

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

In re:

EDDIE BAUER HOLDINGS, INC.,
*et al.*¹

Debtors.

Chapter 11

Case No. 09-12099 (____)

Joint Administration Pending

MOTION OF THE DEBTORS FOR AN ORDER AUTHORIZING (A) THE DEBTORS TO PAY CERTAIN PREPETITION: (I) WAGES, SALARIES, AND OTHER COMPENSATION; (II) EMPLOYEE, MEDICAL AND SIMILAR BENEFITS; (III) REIMBURSABLE EMPLOYEE EXPENSES; (IV) OTHER MISCELLANEOUS EMPLOYEE EXPENSES AND BENEFITS; AND (V) INDEPENDENT CONTRACTOR FEES AND EXPENSES AND (B) DIRECTING BANKS TO RECEIVE, PROCESS, HONOR AND PAY ALL CHECKS PRESENTED FOR PAYMENT AND ELECTRONIC PAYMENT REQUESTS RELATING TO THE FOREGOING

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”) filed this motion (the “**Motion**”) for entry of an order, pursuant to Sections 105, 363, 507(a)(4) and 507(a)(5) of title 11 of the United States Code (the “**Bankruptcy Code**”), (A) authorizing, but not directing, the Debtors to pay certain prepetition: (I) wages, salaries, and other compensation; (II) employee, medical and similar benefits; (III) reimbursable employee expenses; (IV) other miscellaneous employee expenses and benefits; and (V) independent contractor fees and expenses and (B) directing banks to receive, process, honor and pay all

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Eddie Bauer Holdings, Inc., a Delaware corporation (2352); Eddie Bauer, Inc., a Delaware corporation (9737); Eddie Bauer Fulfillment Services, Inc., a Delaware corporation (0882); Eddie Bauer Diversified Sales, LLC, a Delaware limited liability company (1567); Eddie Bauer Services, LLC, an Ohio limited liability company (disregarded), Eddie Bauer International Development, LLC, a Delaware limited liability company (1571); Eddie Bauer Information Technology, LLC, a Delaware limited liability company (disregarded); Financial Services Acceptance Corporation, a Delaware corporation (7532); and Spiegel Acceptance Corporation, a Delaware corporation (7253). The mailing address for Eddie Bauer Holdings, Inc. is 10401 N.E. 8th Street, Suite 500, Bellevue, WA 98004. On or about the Petition Date, Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services, Inc., affiliates of the Debtors, commenced a proceeding before the Superior Court of Justice, Commercial List, for the Judicial District of Ontario, for a plan of compromise or arrangement under the Companies’ Creditors Arrangement Act.



checks presented for payment and electronic payment requests relating to the foregoing.² In support of this Motion, the Debtors respectfully represent as follows:³

JURISDICTION

1. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are Sections 105(a), 363(b), 507(a)(3) and 507(a)(4) and of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "**Bankruptcy Code**").

BACKGROUND

3. On June 17, 2009 (the "**Petition Date**"), Eddie Bauer Holdings, Inc. and each of its Debtor affiliates filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**"). The Debtors intend to continue in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The Debtors have requested that these Chapter 11 Cases be consolidated for procedural purposes. As of the date hereof, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

4. Subsequent to the commencement of these Chapter 11 Cases, the Debtors' two Canadian affiliates – Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services, Inc.

² A copy of the proposed order (the "**Order**") is attached hereto as Exhibit A.

³ The facts and circumstances supporting this Motion are set forth in the Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc., in Support of First Day Motions (the "**First Day Declaration**") filed contemporaneously herewith.

(the “**Canadian Debtor Affiliates**”) – will seek recognition of the Debtors’ Chapter 11 Cases in a Canadian Court as “foreign proceedings” pursuant to Section 18.6 of the Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended. In addition to staying proceedings against the Canadian Debtor Affiliates in Canada, such recognition by the Canadian Court will allow certain orders of this Court to be in full force and effect in the same manner and in all respects as if they had been made by the Canadian Court. Due to the integrated management of the Canadian Debtor Affiliates with the Debtors’ U.S. operations, as well as the role that the Canadian Debtor Affiliates play in the Debtors’ overall prepetition debt structure, these Chapter 11 Cases will function as the main proceedings with respect to the Canadian Debtor Affiliates.

5. As further detailed in the First Day Declaration, the Debtors and the Canadian Debtor Affiliates⁴ are a publicly traded general merchandise and specialty retailer that offers men’s and women’s outerwear, apparel, accessories and gear for an active outdoor lifestyle through catalogs, e-commerce sites and over 370 retail and outlet stores. The Debtors have 556 full-time, part-time, and temporary employees in their corporate headquarters, and 7,144 full-time, part-time, and temporary retail and distribution employees. The Canadian Affiliates have over 950 full-time, part-time, and temporary employees working in management, retail and customer service.

THE PROPOSED 363 SALE

6. Due to (i) Debtors’ and Debtors’ lenders inability to agree upon the terms of a consensual restructuring, (ii) the Debtors’ need to reduce debt load and interest expenses, and (iii) the Debtors’ mounting concerns regarding the potential deterioration of their businesses

⁴ The Debtors also have a non-debtor affiliate located in Hong Kong named Pacific NW Sourcing Co. This affiliate was created in 2008 to act as a purchasing agent in Asia. However, it is not currently fully operational, has no assets and has few, nominal liabilities.

– and accompanying degradation in value – stemming from rumors in the marketplace about the Debtors’ liquidity and viability, the Debtors have determined that the value of their estates would be best maximized and preserved through a sale process (the “**Sale**”). Therefore, the Debtors have negotiated a going-concern Sale of their businesses and assets (the “**Assets**”) to Rainier Holdings LLC as the stalking horse bidder (the “**Stalking Horse Bidder**”) pursuant to an asset purchase agreement and commenced these Chapter 11 Cases to implement the Sale pursuant to Section 363 of the Bankruptcy Code, subject to a competitive Sale process and the solicitation of higher and/or otherwise better offers. The Debtors believe that unless the Sale is expeditiously consummated, whether to the proposed Stalking Horse Bidder or to a purchaser submitting a higher or otherwise better offer, there will be significant value deterioration. Consequently, the Debtors have determined that it is in the best interest of their estates, creditors and other parties-in-interest to move forward with the Sale process.

7. The events leading up to the Petition Date and the Sale and the facts and circumstances supporting the relief requested herein are more fully set forth in the First Day Declaration.

RELIEF REQUESTED

8. By this Motion the Debtors seek authority, in their discretion and in the exercise of their business judgment, to (a) pay or otherwise honor, as the case may be, their employee compensation obligations, deductions, reimbursable expenses, ordinary course incentives, vacation and severance payments and obligations arising in the ordinary course of business (collectively, as described in greater detail below, the “**Employee Obligations**”), as discussed in this Motion, to or for the benefit of, the Employees (as defined herein), (b) to continue post-petition various Employee benefit plans, policies, programs and practices that were in effect immediately prior to the Petition Date, as described herein (collectively, the “**Employee**

Benefits”) and (c) pay or otherwise honor, as the case may be, their Independent Contractor (as defined herein) obligations and reimbursable expenses arising in the ordinary course of business (collectively, as described in greater detail below, the “**Independent Contractor Obligations**”).

9. If there is an interruption in the Employee Obligations, Employee Benefits and Independent Contractor Obligations, Employees may suffer personal hardship and be unable to meet their living expenses or continue health benefits. The inevitable consequence would be Employee attrition, staff distraction and turnover, loss of goodwill and disintegration of employee morale, all to the detriment of the ongoing organizations.⁵ Indeed, the Stalking Horse Bidder has indicated its intent to honor in full for Employees their accrued Vacation Days and Vacation Benefits (as defined below) in order to demonstrate its dedication to Employee satisfaction, the preservation of the Debtors’ businesses and its belief in and support of the Employees who have weathered multiple layoffs and a difficult retail environment, resulting in added responsibility and work hours without increased compensation.

10. Additionally, if there is any interruption to the Independent Contractor Obligations, the Independent Contractors will not only suffer hardship but certain of the Independent Contractors will cease work with the Debtors on critical ongoing projects, to the Debtors’ significant detriment. Indeed, should specific First Ascent / Design Contractors (as defined below) decide to seek work with competitors of the Debtors as a result of Debtors’ breach of their contractual obligations or inability to pay for future work to be performed, there will be a significant detrimental impact on certain of the Debtors’ new product lines and initiatives.

⁵ In addition, if there is an interruption in the Independent Contractors’ compensation, the Independent Contractors will likewise suffer hardship and may cease to provide important services to the Debtors.

11. These factors would have a materially adverse effect upon the Debtors' operational efficiency and could threaten their ability to continue their business operations. At this critical stage in these Chapter 11 Cases, the Debtors cannot risk such a substantial disruption to their business operations. For these reasons, it is essential that any undue hardships to Employees and Independent Contractors as a consequence of the Debtors' Chapter 11 cases be minimized.

12. The Debtors also request entry of an order (a) directing all banks to receive, process, honor and pay any and all checks and drafts drawn on the Debtors' accounts related to the Employee Obligations, Employee Benefits and Independent Contractor Obligations whether presented before or after the Petition Date provided that sufficient funds are on deposit in the applicable accounts to cover such payment, and (b) prohibiting banks from placing any holds on, or attempting to reverse, any automatic transfers to Employees' or Independent Contractors' accounts for Employee Obligations, Employee Benefits and Independent Contractor Obligations.

I. EMPLOYEE OBLIGATIONS

13. The Debtors employ approximately 7,700 employees (the "**Employees**") across the United States, of whom approximately 25% are full-time employees and approximately 75% are part-time employees. Temporary, consulting and seasonal employees consist of less than 1% of the total workforce during the regular retail periods of February through October. During the peak period of November through January, these employees represent 15% of all employees and are hired according to seasonal sales patterns at retail and outlet stores and at distribution and call centers. Approximately 81% of all employees are hourly wage earners (collectively, the "**Hourly Employees**") and the remaining 19% are salaried (collectively, the "**Salaried Employees**").

14. The Debtors' employees include approximately 1,375 full-time and 5,769 part-time and temporary retail and outlet store associates and distribution center employees who are integral to the sales of Debtors' products through three interdependent sales channels: (i) retail stores that sell Debtors' premium merchandise; (ii) outlet stores that sell a value priced version of Debtors' merchandise as well as inventory overstocks at clearance price points and (iii) direct sales which consist of sales through the Debtors' catalogs and website. In addition, the Debtors have approximately 556 corporate personnel, who perform critical in-house design, ordering, quality assurance, advertising, administrative, accounting, management and other tasks. The Employees' skills, knowledge and understanding of the Debtors' infrastructure, operations, vendor and customer relations are essential to affect a successful asset sale. Maintaining employee morale is critical, since poor employee morale may impact all aspects of the business, including retail sales, vendor trust and distribution efficiency. Ensuring uninterrupted, ordinary course operations will maximize the value of Debtors' assets and businesses.

B. Unpaid Compensation

15. The Debtors' average aggregate monthly compensation for all Employees, including wages, salaries and bonuses, is approximately \$10.4 million. Approximately 60% of payroll is made by direct deposit through electronic transfer of funds directly to Employees and the remaining 40% of Employees are paid by checks. All Employees are paid on a bi-weekly basis approximately one week in arrears, with direct deposits or checks issued on the Friday of each two-week period (each a "**Pay Day**"). The last payroll period ended on June 5, 2009 and was paid by the Debtors on June 12, 2009.

16. As of the Petition Date, some of the Debtors' Employees have not been paid all of their prepetition wages earned in arrears. Additionally, compensation may be due and owing as of the Petition Date because of:

- a. *Payroll Discrepancies.* Some discrepancies may exist between the amounts paid and amounts Employees or others believe should have been paid, which, upon resolution, may reveal that additional amounts are owed to such Employees and
- b. *Check Clearing Delays.* Some payroll checks issued to Employees prior to the Petition Date may not have been presented for payment or cleared the banking system and, accordingly, have not been honored and paid as of the Petition Date.

17. The Debtors believe that, as of the Petition Date, approximately \$2,900,000 in accrued wages, salaries, overtime pay, commissions and other compensation (excluding reimbursable expenses, vacation pay, deferred compensation and incentive bonus pay) earned prior to the Petition Date (the “Unpaid Compensation”) remains unpaid to Employees. The Debtors seek authority, in their discretion, to pay such Unpaid Compensation to the Employees.⁶ For the reasons discussed below, the Debtors are requesting authority to honor all Unpaid Compensation claims subject to the limitations set forth herein. In addition to Unpaid Compensation, as discussed below, there are certain unpaid employee claims for vacation.

C. Deductions and Withheld Amounts

18. During each applicable pay period, the Debtors routinely deduct certain amounts from their Employees’ paychecks, including, without limitation, (a) credit union deposits and payments; (b) garnishments, child support and similar deductions and (c) other pretax and after-tax deductions payable pursuant to certain of the Employee benefit plans discussed herein (such as an Employee’s share of health care benefits, insurance premiums, 401(k) contributions, medical “flex plan” contributions, legally ordered deductions and other miscellaneous deductions) (collectively, the “Deductions”) and forward those amounts to the administrators of the self-insured programs and other various third-party recipients. Further, the

⁶ The Debtors believe there is one Employee whose Unpaid Compensation exceeds the \$10,950 per employee cap. However, the Debtors are not seeking reimbursement of any amounts owed for Unpaid Compensation above the priority cap amount.

Debtors are required by law to withhold amounts related to federal, state and local income taxes, social security, Medicare taxes and other amounts from their Employees' wages for remittance to the proper taxing authority (collectively, the "**Withheld Amounts**"). The Debtors must then make matching contributions for social security and Medicare taxes based on a percentage of gross payroll and make additional payments for state and federal unemployment insurance (the "**Employee Payroll Taxes**" and along with the Withheld Amounts, the "**Payroll Taxes**").

19. On average, the Deductions for all Employees total approximately \$65,000 for each pay period. However, due to the commencement of the Chapter 11 Cases, some funds which were deducted from Employees' earnings may not have been forwarded to the appropriate third-party recipients prior to the Petition Date. Accordingly, the Debtors seek authority, in their discretion, to continue to forward these prepetition Deductions (which the Debtors hold in trust and do not believe constitute property of the Debtors' estates) to the applicable third-party recipients on a postpetition basis, as routinely done prior to the Petition Date in the ordinary course of business.

20. On average, the Payroll Taxes for all Employees total approximately \$1.50 million in the aggregate for each pay period, with approximately \$0.40 million attributable to Employee Payroll Taxes and approximately \$1.10 million attributable to Withheld Amounts. Before the Petition Date, the Debtors withheld amounts from Employees' earnings for the Employee Payroll Taxes, but such funds may not have been forwarded to the appropriate taxing authorities prior to the Petition Date. The Debtors seek authority, in their discretion, to continue to honor and process the prepetition obligations with respect to the Payroll Taxes on a postpetition basis, in the ordinary course of business, as routinely done prior to the Petition Date.

D. Reimbursable Expenses

21. Prior to the Petition Date and in the ordinary course of business, the Debtors reimbursed Employees and directors for certain expenses incurred in the scope of their employ.

- a. *Reimbursable Employee and Director Expenses.* Expenses incurred by the Debtors' Employees and board of directors ("**Directors**") may include, *inter alia*, business-related travel expenses, business meals, telephone costs, seminars and other job-related training expenses, car mileage reimbursement and other miscellaneous business expenses (collectively, the "**Reimbursable Employee and Director Expenses**"). Employees and Directors are required to submit Reimbursable Employee Expenses through the Debtors' reimbursable expense program. After the approval of Reimbursable Employee and Director Expenses, such expense is paid to the Employee or Director in the next regularly scheduled paycheck or through automated clearing house payments ("**ACH payments**"). The Debtors estimate that approximately \$100,000 exists in accrued and unpaid Employee and Director Expenses.

22. The foregoing Reimbursable Expenses were all incurred on the Debtors' behalf and with the understanding that they would be reimbursed. Accordingly, to avoid harming individuals who incurred the Reimbursable Expenses, the Debtors request authority, in their discretion, to (a) continue reimbursing the Reimbursable Expenses in accordance with prepetition practices, (b) modify their prepetition policies relating thereto as they deem appropriate and (c) pay all Reimbursable Expenses that accrued prepetition.

E. Incentive Plans

23. The Debtors also maintain in the ordinary course of business various incentive policies and programs tied to periodic levels of performance and productivity for non-executive Employees. These include the Store Team Monthly Incentive Plan, the Area Manager and District Director Monthly Incentive Plan and the TeamShare Plans for the distribution center employees (collectively, the **Incentive Plans**).

- a. ***Store Team Monthly Incentive Plan.*** Certain retail sales associates and store managers are eligible to participate and receive base salary increases or incremental incentive payouts when their retail store achieves and / or exceeds its monthly financial and productivity targets (the “**Store Team Monthly Incentive Plan**”). Hourly Employees eligible to participate in the Store Team Incentive Plan can receive a base level hourly bonus for achieving their monthly targets and incremental hourly wage increases for exceeding their monthly targets, multiplied by the number of hours they work during the designated month. Salaried store directors, store managers, co-managers, and assistant store managers who are eligible to participate in the plan can receive a lump-sum base level payout for meeting their monthly targets and an incremental payout for exceeding their monthly targets, calculated as a percentage of the sales exceeding their monthly store target. All store management may also be eligible to receive an additional incentive for meeting targets for inventory control and shrinkage.⁷
- b. ***Area Manager and District Director Monthly Incentive Plan.*** Certain area managers of retail and outlet stores and district directors who oversee such managers are eligible to participate in a retail sales management incentive plan that provides both a base level incentive and an incremental incentive when the district or area achieves and exceeds its planned financial and performance targets for the month (the “**District Director Monthly Incentive Plan**”). In fiscal 2008, the District Director Incentive Plan and the Store Team Monthly Incentive Plan paid out \$3.95 million in base level and incremental incentives to the Debtors’ district directors and area managers and the Debtors’ store managers and retail sales associates, respectively.
- c. ***TeamShare Plans.*** Certain U.S. based distribution center Employees are eligible to participate in an individual and team-based incentive program (the “**TeamShare Plus Plan**”). The TeamShare Plus Program pays out performance incentives based upon performance measured against certain standards and accuracy levels. The TeamShare Plans pay incentives as part of the normal biweekly payroll process. In fiscal 2008, the TeamShare Plan paid out approximately \$0.70 million in base level and incremental incentives to 640 Employees.

⁷ “Shrinkage” represents the amount of inventory damaged, lost or stolen in the ordinary course of business.

24. Since the Incentive Plan distributions are calculated based on monthly, quarterly and fiscal year-end financial and performance results, the Debtors are unable to estimate their current liability for the Incentive Plans as of the Petition Date. However, in fiscal 2008, Debtors paid approximately \$4.65 million to Employees pursuant to the Incentive Plans. Further, Debtors believe that the Incentive Plans represent an integral component of the Employees' salaries and that discontinuance of the Incentive Plans would detrimentally affect the Employee motivation and morale, impacting sales results and productivity levels, and thereby jeopardizing the Debtors' ability to conduct a successful reorganization. Further, the Stalking Horse Bidder has made it an express condition to the Sale that the Debtors maintain the going concern value of their Businesses – the value of which the Debtors and Stalking Horse Bidder agree would significantly decrease if the Incentive Plans were not maintained.

25. Accordingly, by this Motion, the Debtors seek authority, in their discretion, to (a) continue the Incentive Plans in the ordinary course of business, including payment of third-party administrators' fees, on a postpetition basis until the consummation of a sale of the Debtors' assets, (b) modify their Incentive Plans as they deem appropriate or pursuant to further order of this Court in the ordinary course of business and (c) to make all distributions and to pay amounts, including premiums and claim amounts relating thereto that accrued prepetition.

F. Vacation and other Paid Time Off

26. The Debtors provide Employees with paid vacation time, holidays and floating holidays, overtime pay, personal days, sick days and parental leaves of absence (collectively, "**Vacation and other Paid Time Off**"). These other forms of compensation and benefits are customary in the ordinary course of business in the retail industry and must be continued for the Debtors to retain qualified employees to operate their businesses. In addition,

the Stalking Horse Bidder has represented to the Debtors that it intends to honor all Vacation and other Paid Time Off upon a potential purchase of the Debtors' businesses. The Stalking Horse Bidder believes such protections are essential to preserve the going concern value of the Debtors' business by preserving employee morale.

27. The Debtors provide vacation time to all Employees, which varies based on the Employee's location, position and years of service.

- a. *Vacation Days for full-time Employees.* Generally, full-time Employees accrue between ten (10) and twenty (20) vacation days (the "**Vacation Days**") per year based on length of service and job category and can accumulate up to two (2) years of accrued and unpaid Vacation Days.
- b. *Vacation Benefits for part-time Employees.* Part-time Employees accrue vacation benefits (the "**Vacation Benefits**") on a pro-rata basis predicated upon the number of hours worked and can accumulate up to two (2) years of accrued and unpaid Vacation Days.

28. Accrued but unused Vacation Days and Vacation Benefits are paid out upon termination of employment even if termination occurs before the end of the fiscal year. The Debtors estimate that as of the Petition Date the contingent liability for accrued and unpaid Vacation Days and Vacation Benefits for Employees is approximately \$6.3 million.⁸ By this Motion, the Debtors seek authorization to (a) allow all Employees who are not terminated to use their accrued and unpaid Vacation Days and Vacation Benefits in the ordinary course, (b) pay current Employees with aggregate Section 507(a)(4) priority claims less than \$10,950 (taking into account Unpaid Compensation plus accrued Vacation Days and Vacation Benefits) up to the full payment amount of their Accrued but unused Vacation Days and Vacation Benefits upon termination of such Employees and (c) pay current Employees with aggregate Section 507(a)(4)

⁸ As of the Petition Date, the Debtors estimate that Employees hold Section 507(a)(4) priority claims (net of any Unpaid Compensation payable to each Employee) for accrued and unpaid Vacation Days and Vacation Benefits in the amount of approximately \$5.4 million.

priority claims in excess of \$10,950 (taking into account salary plus accrued vacation) accrued but unused Vacation Days and Vacation Benefits in an amount equal to the difference between \$10,950 and the amount of Unpaid Compensation paid to such Employees hereunder, upon termination, and allow such Employees to file a proof of claim for the remainder of accrued but unused Vacation Days and Vacation Benefits.

29. Due to the nature of the Debtors' business, Employees are often required to work on federal or state holidays. When a store management Employee is required to work on a state or federal holiday, such Employee is awarded an additional paid day off (a "**Floating Holiday**"), which must be taken within a 60-day period. Employees generally cannot take pay in lieu of a Floating Holiday. Hourly store employees are paid holiday pay based on the average number of hours worked per day in the previous two (2) pay periods, and are paid that amount regardless of whether they are required to work on the holiday or not.

30. In the ordinary course of business, full-time Employees are also entitled to take personal days, sick days and paid leaves of absence.

- a. ***Personal Days.*** Employees are assigned up to four (4) personal days ("**Personal Days**") annually. Newly-eligible, newly hired, and part-time employees are assigned Personal Days on a pro-rata basis. Employees cannot carry over their unused personal days into the succeeding fiscal year.
- b. ***Sick Days.*** Employees can also accrue up to ten (10) sick days ("**Sick Days**") annually. Part-time employees accrue Sick Days on a pro-rata basis. Sick days carry over into succeeding fiscal years, however Employees are not permitted to accumulate more than twenty (20) sick days at any given time.

31. If used, the Employees are paid for days that they take off as personal and sick days. However, the Employees are not paid for their unused personal or sick days. Accordingly, the Debtors estimate that there will be no additional cost to honor Debtors' personal and sick leave program.

- a. **Leave of Absence.** The Debtors also provide leaves of absence (the "LOA") to Employees for long-term illness or injury, maternity or paternity leave, military leave, personal leave or dependent care leave. The LOA may be required by law or may be medically necessary. Personal leave is neither required by law nor medically necessary but does require approval by Human Resources and the Employee's direct manager. Employees on LOA may be eligible for certain types of pay based on the type of LOA, the benefit status of the Employee, and the amount of paid time off available. The different types of paid time off available, based on the circumstances, include personal holiday pay, vacation pay, sick pay, short-term disability pay, and parental leave pay.

32. The only additional cost to the Debtors for LOA benefits are those costs associated with parental leave benefits. The Debtors estimate that their average two-week pay period cost for LOA is approximately \$10,000. By this Motion, the Debtors seek authority, in their discretion, to continue to honor their Personal Days, Sick Days and LOA benefits in the ordinary course of business on a postpetition basis until the consummation of a sale of the Debtors' assets.

G. Severance Obligations

33. During the ordinary course of business, the Debtors maintain a severance policy for eligible Employees (the "Severance Plan") pursuant to which Employees who are terminated without cause due to a store closure, reduction in job force or job elimination receive benefits based, in part, on years of service and base compensation. Benefits received under the Severance Plan may include lump sum or periodic severance pay, continuance of medical and dental benefits under COBRA for a period of time, outplacement services and a continuation of services under the Debtors' Employee assistance program (the "Severance Benefits"). Such terminated Employees receive Severance Benefits in exchange for providing the Debtors with a release of claims and/or settlement agreement.

34. The Debtors' monthly COBRA payments total approximately \$82,500; however, such costs are expected to be fully recouped through the employee's monthly COBRA premiums. There are no additional Severance Benefits paid by the Debtors.

35. Payment of these COBRA Severance Benefits is legally required. By this Motion, the Debtors request authority, in their discretion, to (a) continue the COBRA Severance Benefits on a postpetition basis and (b) make all COBRA Severance Benefit payments that accrued prepetition.

II. EMPLOYEE BENEFITS

36. The Debtors maintain various plans and policies to provide Employees with health and dental plans, savings and retirement plans, employee insurance benefits, workers compensation and executive insurance benefits (collectively the "**Employee Benefits**"). These Employee Benefits are described generally below.

A. Health Benefits

37. The Debtors provide their full-time Employees with various health benefit plans, including medical coverage, dental coverage, vision coverage and other assistance programs (collectively, the "**Health Benefits**"). The Debtors' approximate that their monthly cost for maintaining the Health Benefits is \$1.4 million in the aggregate.

38. The Debtors provide medical, vision, dental and prescription benefits to salaried and hourly Employees who meet certain eligibility requirements through self-insured plans (the "**Self-Insured Plans**") administered by Connecticut General Life Insurance Company ("**CIGNA**"), United Healthcare Medical, Delta Dental and Vision Service Plan (collectively, the "**Self-Insured Plan TPAs**"). Under the Self-Insured Plans, the majority of healthcare costs are funded through contributions by the Debtors and the participating Employees. The cost is borne primarily by the Debtors, but Employees also make contributions to the Self-Insured Plans which

the Debtors deduct from participating Employee paychecks (the “**Trust Fund Payments**”) on a bi-weekly basis. The \$1.4 million monthly cost to the Debtors for the Self-Insured Plans is comprised of approximately \$1.3 million for medical and prescription drug benefits, \$100,000 in dental claims and \$29,000 in vision benefits. There exists a lag time of up to six (6) months for the processing of medical, vision, dental and prescription drug claims and often a delay between the time the employee incurs a reimbursable expense and the time the employee or the employee’s medical service provider submits a claim. Thus, as of the Petition Date, the Debtors will be liable for claims under the Self-Insured Plans that have been submitted but not paid or that have been accrued but not submitted.

39. The Debtors have accrued and unpaid medical, dental, vision and prescription drug costs in respect of the Self-Insured Plans (the “**Self-Insured Plan Medical Claims**”) as of the Petition Date in an amount that cannot be determined at this time due to the variable nature of the claims process and medical, dental, vision and prescription drug needs.

40. By this Motion, the Debtors seek authority, in their discretion, to (a) continue the Health Benefits for their Employees in the ordinary course of business on a postpetition basis, (b) modify their prepetition policies relating thereto as they deem appropriate, (c) continue making the above-described contributions to such Health Benefits programs, (d) continue to pay fees of third-party administrators as necessary and (e) pay any amounts related thereto, including any premiums and claim amounts that accrued prepetition.

B. Savings and Retirement Plans

41. Eligible employees may elect to contribute up to 75% of their before-tax base salary and up to five percent (5%) of their after-tax base salary to a 401(k) savings plan, subject to IRS annual dollar limits. Eligible associates age fifty (50) or older may also make “catch up” contributions in accordance with IRS guidelines. Prior to February 28, 2009, the

Debtors matched the employee contribution amount dollar for dollar on the first three percent (3%) of before-tax base salary and fifty cents (\$0.50) on the dollar for the next three percent (3%) of before-tax salary for salaried employees.

42. Effective March 1, 2009, the Debtors suspended its matching contribution. Employees are one hundred percent (100%) vested in their salary deferral contributions and after-tax contributions. Since January 1, 2006, employees have been 100% vested in any of Debtors' matching contributions. Employer matching contributions prior to January 1, 2006 are subject to vesting requirements as defined in the Debtors' 401(k) plan. The Debtors' cost of matching employees' contributions to the plan was \$2,409,000, \$2,480,000 and \$1,554,000 for fiscal 2008, fiscal 2007 and fiscal 2006, respectively. On average, the Debtors withhold approximately \$175,000 every other week in the aggregate for all Employees participating in the 401(k) Plan. By this Motion, the Debtors seek authority to remit all amounts that are related to the 401(k) Plan and that arose prior to the Petition Date in the ordinary course of the Debtors' business.

C. Employee Insurance Benefits

43. The Debtors provide their Employees with Life Insurance and Short and Long-Term Disability Benefits and access to Group Legal Insurance (each as defined herein, and collectively, the "**Employee Insurance Benefits**").

- a. *Life Insurance and Accidental Death and Dismemberment Insurance.* The Debtors offer life insurance and accidental death and dismemberment insurance administered by the Minnesota Life Insurance Company ("**MLIC**") to certain current Employees that are eligible for medical benefits (the "**Life Insurance Plan**"). Upon meeting the eligibility requirements, an Employee is automatically covered by the Life Insurance Plan. The Life Insurance Plan provides these Employees with coverage equal to one times their annual base salary. The cost of the Life Insurance is completely borne by the Debtors.

44. The Life Insurance Plan costs the Debtors approximately \$30,000 per month in premiums. Since these premiums are generally paid by the 15th of the month in the current month, the Debtors believe that there are no accrued and unpaid obligations under the Life Insurance Plan.

- a. *Short-Term and Long-Term Disability Insurance.* In addition, the Debtors provide certain eligible Employees with short-term and long-term disability benefits administered by Standard Insurance Company (“**SIC**”) and The Hartford Financial Services Group, Inc. (“**HFSG**”). Employees are self-insured for short-term disability under SIC, fully-insured for short-term disability under HFSG and fully insured for long-term disability (“**Long Term Disability Plan**”) under SIC.

45. The Short-Term and Long-Term Disability Insurance costs the Debtors approximately \$90,000 per month in premiums.⁹ Because the Debtors generally pay Short-Term and Long-Term Disability Insurance premiums by the 15th of the month in the current month, and Short-Term Disability claims on a weekly basis, the Debtors believe that there are no accrued and unpaid premiums in respect of the Long Term Disability Plan (the “**LTD Premiums**”). However, there is a small possibility that there could be a delay in claims processing for Short-Term Disability and that accrued and unpaid claims may exist.

46. The Debtors believe that they are not liable for any Employee Insurance Benefits as of the Petition Date. By this Motion, the Debtors seek authority, in their discretion, to (a) continue to provide the Employee Insurance Benefits, including payment of third-party administrators’ fees, (b) modify their prepetition policies relating thereto as they deem appropriate and (c) to pay any amounts relating thereto that may have accrued prepetition.

⁹ The Debtors’ monthly costs for maintaining Short-Term and Long-Term Disability Insurance for its Employees exclude costs associated with Short-Term and Long-Term Disability benefits for executive Employees. For these figures please refer to Section II.F. Executive Insurance and D&O Coverage.

D. Workers Compensation

47. The Debtors provide workers' compensation benefits to all Employees. These benefits are covered primarily under the Debtors' fully-insured plans for both primary and excess coverage (the "**Fully-Insured Workers' Compensation Plan**"), but are also assessed through self-insured plans (the "**Self-Insured Plans**") and several state funds (the "**State Funds**"). Failure to maintain this insurance in the various states in which the Debtors do business could result in the institution of administrative or legal proceedings against the Debtors and their officers and directors. Under the Self-Insured Plans, the Debtors routinely pay claims within a prescribed period of time pursuant to applicable law (the "**U.S. Workers' Compensation Claims**"). In addition, where the Debtors are self-insured or may still have outstanding claims under old Self-Insured Plans, the Debtors are also required to post a self-insurer's bond for existing liabilities. The payments paid to the State Funds are paid on monthly, quarterly and yearly bases.

48. As of the Petition Date, the Debtors estimate that a total of \$639,000 in U.S. Workers' Compensation Claims were pending against the Debtors in the U.S. for which the Debtors had reserved \$739,000 in potential liability. However, these claims have not been reconciled and are not currently due and owing. The Debtors hold surety bonds and letters of credit with respect to this liability of roughly \$2,610,000. Further, as of the Petition Date, the Debtors estimate that approximately \$46,000 in payments is owed to the State Funds (the "**State Fund Payments**"). However, it is difficult to estimate with precision the amount due to the State Funds because they are assessed on a monthly, quarterly or yearly basis and vary from period to period. Therefore, to the extent that it is subsequently determined that additional State Fund Payments are owed, the Debtors request authority to pay such amounts.

49. By this Motion, the Debtors seek authority, in their discretion, to (a) continue to maintain their Workers' Compensation Programs in the ordinary course of business, including payment of third-party administrators' fees, (b) modify their prepetition policies relating thereto as they deem appropriate and (c) pay any amounts related thereto that accrued prepetition.

E. Miscellaneous Employee Programs

50. The Debtors also offer various miscellaneous benefits and reimbursements to their Employees, including, but not limited to, reimbursements for the purchase of sporting goods, relocation assistance, car allowance and cellular telephones for business use, Group Legal Services Insurance and an Employee assistance program (collectively, the "Miscellaneous Employee Programs."") The Debtors offer an Associate Discount of thirty percent (30%) on merchandise and gift cards for all eligible associates in the United States, including spouses and qualified dependents, which Associate Discount is increased to forty (40%) for a period of time for certain employees winning awards based on overall performance as rated by their peers. In addition, certain qualified sales associates are entitled to receive an Associate Discount of fifty percent (50%) on the Debtors' merchandise. The Miscellaneous Employee Programs provide key benefits to both the Debtors and their Employees, the interruption of which could result in a decline in morale and a diminished ability of the Debtors to conduct business in the ordinary course during these Chapter 11 Cases. The average monthly cost of the Miscellaneous Employee Programs to the Debtors is approximately \$660,000 in discounts on product sales. By this Motion, the Debtors seek authority, in their discretion, to (a) continue to provide the Miscellaneous Employee Benefits, including payment of third-party administrators' fees, (b) modify their prepetition policies relating thereto as they deem appropriate and (c) pay any amounts relating thereto that accrued prepetition.

III. INDEPENDENT CONTRACTOR OBLIGATIONS

51. The Debtors also employ approximately forty-six (46) Independent Contractors, (the “**Independent Contractors**”). Twenty-nine (29) of these Independent Contractors perform critical, specialized functions related to creative and design work, merchandising and information technology consulting services (collectively, the “**Ordinary Course Contractors**”).

52. The remaining seventeen (17) Independent Contractors make up a design team of world-class mountain climbers and creative and production personnel (“the **First Ascent / Design Contractors**”). The First Ascent / Design Contractors serve as an elite group of Independent Contractors working hand-in-hand with Debtors’ internal merchandising and design personnel to create, test, launch and prepare campaigns to promote several new lines of merchandise deemed key to the revitalization of Debtors’ brand as an active outdoor lifestyle company. New lines of merchandise currently under development include Debtors’ First Ascent™ line of world-class mountaineering outerwear and a line of “heritage” field and stream inspired clothing to be released for the 2009 holiday season and beyond. One of Debtors’ unique competitive advantages is that all merchandise is designed in-house, unlike many competitors who outsource the design process. Debtors’ then work closely with manufacturing vendors who create Debtors’ products according to Debtors’ design specifications. As part of this design process, the First Ascent / Design Contractors have just completed the testing of First Ascent mountaineering outerwear, tents and packs on a much publicized climb of Mount Everest (the “**First Ascent Return to Everest**”). Related to the First Ascent Return to Everest, a number of First Ascent / Design Contractors provide ongoing promotional and public relations services, reinforcing Debtors’ image as the leading provider of outdoor apparel and accessories and thereby helping Debtors increase sales, brand loyalty and market share.

B. Unpaid Compensation to Independent Contractors

53. The Debtors' average aggregate monthly compensation for all Independent Contractors is approximately \$132,000. These amounts are paid through a combination of direct deposit by electronic transfer of funds directly to Independent Contractors and checks.

54. The Debtors pay the Ordinary Course Contractors upon receipt of invoices for their services (the "**Ordinary Course Contractor Fees**").

55. In addition, the Debtors compensate the First Ascent / Design Contractors according to the terms of certain agreed Independent Contractor agreements signed with each individual, which relate to product development and the First Ascent Return to Everest expedition. In addition, certain of the First Ascent / Design Contractors are paid royalties based on the sale of First Ascent goods (together with payments pursuant to the contractor agreements, the "**First Ascent / Design Contractor Fees**").

56. As of the Petition Date, some of the Debtors' Independent Contractors have not been paid all of their prepetition compensation earned in arrears. Additionally, compensation may be due and owing as of the Petition Date because of:

- a. *Invoice Discrepancies.* Some discrepancies may exist between the amounts paid and amounts Independent Contractors believe should have been paid, which, upon resolution, may reveal that additional amounts are owed to such Independent Contractors and
- b. *Check Clearing Delays.* Some payroll checks issued to Independent Contractors prior to the Petition Date may not have been presented for payment or cleared the banking system and, accordingly, have not been honored and paid as of the Petition Date.

57. The Debtors estimate that approximately \$77,000 is outstanding in accrued and unpaid Ordinary Course Contractor Fees. The Debtors estimate that approximately

\$55,000 is outstanding in accrued and unpaid First Ascent / Design Contractor Fees. By this Motion, the Debtors seek authority, in their discretion, to (a) continue to pay the Ordinary Course Contractor Fees and First Ascent/Design Contractor Fees and (b) pay any amounts relating thereto that accrued prepetition.

C. Reimbursable Expenses to Independent Contractors

58. Prior to the Petition Date and in the ordinary course of business, the Debtors reimbursed Independent Contractors for certain expenses incurred in the scope of their employ (the “**Reimbursable Contractor Expenses**”).

- a. *Independent Contractor Business Expenses.* The Debtors reimburse in the ordinary course the Ordinary Course Contractors for certain expenses such as buying samples, travel, lodging, ground transportation, meals and other miscellaneous business expenses (collectively, “**Independent Contractor Business Expenses**”). It is difficult for the Debtors to estimate what the Independent Contractor Business Expenses will be given the expense submission process and variable nature of expenses, however, the Debtors anticipate that any unpaid Independent Contractor Business Expenses for the prepetition period will be nominal.
- b. *First Ascent / Design Contractor Business Expenses.* The Debtors reimburse the First Ascent / Design Contractors in the ordinary course for certain expenses associated with the development of First Ascent products and the First Ascent Return to Everest expedition. Such expenses include research and materials, travel, lodging, film equipment rental, transportation, insurance and other pre- and post-expedition miscellaneous business expenses (collectively, “**First Ascent / Design Contractor Business Expenses**”). It is difficult for the Debtors to estimate what the First Ascent / Design Contractor Business Expenses will be given the expense submission process and variable nature of expenses, however the Debtors anticipate that any unpaid First Ascent / Design Contractor Business Expenses for the prepetition period will be minimal, especially, in the case of the First Ascent team, because the costs of the Everest Expedition were largely prepaid.

59. The foregoing Reimbursable Contractor Expenses were all incurred on the Debtors’ behalf and with the understanding that they would be reimbursed. Accordingly, to

avoid harming individuals who incurred the Reimbursable Contractor Expenses, the Debtors request authority, in their discretion, to (a) continue reimbursing the Reimbursable Contractor Expenses in accordance with prepetition practices, (b) modify their prepetition policies relating thereto as they deem appropriate and (c) pay all Reimbursable Contractor Expenses that accrued prepetition.

BASIS FOR RELIEF

D. Ample Cause Exists For The Court To Authorize The Debtors To Pay Employee Obligations and To Honor Employee Benefits.

60. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Debtors seek authority to continue their Employee Obligations and Employee Benefits policies and programs on a postpetition basis, and to pay all of the Employee Obligations owed thereunder in the ordinary course of business as of the Petition Date, without regard to whether such obligation accrued before or after the Petition Date.

61. The payment of the Employee Obligations and Employee Benefits is justified pursuant to Section 105(a) of the Bankruptcy Code and the well-established “necessity of payment doctrine. See Miltenberger v. Logansport Ry. Co., 106 U.S. 286 (1882). The “necessity of payment doctrine” and Section 105(a) provide that courts may authorize a debtor to make postpetition payments with respect to prepetition claims where such payments are necessary for the preservation of the estate. Id. See also In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1989) (noting that, under the “necessity of payment” doctrine, “if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during reorganization, payment may be authorized even if it is out of corpus [of the estate]”).

62. Courts, in turn, frequently apply Section 105(a) to authorize relief in chapter 11 cases, similar to that sought herein, where the debtor has a large workforce that is important to the preservation of its business. See In re Chateaugay Corp., 80 B.R. 279, 287 (S.D.N.Y. 1987) (affirming a bankruptcy court order authorizing the debtor to pay prepetition wages, salaries, employee benefits, reimbursements and workers' compensation claims and premiums); see also In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (reasoning that because debtor-in-possession has fiduciary duties it must meet, it is logical that the bankruptcy court may "authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate" under section 105(a)); In re Gulf Air, Inc., 112 B.R. 152, 154 (Bankr. W.D. La. 1989) (authorizing the debtor to pay current employees' pre-bankruptcy wages, salaries, medical benefits and business expense claims).

63. The Debtors' request to pay prepetition amounts related to Employee Obligations and Employee Benefits easily meets the preceding standards. The failure to grant such relief, even for a brief amount of time, could have a material adverse impact on both the reorganization efforts and day-to-day operations of the Debtors' businesses, and would run afoul of the rehabilitative nature of the Bankruptcy Code. In addition, the Debtors are seeking to sell their assets to the Stalking Horse Bidder or another purchaser. The Stalking Horse Bidder and likely any other potential buyer of the Debtors' assets will find it essential that the Debtors have maintained the going concern value of their businesses, including the morale and integrity of their work force.

64. The Debtors believe that if they are unable to honor the Employee Obligations and Employees Benefits even for a short time, Employee morale and loyalty will be jeopardized at a time when Employee support is most critical. Poor Employee morale may also

impair vendor relations and jeopardize the manufacturing and distribution process that is crucial to Debtors' ongoing business. In these times of extraordinary economic turmoil, regardless of the length of these Chapter 11 Cases, the Employees will be exposed to significant financial and health-related hardships if the Debtors are not permitted to pay the unpaid Employee Obligations and Employee Benefits in the ordinary course of business.

65. Moreover, the Debtors estimate that substantially all of the amounts they seek to pay herein are entitled to priority under Sections 507(a)(4) and (a)(5) of the Bankruptcy Code. Section 507(a)(4) of the Bankruptcy Code grants priority to employee claims for "wages, salaries, or commissions, including vacation, severance and sick leave pay" earned within ninety (90) days before the filing of the applicable petition, up to \$10,950 per employee. Similarly, Section 507(a)(5) of the Bankruptcy Code provides that claims for contributions to certain employee benefit plans are also afforded priority treatment up to the number of employees covered by each plan multiplied by \$10,950, less any amounts paid pursuant to Section 507(a)(4) of the Bankruptcy Code.

66. Thus, granting the relief sought herein would affect only the timing, and not the amount, of payment of the Employee Obligations and Employee Benefits to the extent they constitute priority claims. Many Employees live from paycheck to paycheck and rely exclusively on receiving their full compensation or reimbursement of their expenses in order to continue to pay their daily living expenses. These Employees will be exposed to significant financial and health-related issues if the Debtors are not permitted to pay the Employee Obligations and Employee Benefits. Indeed, if the Debtors are not authorized to pay for the Employee Benefits, such as medical and dental benefits, then many of the Employees may not be reimbursed or otherwise have their health benefit claims paid. In addition, certain Employees

may become primarily obligated for the payment of these claims in cases where health care providers have not been reimbursed, and may face having their health care services terminated. The Debtors believe that such uncertainty will cause significant anxiety at precisely the time the Debtors need their Employees to perform their jobs at peak efficiency.

67. Courts in this district have routinely granted the relief requested herein. See, e.g., In re JHT Holdings, Inc., Case No. 08-11267 (BLS) (Bankr. D. De. June 25, 2008); In re Holly Performance Prods., Inc., Case No. 08-10256 (PJM) (Bankr. D. De. Feb. 12, 2008); In re Buffets Holdings, Inc., Case No. 08-10141 (MFW) (Bankr. D. Del. Jan. 23, 2008); In re Am. Home Mortgage Holdings, Inc., Case No. 07-11047 (Bankr. D. Del. Aug. 7, 2007) (Sontchi, J.); In re Earthsell Corp., Case No. 07-10086 (Bankr. D. Del. Jan. 24, 2007) (Gross, J.); In re Sea Containers Ltd., Case No. 06-11156 (Bankr. D. Del. Oct. 17, 2006) (Carey, C.J.).

68. Additionally, with respect to that portion of the Employee Obligations that constitutes taxes, the relevant taxing authorities would hold a priority claim under Section 507(a)(8) of the Bankruptcy Code in respect of such obligations. Moreover, the monies payable for trust fund taxes generally are not property of a debtors' estate. See Begier v. IRS, 496 U.S. 53, 67 (1990).

E. Ample Cause Exists For The Court To Authorize The Debtors To Pay Their Independent Contractor Obligations.

69. The payment of the Independent Contractor Obligations is justified pursuant to Section 105(a) of the Bankruptcy Code and the well-established “necessity of payment doctrine.” As discussed above, Section 105(a) of the Bankruptcy Code and the “necessity of payment doctrine” rule “recognize the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” Ionosphere Clubs, Inc., 98 B.R. at 176. This doctrine is

consistent with the paramount goal of chapter 11—“facilitating the continued operation and rehabilitation of the debtor.” *Id.* Accordingly, this Court has the power to authorize the payment of prepetition Independent Contractor obligations.

70. Further, pursuant to Section 363 of the Bankruptcy Code, a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the bankruptcy court’s discretion outside the ordinary course of business. For the reasons set forth herein, there is sufficient business justification to authorize the Debtors to pay the prepetition Independent Contractor obligations as requested herein, even if such payments are deemed to be outside the ordinary course of business. *See Ionosphere Clubs*, 98 B.R. at 175.

71. Maintaining access to the services supplied by the Independent Contractors is absolutely critical and in the best interests of the Debtors’ estates. Unless the Debtors’ prepetition obligations to the Independent Contractors are satisfied, the Debtors believe it is highly unlikely the Independent Contractors will be willing to continue to provide services to the Debtors. Moreover, it would be extremely difficult, expensive and inefficient to replace the Independent Contractors. Particularly, the First Ascent / Design Contractors, whose extraordinary skills and accomplishments make their services entirely unique, are irreplaceable. And, even if the Independent Contractors were replaceable, the Debtors believe that the damage to and disruption of their businesses would be substantial and far exceed the cost of paying any prepetition amounts due and owing to such Independent Contractors.

72. Indeed, the retention of the Independent Contractors is essential to the Debtors’ ability to preserve their going concern value. This is particularly important here given that the Debtors are seeking to sell their assets at the highest and best value for the Debtors’ estates. Such value can only be received if the morale and integrity of Debtors’ work force is

maintained during these Chapter 11 Cases. Due to the competitive nature of the fast-moving retail industry, Debtors require ongoing and cost-effective access to specialized services in order to develop and manufacture new products and to launch and manage marketing initiatives. The Ordinary Course Independent Contractors, with their specialized knowledge, design and production skills are as essential to the Debtors' efficient and effective functioning as the Employees. The First Ascent / Design Contractors are critical to the Debtors' marketing and branding of their new product lines and are therefore essential to the Debtors' strategy for renewed and increased market share in the elite outdoor apparel industry. The entire First Ascent line—including its name—hinges on the continued involvement and employ of the First Ascent / Design Contractors.

73. The potential that any material portion of the Independent Contractors may refuse to perform services for the Debtors would jeopardize these Chapter 11 Cases. Without their involvement, all of the money and efforts that the Debtors have expended for the development and marketing of the First Ascent and field and stream lines would be lost and the Debtors' brand image and competitive advantage would be at risk. Indeed, even if a small percentage of the Independent Contractors stopped supplying services, there would be an immediate and severe impact on the Debtors' product and brand, likely causing customers to turn immediately to competitors and resulting in significant degradation of the Debtors' ongoing value.

74. This Court, as well as other courts, has approved the payment of prepetition Independent Contractor obligations before on the grounds that payment of such claims was necessary to effectuate a successful reorganization. See, e.g., In re GWLS Holdings, Inc., et al., Case No. 08-12430 (PJW) (Bankr. D. Del. Oct. 22, 2008) (order authorizing, inter

alia, payment of prepetition amounts owed to independent contractors who were critical to the debtors' viability and continued operation of the debtors' business); In re JHT Holdings, Inc., Case No. 08-11267 (BLS) (Bankr. D. Del. June 25, 2008) (same); In re Winn-Dixie Stores, Inc., Case No. 05-11063 (RDD) Bankr. S.D.N.Y. Mar. 15, 2005) (same); In re Onco Inv. Co., Case No. 04-10558 (JBR) (Bankr. D. Del. Apr. 28, 2004) (same); In re Transit Group, Inc., Case No. 01-12820 (Bankr. M.D. Fla. Dec. 31, 2001) (order authorizing inter alia, payment of prepetition amounts owed to independent contractors, including broker agents). The Debtors believe that the ability to pay the prepetition Independent Contractor obligations in accordance with the Debtors' prepetition business practices is in the best interests of the Debtors, the creditors and all parties in interest, and is necessary to enable the Debtors to continue to operate their businesses efficiently without disruption.

75. Accordingly, payment of the Employee Obligations and Independent Contractor Obligations and the policies to be continued postpetition are incorporated into the budget being submitted with the Debtors' motion seeking authorization for use of cash collateral. The Debtors believe that their prepetition lenders will consent to the payment of the Employee Obligations, Independent Contractor Obligations and the continuation of the specified employee policies consistent with that budget.

76. For all the reasons previously set forth herein, the Debtors submit that payment of the Employee Obligations, the continuation of the Employee Benefits and payment of the Independent Contractor Obligations are necessary to the success of the Debtors' orderly and effective reorganization and should be authorized by this Court.

77. The proposed order provides that the relief granted therein shall not constitute or be deemed an assumption of any of the employment and service agreements to

which the Debtors are a party or any of the Debtors' employee benefit policies, plans, programs, practices and procedures under Section 365(a) of the Bankruptcy Code.

F. The Court Should Authorize the Debtors' Financial Institutions To Honor Checks and Electronic Fund Transfers Relating To Employee Obligations, Employee Benefits and Independent Contractor Obligations.

78. As discussed in the Debtors' Cash Management Motion filed simultaneously herewith, the Debtors request that all applicable banks and other financial institutions be authorized and directed to receive, process, honor and pay all checks presented for payment, and to honor all fund transfer requests made by the Debtors related to the Employee Obligations, Employee Benefits and Independent Contractor Obligations, whether such checks were presented or fund transfer requests were submitted prior to or after the Petition Date. The Debtors represent that these checks are drawn on identifiable payroll and disbursement accounts. Accordingly, checks other than those for the Employee Obligations, Employee Benefits and Independent Contractor Obligations will not be honored inadvertently. Moreover, the Debtors represent that they have sufficient liquidity to promptly pay all claims arising from the Employee Obligations, Employee Benefits and Independent Contractor Obligations on an ongoing basis and in the ordinary course of their businesses.

79. For the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interests of all parties in interest.

SATISFACTION OF BANKRUPTCY RULE 6003

80. Pursuant to Bankruptcy Rule 6003, the Court may grant a request of a debtor to pay all or part of a pre-petition claim in the first 20 days of a case only if that relief is necessary to avoid immediate and irreparable harm. For the reasons set forth above, the ability to honor the Employee Obligations, Employee Benefits and Independent Contractor Obligations immediately is necessary to avoid (a) the delay or additional cost of reorganization, to the detriment of all parties, if the employees sought employment elsewhere and (b) related hardships that the employees could suffer. Accordingly, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 with respect to the relief requested in this Motion.

81. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein.

NOTICE

82. No trustee, examiner or creditors' committee has been appointed in the Chapter 11 Cases. The Debtors have provided notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) counsel to administrative agent under the prepetition term loan facility; (c) counsel to the steering committee for the prepetition term lenders; (d) counsel to agent under the prepetition revolving credit facility; (e) counsel for the indenture trustee for the \$75 million 5.25% convertible senior notes due 2014 and (f) the creditors listed on the Debtors' consolidated list of 30 largest unsecured creditors, as filed with the chapter 11 petitions. In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

83. A copy of the Motion is available on the Court's website: www.deb.uscourts.gov. Additional copies of the Motion are available on the website of the

Debtors' proposed claims, noticing, soliciting and balloting agent, Kurtzman Carson Consultants, at www.kccllc.net/eddiebauer or can be requested by calling (866) 967-1781.

NO PRIOR REQUEST

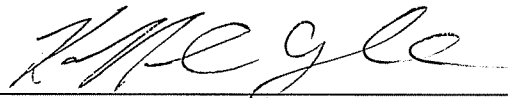
84. No prior motion for the relief requested herein has been made to this or any other court.

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WHEREFORE, the Debtors respectfully request the entry of an order, in substantially in the form attached hereto as Exhibit A, (A) Authorizing, but Not Directing, the Debtors to Pay Certain Prepetition: (I) Wages, Salaries, and Other Compensation; (II) Employee Medical and Similar Benefits; (III) Reimbursable Employee Expenses; (IV) Other Miscellaneous Employee Expenses and Benefits and (V) Independent Contractor Fees and Expenses, (B) Directing Banks to Receive, Process, Honor and Pay All Checks Presented For Payment and Electronic Payment Requests Relating to the Foregoing, and (C) granting such other and further relief as the Court deems appropriate.

Dated: June 17, 2009
Wilmington, Delaware

Respectfully Submitted,



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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS-IN-POSSESSION

EXHIBIT A
Proposed Order

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

In re:

EDDIE BAUER HOLDINGS, INC.,
et al.,¹

Debtors.

Chapter 11

Case No. _____

Joint Administration Pending

**ORDER (A) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION:
(I) WAGES, SALARIES, AND OTHER COMPENSATION; (II) EMPLOYEE,
MEDICAL AND SIMILAR BENEFITS; (III) REIMBURSABLE EMPLOYEE
EXPENSES; (IV) OTHER MISCELLANEOUS EMPLOYEE EXPENSES AND
BENEFITS; AND (V) INDEPENDENT CONTRACTOR FEES AND EXPENSES, AND
(B) DIRECTING BANKS TO RECEIVE, PROCESS, HONOR AND PAY ALL CHECKS
PRESENTED FOR PAYMENT AND ELECTRONIC PAYMENT REQUESTS
RELATING TO THE FOREGOING**

Upon consideration of the motion (the "Motion")² of the Debtors for entry of an order (A) authorizing, but not directing, the debtors to pay certain prepetition: (i) wages, salaries, and other compensation; (ii) employee, medical and similar benefits; (iii) reimbursable employee expenses; (iv) other miscellaneous employee expenses and benefits; and (v) independent contractor fees and expenses; and (b) directing banks to receive, process, honor and pay all checks presented for payment and electronic payment requests relating to the foregoing; it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this Motion is a core proceeding pursuant to 28 U.S.C. § 157; and adequate

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Eddie Bauer Holdings, Inc., a Delaware corporation (2352); Eddie Bauer, Inc., a Delaware corporation (9737); Eddie Bauer Fulfillment Services, Inc., a Delaware corporation (0882); Eddie Bauer Diversified Sales, LLC, a Delaware limited liability company (1567); Eddie Bauer Services, LLC, an Ohio limited liability company (disregarded), Eddie Bauer International Development, LLC, a Delaware limited liability company (1571); Eddie Bauer Information Technology, LLC, a Delaware limited liability company (disregarded); Financial Services Acceptance Corporation, a Delaware corporation (7532); and Spiegel Acceptance Corporation, a Delaware corporation (7253). The mailing address for Eddie Bauer Holdings, Inc. is 10401 N.E. 8th Street, Suite 500, Bellevue, WA 98004. On or about the Petition Date, Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services, Inc., affiliates of the Debtors, commenced a proceeding before the Superior Court of Justice, Commercial List, for the Judicial District of Ontario, for a plan of compromise or arrangement under the Companies' Creditors Arrangement Act.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

notice of the Motion and opportunity for objection having been given; and it appearing that no other notice need be given; and after due deliberation and sufficient cause therefore, it is hereby:

ORDERED, that the Motion is granted; and it is further

ORDERED, that the Debtors are authorized, but not directed, (a) to continue to honor, pay, and modify the Employee Obligations, Employee Benefits and Independent Contractor Obligations in accordance with the Debtors' stated policies and prepetition practices, and in the ordinary course of the Debtors' businesses, including, but not limited to wages, salaries, bonuses and other compensation and other Unpaid Compensation (including the Ordinary Course Contractor Fees and First Ascent/Design Contractor Fees), Payroll Taxes, Reimbursable Expenses, Reimbursable Contractor Expenses, Incentive Plans, Vacation and other Paid Time Off (including Vacation Benefits and Vacation Days as provided in the Motion), Severance Plans and Severance Benefits (including COBRA Severance Benefits), Deductions, Withheld Amounts, Employee Benefits (including Health Benefits, Savings and Retirement Plans, Employee Insurance Benefits, the U.S. Compensation Claims and the Miscellaneous Employee Programs) and any other policy or program described in the Motion; and (b) pay any claims arising thereunder without regard to whether such claims arose before or after the Petition Date, except that no Employee shall receive a cash payment in excess of \$10,950 for Unpaid Compensation and Vacation Days and Vacation Benefits, in each case without further notice to or order of this Court, however Debtors reserve the right to seek further Court order as to the payment of all such claims; and it is further

ORDERED, that the Debtors are authorized, but not directed, to continue the Employee Obligations, Employee Benefits and Independent Contractor Obligations on a postpetition basis and to alter, modify or discontinue such programs and policies as they deem necessary or

appropriate in the ordinary course of business, without further notice to or order of this Court; and it is further

ORDERED, that the Debtors are authorized, but not directed, to continue to allocate and distribute the Payroll Taxes in accordance with the Debtors' stated policies and prepetition practices or as required by applicable federal, state and local law, without regard to whether such amounts arose before or after the Petition Date; and it is further

ORDERED, that the Debtors are authorized, but not directed, to pay all processing fees, costs and expenses associated with the payment and administration of the Employee Obligations, Employee Benefits and Independent Contractor Obligations, including payment to third-party administrators, without regard to whether such amounts arose before or after the Petition Date; and it is further

ORDERED, that to the extent that checks are issued to Employees or Independent Contractors or other entities in connection with the Employee Obligations, Employee Benefits and Independent Contractor Obligations, the banks upon which any checks are drawn in payment thereof, either before, on or after the date on which the Debtors filed these Chapter 11 Cases be, and hereby are, authorized to honor such checks upon presentation; and it is further

ORDERED, that all applicable banks and other financial institutions are hereby authorized to receive, process, honor and pay any and all checks evidencing amounts paid by the Debtors under this Order, whether presented prior to or after the Petition Date. Such banks and financial institutions are authorized and directed to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order; and it is further

ORDERED, that the Debtors are authorized to reissue any check, electronic payment or other transfer that was drawn in payment of any claims arising from or related to the Employee

Obligations, Employee Benefits and Independent Contractor Obligations that is not cleared by a depository; and it is further

ORDERED, that any payment or transfer made or service rendered by the Debtors pursuant to this Order is not, and shall not be deemed, an admission as to the validity of the underlying obligation, a waiver of any rights the Debtors may have to dispute such obligation or an approval or assumption of any agreement, contract or lease under Section 365 of the Bankruptcy Code; and it is further

ORDERED, that notwithstanding anything in this Order to the contrary, the payment of any claims pursuant to this Order and other honoring of the Employee Obligations, Employee Benefits and Independent Contractor Obligations shall neither (a) make such obligations administrative expenses of the estates entitled to priority status under sections 503 and 507 of the Bankruptcy Code nor (b) constitute approval by this Court of any employee plan or program, including section 503(c); and it is further

ORDERED, that the Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order; and it is further

ORDERED, that Rule 6003(b) of the Federal Rules of Bankruptcy Procedure has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors; and it is further

ORDERED, that notwithstanding the possible applicability of Rules 6004(h) of the Federal Rules of Bankruptcy Procedure, or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED, that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2009
Wilmington, Delaware

United States Bankruptcy Judge