Wage Obligations amounts related to federal, state, and local income taxes, as well as social security and Medicare taxes (collectively, the "Withholding Taxes") and to remit the same to the appropriate taxing authorities (collectively, the "Taxing Authorities"). In addition, the Debtors are required to make matching payments from their own funds on account of social security and Medicare taxes and to pay, based on a percentage of gross payroll and subject to state-imposed limits, additional amounts to the Taxing Authorities for, among other things, state and federal unemployment insurance (collectively, the "Employer Payroll Taxes" and, together with the Withholding Taxes, the "Payroll Taxes"). As of the Commencement Date, SemManagement owes the Taxing Authorities approximately \$13,500 on account of Payroll Taxes relating to the prepetition period.

12. In the ordinary course of processing payroll checks for their Employees, SemManagement also withholds certain amounts for various writs of garnishment (such as tax levies, child support, payments to bankruptcy trustees, and student loans).

Obligations in Respect of Payroll Processing Service

13. ADP is paid a bi-weekly fee of approximately \$2,300 for the provision of payroll services, which includes withholding payroll taxes (the "ADP Payroll Service Fees"). Payment of these modest fees is crucial for the Debtors' seamless entry into chapter 11 and to

ensure that all Employees are paid timely and accurately postpetition. As of the Commencement Date, SemManagement does not owe ADP any outstanding prepetition amounts.

14. Finally, ADP also withholds from Employee wages any amounts subject to a writ of garnishment. SemManagement pays ADP approximately \$500 per month to process garnishment payments. Payment of this modest fee is crucial to ensure that the Debtors are compliant with applicable writs of garnishment. As of the Commencement Date, SemManagement does not owe ADP any outstanding prepetition amounts for the garnishment services.

Reimbursement of Expenses

15. The Debtors' Employees, and their partners, management, or board members, as the case may be, incur various expenses in the discharge of their ordinary duties, such as travel and meal expenses. Because these expenses are incurred as part of their official duties and in furtherance of the Debtors' business, the Employees and partners, management, or board members, as the case may be, are reimbursed in full (the "Expense Reimbursements") after submission of appropriate documentation to the Debtors' accounting department. Expenses are reimbursed on a rolling basis, with a time lag of approximately two weeks between submission and reimbursement. Although it is difficult for the Debtors to determine the amount of Expense Reimbursements outstanding at any particular time, the Debtors are currently aware of approximately \$165,000 in outstanding Expense Reimbursements as of the Commencement Date.

Employee Benefit Plans

16. In the ordinary course of business, the Debtors have established various benefit plans and policies for their Employees that can be divided into the following categories: (i) medical insurance, dental insurance, vision care, basic and supplemental life insurance,

accidental death and disability insurance, business travel insurance, short and long-term disability, and flexible spending accounts (collectively, the “Health and Welfare Plans”); (ii) paid time off plans, including vacation, sick/bereavement days, and paid holidays (collectively, the “PTO Plans”); (iii) a 401(k) plan (the “401(k) Plan”) and supplemental executive retirement plan (the “SERP”); (iv) an American Express credit card expense reimbursement plan (the “AMEX Reimbursement Plan”); and (v) an proposed severance plan (the “Severance Plan,” and together with the Health and Welfare Plans, PTO Plans, the 401(k) Plan, the SERP, and the AMEX Reimbursement Plan, the “Employee Benefits”). The Debtors deduct specified amounts from the Employees’ wages in connection with certain of the Employee Benefits, such as medical insurance and 401(k) Plan contributions.

(i) **Health and Welfare Plans**

17. The Debtors sponsor several Health and Welfare Plans to provide benefits to Employees, including, without limitation, (i) medical, dental, vision, life, business travel insurance, and accidental death and disability insurance (the “Basic Healthcare Package”); (ii) long- and short-term disability insurance (“Disability Insurance”); and (iii) flexible spending accounts (“Flexible Spending Accounts”).

(a) **Basic Healthcare Package**

18. The Debtors offer a Basic Healthcare Package to all their full-time Employees. The Basic Healthcare Package is administered by the following vendors: (i) Principal Financial Group (“Principal”); (ii) Delta Dental Plan of Oklahoma (“Delta”); (iii) Vision Service Plan (“VSP”); (iv) Guardian Life Insurance (“Guardian”); and (v) Chubb Group of Insurance Companies (“Chubb”).

(i) Medical Plan Coverage

19. Within the Basic Healthcare Package, the Debtors' medical coverage is primarily provided through a self-insured medical plan administered by Principal (the "Principal Medical Plan"). Through Principal, the Debtors offer certain preferred provider organization options to their Employees. Employee payments range between \$45 per month for individuals, \$84 per month for an Employee plus spouse, \$74 per month for an Employee plus children, and \$107 per month for an Employee plus family.

(ii) Dental Plan

20. Delta administers the Debtors' fully-insured dental plan (the "Dental Plan"). The Debtors pay approximately \$100,000 per month in premiums for the Dental Plan.

(iii) Vision

21. VSP administers the Debtors' fully-insured vision care plan (the "Vision Plan"). Employees who enroll in the Dental Plan automatically receive coverage under the Vision Plan. The Debtors pay approximately \$30,000 per month in premiums for the Vision Plan. As of the Commencement Date, the Debtors estimate that they have approximately \$1,261,000 of cumulative accrued amounts owing under the Principal Medical Plan, Dental Plan, and Vision Plan.

(iv) Life, AD&D, and Business Travel Insurance

22. The Debtors maintain basic life insurance for their full-time Employees and also offer Employees the opportunity to purchase supplemental life insurance (the "Life Insurance Plan"). Guardian administers the Life Insurance Plan, which costs the Debtors approximately \$155,000 per month.

23. The Debtors also provide accidental death and disability coverage through a plan administered by Guardian (the "Guardian AD&D Plan"). Under the Guardian AD&D

Plan, depending upon the type and severity of an injury, an eligible Employee or an Employee's designee (as applicable) may receive up to 100% of reimbursable costs, subject to a defined limit.

24. Finally, the Debtors provide business travel accident insurance to all active Employees through a plan administered by Chubb (the "Chubb Travel Plan"). Under the Chubb Travel Plan, an Employee is entitled to receive up to ten times the Employee's annual base salary, subject to caps based upon annual salary, in the event an Employee is injured while traveling on business. The Chubb Travel Plan is provided at fixed premiums paid by the Debtors. As of the Commencement Date, the Debtors owe approximately \$4,500 in accrued but unpaid premiums relating to the Chubb Travel Plan.

(b) Disability Benefits

25. The Debtors maintain both short- and long-term disability insurance plans. The Debtors' voluntary long-term disability plan (the "LTD Plan") is administered by Guardian and is funded entirely by Employee contributions. An Employee is eligible to receive benefits if the Employee has been disabled for more than 90 consecutive calendar days. Under the LTD Plan, eligible Employees receive 60% of their base salary from day 91 for as long as the Employee remains disabled. The minimum benefit is \$50 per month and the maximum benefit is \$10,000 per month.

26. In addition to the LTD Plan, the Debtors provide supplementary long-term disability insurance (the "Supplemental LTD Plan") through UNUM Provident Corporation to their executives (the "Executives"). The Supplemental LTD Plan assists Executives achieve a level of long-term disability coverage that is commensurate with their compensation. The Supplemental LTD Plan allows eligible Executives to receive up to an additional \$10,000 per

month of long-term disability coverage. As of the Commencement Date, the Debtors believe there are no outstanding amounts owing on account of the Supplemental LTD Plan.

27. Finally, the Debtors provide a self-insured short term disability insurance plan (the "STD Plan") to their Employees who elected coverage under the LTD Plan. Guardian administers the STD Plan offered to Employees. Under the STD Plan, eligible Employees receive 70% of their income, up to a maximum of \$2,700 per week, from day 16 for an additional eleven weeks. As of the Commencement Date, the Debtors estimate that approximately \$15,048 is owed to Guardian on account of the Life Insurance Plan, the Guardian AD&D Plan, the LTD Plan, and the STD Plan.

(c) Flexible Spending Accounts

28. The Debtors offer two flexible spending account programs, one to be used for health care costs, and one to be used for dependent care costs (collectively, the "Flexible Spending Accounts"). Funds contributed by Employees to the Flexible Spending Accounts are held by the Debtors in trust for the benefit of the Employees.

29. Flexible Spending Accounts allow employees to contribute up to \$5,000 per year of pre-tax income through payroll deductions to be used for out-of pocket medical and dental expenses, and up to \$5,000 per year for dependent care expenses. As of the Commencement Date, the Debtors estimate that they have approximately \$23,152 of accrued amounts owing under the Flexible Spending Accounts. Additionally, the Debtors pay ADP administrative fees totaling approximately \$2,000 per month for ADP's provision of such administrative services (the "FSA Administrative Fees"). As of the Commencement Date, the Debtors do not owe ADP any outstanding prepetition amounts for FSA Administrative Fees.

(ii) **Paid Time Off Benefits**

30. Under the PTO Plans, Employees are eligible, in certain circumstances, to receive their full wages for, among other things, vacation, sick/bereavement days, and holidays.

(a) **Vacation**

31. Full-time Employees accrue vacation days based on the number of years of service. For example, Employees with less than five years of service accrue vacation time at a rate of 10 days of vacation per year. After five years, but less than 10 years, of continuous full-time employment, Employees begin to accrue time at a rate of 15 days of vacation per year. After 10 years, but less than twenty years, of full-time continuous employment, Employees begin to accrue time at a rate of 20 days of vacation per year. The maximum accrual is 30 vacation days. Employees are only entitled to be paid for accrued and unused vacation time (if payable by law) in the event they are terminated.

(b) **Sick/Bereavement**

32. All full-time Employees are also allowed a combined total of five paid sick/bereavement days each year. Employees are eligible for this benefit on the first of the month following hire.

(c) **Holidays**

33. Employees are eligible for paid holidays after one full-time day at work. The Debtors observe nine paid holidays during the calendar year: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Day After Thanksgiving, Christmas Eve, and Christmas Day. New Employees hired on or before June 30, 2008 may also designate two days as paid floating holidays each year and Employees hired after July 1, 2008 may designate one day.

34. Because the PTO Plans are essential features of the Debtors' employ and failure to provide these benefits could harm Employee morale and encourage the premature departure of Employees, the Debtors request authority to honor all of their obligations under the PTO Plans as and when they come due.

(iii) 401(k) Plan/SERP

35. The Debtors, through SemManagement, sponsor a retirement investment plan and withhold from the wages of participating Employees contributions towards the 401(k) Plan (the "Withholding Contributions"). In order to participate, Employees must be employed for at least one month and have worked 1,000 hours during the previous 12 months. For all Employees enrolled in the 401(k) Plan, the Debtors contribute an amount equal to 3% of an Employee's compensation. Participants may elect to contribute from 1% to 50% of their compensation. The Debtors match 100% of the Employee's contribution up to 5%. Participants are 100% vested in both their employee and company contributions immediately upon enrollment. Bank of Oklahoma, N.A ("Bank of Oklahoma") administers the 401(k) Plan for quarterly fees of approximately \$17.50 per participant. As of the Commencement Date, the Debtors estimate \$475,431 in accrued obligations in contributions and trust service fees to Bank of Oklahoma.

36. In addition to the 401(k) Plan, SemManagement also offers a SERP, which is administered through Northwestern Mutual Life Insurance Company, of Milwaukee, Wisconsin ("NWM") and Pacific Life Insurance Company ("Pacific"). The premiums for the SERP are paid by SemManagement until the Employee: (i) attains the age of 65; (ii) dies; (iii) is terminated; or (iv) is no longer eligible under the terms of their respective SERP. Executives vest in the SERP after completing five years of service with SemManagement. As of the

Commencement Date, the Debtors owe Pacific approximately \$70,000 in outstanding prepetition premiums relating to the SERP.

(iv) **AMEX Reimbursement Plan**

37. The Debtors offer the AMEX Reimbursement Plan to reimburse Employees who incur day-to-day business related expenses on behalf of the Debtors in the ordinary course of the Debtors' business (the "AMEX Reimbursements"). Under the AMEX Reimbursement Policy, after the submission of appropriate documentation to the Debtors, the Debtors directly pay American Express for approved expenses incurred by an Employee on an American Express credit card issued in the name of an Employee, and not the Debtors (the "AMEX Cards"). Because the Employees do not always submit claims for AMEX Reimbursements promptly, it is difficult for the Debtors to determine the exact amount of AMEX Reimbursements outstanding at any particular time. Nevertheless, the Debtors estimate that as of the Commencement Date the AMEX Reimbursements to be paid to Employees aggregate approximately \$935,000.

(v) **Severance Plan**

38. As more fully described in the Ronan Declaration, in their effort to manage their liquidity crisis, the Debtors implemented several cost-saving measures, including a reduction in workforce plan (the "RIF"). In light of the RIF and in order to maintain employee morale, the Debtors seek authority to implement the Severance Plan, which provides severance benefits for Employees affected by the RIF equal to two weeks of the Employee's base salary (the "Severance Benefits"). The Severance Plan applies only to those Employees who do not have an employment contract with the Debtors or their affiliates and who were not fired for cause. The Debtors anticipate that approximately 276 Employees will be offered the Severance Plan, which will result in the payment of approximately \$1.1 million in Severance Benefits. The

Debtors believe that it is necessary and important to provide the Severance Benefits to Employees under the Severance Plan. The Debtors intend to seek the entry of an order approving the relief requested in the Motion regarding the Severance Plan at a further hearing before this Court in the near future.

**Cause Exists to Authorize the
Payment of the Debtors' Employee Obligations**

39. Pursuant to section 507(a)(4)(A) of the Bankruptcy Code, claims of Employees of the Debtors for "wages, salaries, or commissions, including vacation, severance, and sick leave pay" earned within 180 days before the Commencement Date are afforded priority unsecured status to the extent of \$10,950 per Employee. Similarly, section 507(a)(5) of the Bankruptcy Code provides that Employees' claims for contributions to certain employee benefit plans also are afforded priority unsecured status to the extent of \$10,950 per Employee covered by such plan, less any amount paid pursuant to section 507(a)(4).

40. Furthermore, section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code further provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

41. Many of the Employee Obligations relating to the period prior to the Commencement Date constitute priority claims under sections 507(a)(4) and (5) of the

Bankruptcy Code. As priority claims, the Employee Obligations must be paid in full before any general unsecured obligations of the Debtors may be satisfied. Accordingly, the relief requested may affect only the timing of the payment of these priority obligations and will not prejudice the rights of general unsecured creditors or other parties in interest. Indeed, as of the Commencement Date, the overwhelming majority of Employees are owed less than \$10,950 for wages.²

42. Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Moreover, section 363(b)(1) of the Bankruptcy Code provides “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

43. A bankruptcy court’s use of its equitable powers to “authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). “Under Section 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177). *See also In re Just for Feet, Inc.*, 242 B.R. 821 (D. Del. 1999) (court is authorized under section 105(a) to allow immediate payment of prepetition claims of vendors found to be critical to the debtor’s reorganization, citing *In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973)); *In re Columbia Gas Sys.*

² There are approximately eight Employees who are currently owed over \$10,950. The average amount owed to such Employees is \$13,500. The Debtors believe the payment of such amounts are necessary and appropriate and may be authorized under sections 105(a) and 363(b) of the Bankruptcy Code pursuant to the “necessity of payment” doctrine.

Inc., 171 B.R. 189 (Bankr. D. Del. 1994) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to continued operation of their business).

44. The “necessity of payment” doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176 (Bankr. S.D.N.Y. 1989) (authorizing the payment of prepetition employee wages and benefits); *see also Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279, 285-86 (S.D.N.Y. 1987), *appeal dismissed* 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits). This doctrine is consistent with the paramount goal of chapter 11 of “facilitating the continued operation and rehabilitation of the debtor.” *Ionosphere Clubs*, 98 B.R. at 176.

45. In this case, any delay or failure to pay wages, salaries, benefits, and other similar items would irreparably impair the Employees’ morale, dedication, confidence, and cooperation, and would adversely impact the Debtors’ relationship with their Employees at a time when the Employees’ support is critical to Debtors’ chapter 11 cases. At this early stage, the Debtors simply cannot risk the substantial damage to their business that would inevitably attend a rapid decline in their Employees’ morale.

46. Absent an order granting the relief requested herein, the Employees will suffer undue hardship and, in many instances, serious financial difficulties, as the amounts in question are needed to enable the Employees to meet their own personal financial obligations. Without the requested relief, the stability of the Debtors will be undermined, perhaps irreparably, by the distinct possibility that otherwise loyal Employees will seek other employment

alternatives. In addition, it would be inequitable to require the Debtors' Employees to bear personally the cost of any business expenses they incurred prepetition, for the benefit of the Debtors, with the understanding that they would be reimbursed.

47. With respect to Payroll Taxes, the payment of such taxes will not prejudice other creditors of the Debtors' estates, as the relevant Taxing Authorities generally would hold priority claims under section 507(a)(8) of the Bankruptcy Code in respect of such obligations. Moreover, the portion of the Payroll Taxes withheld from an Employee's wages on behalf of the applicable Taxing Authority are held in trust by the Debtors. As such, these Payroll Taxes are not property of the Debtors' estates under section 541 of the Bankruptcy Code. *See, e.g., Begier v. IRS*, 496 U.S. 53 (1990) (withholding taxes are property held by a debtor in trust for another and, as such, are not property of the debtors' estates).

48. In addition, the Debtors believe it is necessary to continue payment of administrative fees to the administrators of the Debtors' Employee Obligations and to the administrators of programs related to Employee Benefits. Without the continued services of these administrators, including, but not limited to, Zurich, Chubb, Guardian, Principal, Delta, and VSP, the Debtors will be unable to continue to honor their Employee Obligations in an efficient and cost-effective manner.

49. The Debtors do not seek to alter their compensation, vacation, or other benefit policies at this time. This Motion is intended only to permit the Debtors, in their discretion, to make payments consistent with the Debtors' existing policies to the extent that, without the benefit of an order approving this Motion, such payments may be inconsistent with the relevant provisions of the Bankruptcy Code, and to permit the Debtors, in their discretion, to continue to honor their practices, programs, and policies with respect to their Employees, as such

practices, programs, and policies were in effect as of the Commencement Date. Payment of all Employee Obligations in accordance with the Debtors' prepetition business practices is in the best interests of the Debtors' estates, their creditors, and all parties in interest and will enable the Debtors to continue to operate their business in an economic and efficient manner without disruption. The Debtors' Employees are central to their operations and are vital to these chapter 11 cases. A significant deterioration in employee morale at this critical time undoubtedly would have a devastating impact on the Debtors, their customers and vendors, the value of the Debtors' assets and business, and the Debtors' ability to continue operations. The total amount sought to be paid herein is relatively modest compared with the size of the Debtors' overall business and the importance of the Employees to the Debtors' chapter 11 cases.

50. In other chapter 11 cases, courts in this district have approved payment of prepetition claims for compensation, benefits, and expense reimbursements similar to those described herein.³ See, e.g., *In re Shaper Image Corp.*, Ch. 11. Case No. 08-10322 (KG) (Bankr. D. Del. Feb. 20, 2008); *In re Charys Holding Co., Inc.*, Ch. 11 Case No. 08-1-289 (BLS) (Bankr. D. Del. Feb. 15, 2008); *In re Holley Performance Prods., Inc.*, Ch. 11 Case No. 08-10256 (PJW) (Bankr. D. Del. Feb. 12, 2008); *In re Buffets Holdings, Inc.*, Ch. 11 Case No. 08-10141 (MFW) (Bankr. D. Del. Jan. 23, 2008); *In re Hancock Fabrics, Inc.*, Ch. 11 Case No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007); *In re Am. Home Mortg. Holdings, Inc.*, Ch. 11 Case No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); *In re Sea Containers Ltd.*, Ch. 11 Case No. 06-22256 (MFW) (Bankr. D. Del. Oct. 27, 2006); *In re Foamex Int'l Inc.*, Ch. 11 Case No. 05-12685 (PJW) (Bankr. D. Del. 2005); *In re Maxide Acquisitions, Inc.*, Ch. 11 Case No. 05-10429 (MFW) (Bankr. D. Del. 2005).

³ Because of the voluminous nature of the orders cited herein, they are not annexed to this Motion. Copies of these orders are available upon request of Debtors' counsel, including at the hearing to consider this Motion.

The Severance Plan is Not Governed by Section 503(c)(2)

51. Section 503(c)(2) of the Bankruptcy Code prohibits severance payments made to insiders of the debtor unless (A) the payment is part of a program that is generally applicable to all full-time employees; and (B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made. 11 U.S.C. § 503(c)(2). Section 503(c)(2) is not applicable because the Severance Plan does not provide for payments to insiders.

The Severance Plan is Permissible Under Section 503(c)(3)

52. To the extent applicable, the Severance Plan is permissible under section 503(c)(3) of the Bankruptcy Code, which prohibits “other transfers or obligations that are outside of the ordinary course of business and payments and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the filing of the petition.” 11 U.S.C. § 503(c)(3). A plain language reading of the statute provides that the predominant focus of section 503(c) is on payments made to “insiders” outside of the ordinary course of business, which, as explained above, does not apply to the Severance Plan.

53. Even if applicable, the “business judgment” standard is the proper standard for determining whether the Severance Plan is justified under section 503(c)(3) of the Bankruptcy Code. See, e.g., In re Nellson Neutraceutical, Inc., 369 B.R. 796, 804 (Bankr. D. Del. 2007) (holding that because section 503(c)(2) did not apply, compensation plan was reviewed under the business judgment standard); In re Global Home Prods., LLC, 369 B.R. 778, 787 (Bankr. D. Del. 2007) (same); see also In re Nobex Corp., No. 05-20050 Hearing Tr. at p. 86-87 (Bankr. D. Del. Jan. 12, 2006) (MFW) (Docket No. 194) (“I find [503(c)(3)] quite frankly

nothing more than a reiteration of the standard under 363...under which courts had previously authorized transfers outside the ordinary course of business and that [are], based on the business judgment of the debtor...”).

54. In determining whether a proposal for compensation, and the process for developing such proposal, are an exercise of a debtor’s sound business judgment, courts examine, among other things, the following factors:

- i. Is there a reasonable relationship between the plan proposed and the results to be obtained?
- ii. Is the cost of the plan reasonable in the context of the debtor’s assets, liabilities and earning potential?
- iii. Is the scope of the plan fair and reasonable; does it apply to all employees; does it discriminate unfairly?

In re Global Home Prods., LLC, 369 B.R. at 786 (quoting In re Dana Corp., 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006)).

55. The Debtors do not have an established prepetition severance plan for their Employees. The Severance Plan is a sound-exercise of the Debtors’ business judgment because it seeks to provide meaningful financial assistance to non-Executive Employees affected by the RIF. In formulating Severance Plan, the Debtors have been fully cognizant of the costs involved and have made every effort to ensure that the goals of the Severance Plan can be attained in an economic and reasonable fashion. The Severance Plan does not discriminate unfairly because it is tailored to assist Employees affected by the RIF and only excludes Employees who do not have an employment contract with the Debtors or their affiliates or who may have been fired for cause.

56. The Debtors submit that offering Severance Benefits in the form of two weeks base salary does not represent an unreasonable request, especially in light of the

circumstances faced by the Employees affected by the RIF. Without approval of the Severance Plan, valuable employees may become fearful of their own financial security and seek new employment to the detriment of the Debtors' businesses and all of the Debtors' creditors. Decreased employee morale and the loss of a significant number of employees would hamper the Debtors' ability to serve existing clients, earn revenues, reorganize and maximize the value of their estates for the benefit of all creditors. The Debtors' Employees are central to their operations and absolutely vital to their reorganization efforts. Therefore, the Severance Benefits that will be realized through the Severance Plan are fair and reasonable and fully justified.

**Applicable Banks Should be Authorized
to Honor and Pay Checks Issued and Make
Other Transfers to Pay the Employee Obligations**

57. The Debtors further request that the Court authorize the applicable Banks, identified on Exhibit A annexed hereto, to receive, process, honor, and pay all prepetition and postpetition checks issued or to be issued, and electronic fund transfers requested or to be requested, by the Debtors in respect of the Employee Obligations. The Debtors also seek authority to issue new postpetition checks, or effect new electronic fund transfers, on account of the Employee Obligations to replace any prepetition checks or electronic fund transfer requests that may be dishonored or rejected.

58. As a result of the commencement of the Debtors' chapter 11 cases, and in the absence of an order of the Court providing otherwise, the Debtors' checks, wire transfers, and direct deposit transfers in respect of the Employee Obligations may be dishonored or rejected by the Banks. The Debtors represent that each of these checks or transfers is or will be drawn on the Debtors' payroll and general disbursement accounts and can be readily identified as relating directly to payment of the Employee Obligations. Accordingly, the Debtors believe that

prepetition checks and transfers, other than those for Employee Obligations, will not be honored inadvertently.

59. Authorization to pay all amounts on account of Employee Obligations 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 are in the process of reviewing these matters and reserve all of their rights under the Bankruptcy Code with respect thereto. Moreover, authorization to pay all amounts on account of Employee Obligations shall not affect the Debtors' right to contest the amount or validity of any Employee Obligations, including, without limitation, the Payroll Taxes that may be due to any Taxing Authority. Based on the foregoing, the Debtors submit that the relief requested is necessary and appropriate, is in the best interests of their estates and creditors, and should be granted in all respects.

60. The Debtors submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

61. To successfully implement the foregoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the ten-day stay under Bankruptcy Rule 6004(h).

Notice

62. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. The Debtors have served notice of this Motion on: (a) the U.S. Trustee for the District of Delaware, (b) those creditors listed on the Debtors' Consolidated List of Creditors Holding 30 Largest Unsecured Claims, (c) counsel to Bank of America, N.A., as administrative agent for certain of the Debtors' prepetition secured lenders, (d) General Electric Capital Corporation, as administrative agent for SemCurde Pipeline, L.L.C.'s secured prepetition

lenders, (e) Wells Fargo National Bank, National Association, as indenture trustee for the Debtors' prepetition unsecured bondholders, and (f) Manchester Securities Corp. and Alerian Finance Partners, LP, the Debtors' prepetition secured lenders. The Debtors submit that no other or further notice need be provided.

WHEREFORE the Debtors respectfully request entry of an order, substantially similar to the proposed form of order attached hereto, granting the relief requested herein and such other and further relief as the Court may deem just.