



prepetition claims arising under the Perishable Agricultural Commodities Act of 1930 (as amended, modified or supplemented from time to time, “**PACA**”), the Packers and Stockyards Act of 1921 (as amended, modified or supplemented from time to time, “**PASA**”) and any all state statutes of similar effect<sup>2</sup> of PACA and PASA vendors (collectively, the “**PACA/PASA Vendors**,” whose claims shall be identified herein collectively as the “**PACA/PASA Claims**”); (b) prepetition claims upon which a lien may arise as a result of a mechanic’s lien, artisan’s lien, materialman’s lien or any other similar lien (collectively, the “**Lien Vendors**,” whose claims shall be identified herein collectively as the “**Lien Claims**”); (c) claims entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code (collectively, the “**503(b)(9) Vendors**,” whose claims shall be identified herein collectively as the “**503(b)(9) Claims**”); and (d) prepetition claims of certain critical vendors and service providers (collectively, the “**Critical Vendors**,” whose claims shall be identified herein collectively as the “**Critical Vendor Claims**”); and (ii) authorizing banks and other financial institutions (collectively, the “**Banks**”) to honor and process check and electronic transfer requests related to the foregoing. The facts and circumstances supporting this Motion are set forth in the concurrently filed *Declaration of Robert Griffin In Support of Debtors’ Chapter 11 Petitions and First Day Motions and Applications* (the “**First Day Declaration**”).<sup>3</sup> In further support of this Motion, the Debtors respectfully state as follows:

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<sup>2</sup> Some states have enacted statutes granting protections similar to that of PACA and PASA. Accordingly, the relief requested in this Motion with respect to PACA/PASA Vendors and PACA/PASA Claims is also requested with respect to the goods, claims and claimants under those state statutes having an effect and purpose similar to PACA and PASA.

<sup>3</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

## **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the “**Amended Standing Order**”). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105(a), 363(b), 507(a)(8), 541, 1107(a) and 1108 of the Bankruptcy Code.

## **BACKGROUND**

### **A. General**

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

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

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

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

**B. The Claims**

6. As described in greater detail below, various third parties may be able to assert liens against statutorily-created trust assets or against the assets of the Debtors and their estates, including the PACA/PASA Vendors and the Lien Vendors. In addition, due to the nature of the Debtors' business operations, certain vendors may possess administrative claims pursuant to section 503(b)(9) of the Bankruptcy Code. Also, the Debtors have determined, in an exercise of their business judgment, that their continued receipt of certain goods and services from the Critical Vendors is necessary to ensure that there are not any unexpected or inopportune interruptions in the Debtors' business operations, and to preserve and maximize the value of estates. Without the relief requested herein, the Debtors believe that many of the PACA/PASA Vendors, the Lien Vendors, the 503(b)(9) Vendors and the Critical Vendors (each, a "**Vendor**," and collectively, the "**Vendors**") may cease delivering goods and providing services to the Debtors, which could have devastating consequences for the Debtors' efforts in connection with these chapter 11 cases.

*i. PACA/PASA Claims*

7. The Debtors operate a hotel and casino business which, in the ordinary course, purchases a variety of consumable goods for the Debtors' customers and employees. These consumable goods include, among other items, groceries, meat, dairy products, frozen foods, produce, and general merchandise, and are purchased from a diverse range of vendors, including agricultural growers. These goods are used daily and continuously in the bars, restaurants, and other locations at the Debtors' facilities and in the Debtors' catering and room service operations.

8. Prior to the Petition Date, certain of the Vendors sold goods to the Debtors that may be deemed (i) "perishable agricultural commodities," as such term is defined under

PACA, and/or (ii) “livestock,” as that term is defined by PASA, and other eligible goods covered by state statutes of similar effect to PACA and PASA.<sup>4</sup> To ensure that the Debtors continue to receive a constant supply of fresh fruits and vegetables and other similar consumable goods on a postpetition basis, the Debtors seek authority, but not direction, in their discretion, to continue to pay PACA/PASA Claims in the ordinary course of business and consistent with their historical practices.

9. Congress enacted PACA to regulate the sale of “perishable agricultural commodities.” 7 U.S.C. § 499a; see Endico Potatoes, Inc. v. CIT Group/Factoring, 67 F.3d 1063, 1067 (2d Cir. 1995). Under PACA, the term “perishable agricultural commodity” is generally defined as “fruits and fresh vegetables of every kind and character” “whether or not frozen or packed in ice.” 7 U.S.C. § 499a(b)(4). PACA provides various protections to fresh fruit and vegetable sellers, including the establishment of a statutory constructive trust (a “**PACA Trust**”), consisting of a purchaser’s entire inventory of food or other derivatives of perishable agricultural commodities, the products derived therefrom and the proceeds related to any sale of the commodities or products (collectively, the “**PACA Trust Assets**”). See 7 U.S.C. § 499e(c)(2).

10. PASA creates a statutory trust (the “**PASA Trust**”) scheme which is virtually identical to PACA’s in respect of the delivery of “livestock” and other eligible goods (collectively, the “**PASA Trust Assets**”).

11. PACA Trust Assets and PASA Trust Assets are preserved as a non-segregated floating trust and may be commingled with non-trust assets. However, courts in this district and

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<sup>4</sup> The Debtors do not believe that the Vendors have sold them “livestock” – generally defined as cattle, sheep, swine, horses, mules, or goats – or any other eligible goods covered by PASA or state statutes of similar effect. Consequently, there should be no valid PASA claims. However, out of an abundance of caution, the Debtors seek authority to address and resolve valid PASA claims pursuant to this Motion, as a protective measure in the event that the Vendors do have rights under PASA.

other districts have consistently held that such assets are not property of a debtor's estate. See In re CFP Liquidating Estate, 405 B.R. 694 (Bankr. D. Del. May 21, 2009); In re Long John Silver's Restaurants, Inc., 230 B.R. 29, 32 (Bankr. D. Del. 1999); Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F. Supp. 346, 348 (S.D.N.Y. 1993).

12. PACA and PASA require that certain procedural steps be taken by a seller in order to preserve its rights as a trust beneficiary. Specifically, a vendor must provide written notice to the purchaser of such goods and its intent to preserve the benefits of the PACA Trust or the PASA Trust, as applicable. See In re HR. Hindle & Co., 149 B.R. 775, 785 (Bankr. E.D. Pa. 1993); In re Richmond Produce Co., 112 B.R. 364 (Bankr. N.D. Cal. 1990). Written notice under PACA and PASA may be accomplished by either (a) including the statutorily-mandated language on the face of the vendor's invoices or (b) providing written notice to the purchaser of the PACA or PASA goods within 30 days after the time payment is due. Beneficiaries of a PACA Trust or PASA Trust that adhere to the statutory notice requirements are generally entitled to prompt payment from the PACA Trust Assets or PASA Trust Assets, as applicable, ahead of secured, priority and unsecured creditors of a debtor's estate. See "R" Best Prod., Inc. v. 646 Corp., No. 00-CV-8536, 2002 WL 31453909, at \*1 (S.D.N.Y. Oct. 31, 2002). However, a vendor's failure to comply with the notice requirements renders its claim a general unsecured claim in a debtor's chapter 11 case. See In re HR. Hindle, 149 B.R. at 786.

13. Application of PACA and PASA is limited to sales to commission merchants, brokers, and dealers. See 7 U.S.C. § 499e(c). "Dealer," as such term is defined in PACA, is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." 7 U.S.C. § 499a(b). The Debtors believe that a certain portion of the goods

purchased from their vendors may qualify as “perishable agricultural commodit[ies]” under PACA.

14. As a result, insofar as those vendors abide by the notice requirements of PACA or PASA, as applicable, such vendor will be eligible to assert PACA/PASA Claims granting them priority ahead of all other creditors in the Debtors’ chapter 11 cases. Accordingly, payment of PACA/PASA Claims at this time will not prejudice or affect the amount available for distributions to other creditors of the Debtors. To ensure that the Debtors continue to receive the supply of fresh produce and other consumable goods that is necessary to ensure that there are not any unexpected or inopportune interruptions in the Debtors’ business operations, it is imperative that the Debtors be authorized to pay the PACA/PASA Claims in the ordinary of business and consistent with their historical practices.

15. Any PACA/PASA Vendor which accepts payment from the Debtors in satisfaction of its valid PACA/PASA Claim will be deemed to have waived any and all claims of whatever type, kind, or priority, against the Debtors, their property, their estates, and any PACA Trust Assets or PASA Trust Assets, as applicable, but only to the extent that payment has been received by such PACA/PASA Vendor on account of its PACA/PASA Claim.

16. As of the Petition Date, the Debtors estimate that aggregate amount of the PACA/PASA Claims is approximately \$100,000.

*ii. Lien Claims*

17. In the ordinary course of business, the Debtors engage various service providers to repair, maintain, and improve the Debtors’ real and personal property. These Lien Vendors could potentially assert liens, including mechanic’s liens, artisan’s liens, materialman’s liens and other similar liens, against the Debtors’ property for amounts that the Debtors owe to them.

Pursuant to section 362(b)(3) of the Bankruptcy Code, the act of perfecting such liens, to the

extent consistent with section 546(b) of the Bankruptcy Code, is excluded from the automatic stay. Under section 546(b) of the Bankruptcy Code, a debtor's lien avoidance powers "are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." 11 U.S.C. § 546(b)(1)(A).

18. If the Debtors are unable to pay the Lien Claims, they risk losing access to critical property, which could immediately and irreparably harm the Debtors to the detriment of all stakeholders. Accordingly, the Debtors seek authority, in their discretion, to pay and discharge, on a case-by-case basis, the Lien Claims that the Debtors believe have created, or could give rise to, a lien against the Debtors' property, regardless of whether the related Lien Vendors have already perfected their interests.

19. The Debtors estimate that, as of the Petition Date, the aggregate amount of the Lien Claims is approximately \$100,000.

*iii. 503(b)(9) Claims*

20. Certain vendors may be entitled to administrative expense priority under section 503(b)(9) of the Bankruptcy Code to the extent the Debtors received goods from the vendors, in the ordinary course of business, within the twenty-day period immediately prior to the Petition Date. Because the Debtors must pay such claims in full to confirm a chapter 11 plan, the payment of the 503(b)(9) Claims merely affects the timing of such payments, and not the amount to be received by the 503(b)(9) Vendors on account of their claims. The Debtors seek authority, in their discretion, to pay the 503(b)(9) Claims in the ordinary course of business to the extent necessary to preserve the going-concern value of the Debtors' estates.

21. The Debtors estimate that, as of the Petition Date, the aggregate amount of the 503(b)(9) Claims is approximately \$1,000,000.



*iv. Critical Vendor Claims*

22. The Debtors' gaming and hospitality business depends on, among other things, the Debtors' ability to retain their vendors and maintain their reputation and customer loyalty within the industry in which they operate. The Debtors need to be able to assure their customers, vendors, and employees that, notwithstanding the filing of these chapter 11 cases, the Debtors will nonetheless be able to provide customers with a high quality casino entertainment and hospitality experience. Without a full supply of, among other things, marketing and entertainment, food, or room amenities, the Debtors would suffer a swift attrition in customer patronage, which would be difficult to restore. The result of any such outcome would likely be irreparable harm to the Debtors.

23. To maintain consistency, the Debtors have developed a research and product development, purchasing, and delivery system that relies significantly on a large number of third parties which supply the Debtors with food products, material goods, and supplies, and provide services necessary to maintain and repair the Debtors' real and personal property and provide essential marketing and entertainment. It is essential that the Debtors be able to maintain their business relationships with, and honor outstanding payment obligations to, certain key vendors and service providers – the Critical Vendors – in light of the role that they play in the day-to-day in the Debtors' business. To prevent the commencement of these chapter 11 cases from causing an unexpected or inopportune interruption to their business operations, the Debtors are seeking to pay Critical Vendor Claims to ensure the Debtors' continued receipt of goods and services and favorable credit terms from the Critical Vendors.

24. To identify the Critical Vendors, the Debtors have reviewed their accounts payable and prepetition vendor lists to identify those creditors most essential to the Debtors'

operations pursuant to the following criteria: (i) whether certain quality specifications or other requirements of the Debtors' customers prevent the Debtors from obtaining a vendor's products or services from alternative sources within a reasonable timeframe; (ii) whether, if a vendor is not a single source supplier, the Debtors have sufficient product in inventory to continue their operations while a replacement vendor is put in place; and (iii) whether a vendor meeting the foregoing criteria is able or likely to refuse to ship product to the Debtors postpetition if its prepetition balances are not paid.

25. The following are the significant categories of the Debtors' Critical Vendors.

26. Food and Beverage Vendors. As noted above, the Debtors operate a hotel and casino business, which includes, among other things, restaurants, bars, and catering and room service operations. The Debtors purchase a variety of consumable goods, including meat, dairy products, frozen foods, produce, specialty foods and beverages, and other general merchandise, which are used daily and continuously.

27. Because of the nature of the food and beverage service business and the scale of the Debtors' operations, the Debtors conduct business with vendors who are uniquely able to meet their overall volume requirements, demand for high volumes of certain critical products and/or are the sole source of certain ingredients or products. The Debtors operate numerous different restaurants and offer in-room dining services to the hotel rooms. Because of the short shelf-life of many food products, the Debtors maintain no more than a few days' – or in certain cases, as little as one day's – inventory of such items, choosing instead to place many of their orders with suppliers on a weekly (and often daily) basis.

28. As a result, the Debtors rely significantly on certain food and beverage vendors who understand that, without the delivery of these food and beverage items, the Debtors lack the

requisite ingredients to meet their operational needs. The Debtors' dining establishments, bars, and in-room services generate a substantial revenue and are an important element of the Debtors' brand as a full-service gaming and hospitality establishment. Payment of certain of the Debtors' food and beverage vendors to ensure that the Debtors continue to receive food and beverage items of the same quality, quantity, consistency and price as those received prior to the Petition Date is critical to the success of these chapter 11 cases and is to the benefit of the Debtors' estates, creditors and all parties in interest.

29. Operating and Retail Vendors. The Debtors do business with certain suppliers of hospitality-related goods, in-room amenities and other retail supplies. In many instances, these vendors are the only vendors able to produce or deliver (from a logistics standpoint) quantities of certain materials or products sufficient to meet the Debtors' operational needs. Many of these vendors supply goods and services to the Debtors on the basis of informal arrangements, relying on past practice, course of dealing with the Debtors, and industry standards to set the trade terms of these transactions. While the Debtors have typically enjoyed good working relationships with these operating vendors, the limited number of vendors which can supply the Debtors with a quantity of products that meets their operational needs provides vendors with considerable bargaining power in the event of nonpayment by the Debtors. At this critical time following the filing of these cases, the loss of operating vendors will impair significantly the Debtors' ability to find replacement vendors, even on new, less favorable trade terms.

30. Gaming Support Vendors. There are several vendors that supply essential goods and services that are ancillary to the operation of the Debtors' casino games. Such vendors provide the Debtors' casino operations with tables, parts, cards, dice, chips, tiles and ticket-tape for, and data systems that support, the games. Because the New Jersey gaming industry is highly

regulated by the New Jersey Casino Control Commission and other regulatory bodies, all vendors providing these products and services must pass a rigorous screening and licensing process by the Service Industry License Bureau of the New Jersey Division of Gaming Enforcement before they are eligible to provide gaming-related goods and services to casinos in New Jersey. As a result of this selective process, the vast majority of these vendors are single-source suppliers. If these single-source gaming suppliers refuse to provide goods and services to the Debtors after the Petition Date on account of unpaid prepetition claims, the Debtors' only option would be to convince third-party vendors to obtain the requisite licenses. This process would take, at a minimum, six to eight weeks, and there is no guarantee that any such replacement vendors would in fact obtain a license or otherwise be able to provide the required data support systems in a timely and efficient manner. Given that the Debtors maintain relatively low inventory levels of such ancillary goods and are required to maintain certain data support systems, this delay and uncertainty could cause irreparable damage to the Debtors' casino operations.

31. Marketing and Entertainment Vendors. The Debtors operate a hotel and casino business which includes, among other things, restaurants, bars, and catering and room service operations. The Debtors do business with certain vendors who provide certain marketing and entertainment products and services to the casino facilities. In many instances, these vendors are the only vendors able to provide the required marketing and entertainment products and services to meet the Debtors' operational needs. Many of these vendors supply products and services to the Debtors on the basis of informal arrangements, relying on past practice, course of dealing with the Debtors, and industry standards to set the trade terms of these transactions. While the Debtors have typically enjoyed good working relationships with these marketing and

entertainment vendors, the limited number of vendors who can supply the Debtors with these products and services to meet their operational needs provides the vendors with significant bargaining power in the event of nonpayment by the Debtors. At this critical time following the Petition Date, the loss of marketing and entertainment vendors will impair significantly the Debtors' ability to find replacement vendors, even on new, less favorable trade terms.

32. Service Vendors. The Debtors use a variety of vendors to provide various services to their facilities. These services range from linen supply, elevator repair, cleaning and information technology services. In many instances, these vendors are the only vendors able to provide the required services to meet the Debtors' operational needs. Many of these vendors supply services to the Debtors on the basis of informal arrangements, relying on past practice, course of dealing with the Debtors, and industry standards to set the trade terms of these transactions. Any loss of these vendors during this critical time following the commencement of these chapter 11 cases will impair the Debtors' effort to preserve and maximize the value of their estates and to successfully prosecute these cases.

33. The Debtors estimate that, as of the Petition Date, the aggregate amount of the Critical Vendor Claims is approximately \$3,500,000. This estimate does not include any amounts attributable to the PACA/PASA Claims, Lien Claims, or 503(b)(9) Claims.

#### **RELIEF REQUESTED**

34. By this Motion, the Debtors request the Court enter the Proposed Orders, (i) authorizing, but not directing, the Debtors, in their discretion, to pay PACA/PASA Claims, Lien Claims, 503(b)(9) Claims and Critical Vendor Claims (each, a "**Vendor Claim**," and collectively, the "**Vendor Claims**") subject to the caps provided for in the Proposed Interim

Order and the Proposed Final Order, as summarized immediately below, and (ii) authorizing the Banks to honor and process check and electronic transfer requests related thereto.

	Proposed Interim Order Cap	Proposed Final Order Cap
PACA/PASA Claims	\$100,000	\$100,000
Lien Claims	\$100,000	\$100,000
503(b)(9) Claims	\$1,000,000	\$1,000,000
Critical Vendor Claims	\$2,275,000	\$3,500,000

35. The Debtors further request that they be authorized, but not required, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on terms that are as or more favorable to the Debtors as the most favorable trade terms, practices, and programs in effect between the Vendor and the Debtors in the six (6) months prior to the Petition Date (collectively, the “**Customary Trade Terms**”), or such other trade terms as are agreed to by the Debtors and the Vendor.

36. To the extent that the Debtors determine, in their business judgment, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, the Debtors propose that a letter (a “**Vendor Letter**”) be sent to the Vendor, along with a copy of any order granting this Motion (the “**Vendor Order**”), including, without limitation, the following terms:

a. The amount of the Vendor’s estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of the Vendor Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);

b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in the Vendor Order;

c. The Vendor’s agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (including, but not limited to, credit limits,

pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates or any of their respective assets or property (real or personal) any lien (a "**Lien**") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor shall immediately take all necessary actions to release such Lien;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of the Vendor Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of the Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor, such Vendor shall immediately repay to the Debtors any payments received on account of its pre-petition claim to the extent that the aggregate amount of such payments exceed the post-petition obligations then outstanding to such Vendor, without the right of setoff, recoupment or reclamation, and the Vendor's pre-petition claim shall be reinstated as a pre-petition claim in these chapter 11 cases and subject to the terms of any bar date order entered in these chapter 11 cases.

37. Any such Vendor Letter, once agreed to by the Debtors and a Vendor, shall be the agreement between the parties that governs their post-petition trade relationship (the "**Trade Agreement**"). The Debtors request that they be authorized, but not required, in their discretion, to enter into Trade Agreements with the Vendors.

**BASIS FOR RELIEF**

**A. The Court Should Authorize, But Not Direct, the Debtors, in Their Discretion, to Pay Vendor Claims**

**I. The Vendors Are Essential To Avoiding Any Unexpected or Inopportune Interruption to the Debtors' Business Operations**

38. The Debtors believe that the goods and services provided by the Vendors are necessary to ensure that there are not any unexpected or inopportune interruptions to the Debtors' operations, because the Vendors are the most cost-efficient and, in many cases, the only source from which the Debtors can procure critical goods and services within a timeframe that would permit the Debtors to avoid unanticipated interruptions, delays or shutdowns in their operations. Any failure to pay the Vendor Claims would, in the Debtors' business judgment, result in the Vendors refusing to provide necessary goods and services to the Debtors. Any unexpected or inopportune interruption, delay or shutdown in the Debtors' operations resulting from a refusal by the Vendors to do business with the Debtors on a post-petition basis would have disastrous effects on the Debtors' business and undermine the Debtors' ability to preserve and maximize the value of their estates.

39. As noted above, the PACA/PASA Vendors will be eligible to assert PACA/PASA Claims, likely granting them priority ahead of all other secured, priority and unsecured creditors in the Debtors' chapter 11 cases. The Lien Vendors may assert and perfect construction, materialman's, mechanic's or other similar statutory liens on the Debtors' assets, thereby jeopardizing the Debtors' ability to prosecute these chapter 11 cases in a timely and efficient manner. Also, the Debtors' payment of the 503(b)(9) Claims merely affects the timing of such payments, and not the amount to be received by the 503(b)(9) Vendors on account of their claims, which are afforded administrative expense priority under section 503(b)(9) of the Bankruptcy Code.



40. With respect to the Critical Vendor Claims, the Debtors have reviewed their accounts payable and undertaken a process to identify those vendors which are essential to avoid any unexpected or inopportune interruptions to their operations. The Debtors have further developed certain procedures that, if and when implemented, in their discretion and business judgment, will ensure that the Critical Vendors receiving payment of their Critical Vendor Claims will continue to provide goods and services to the Debtors based upon the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendors.

41. The Debtors believe that authority to pay Vendor Claims is vital to their efforts to preserve and maximize the value of their estates. If the Proposed Orders are not entered, the Debtors believe that many of the Vendors will refuse to do business with the Debtors and some may have to cease their own operations. Such a result would be damaging to the Debtors' efforts to successfully prosecute these chapter 11 cases, to the detriment of the Debtors' estates and creditors. Moreover, the continued availability of trade credit in amounts and on terms consistent with the Debtors' pre-petition trade terms is critical. The retention or reinstatement of the Customary Trade Terms will enable the Debtors to maximize the value of their business. Conversely, a deterioration in post-petition trade credit available to the Debtors, together with a disruption in the Debtors' receipt of necessary goods and services, would, among other things, increase the amount of liquidity needed by the Debtors post-petition, and impede the Debtors' chapter 11 efforts.

42. For the foregoing reasons, the Debtors respectfully submit that entry of the Proposed Order is in the best interests of the Debtors, their estates, and creditors.

**II. The Relief Requested Herein Is Supported by the “Doctrine of Necessity”**

43. Section 363(b)(1) of the Bankruptcy Code provides that, after notice and a hearing, the trustee “may use, sell, or lease, other than in the ordinary course of business, property of the estate....” 11 U.S.C. § 363(b)(1).

44. Section 105(a) of the Bankruptcy Code empowers a bankruptcy 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). Bankruptcy courts have invoked the equitable power of section 105 of the Bankruptcy Code to authorize the post-petition payment of pre-petition claims where such payment is necessary to preserve the value of a debtor’s estate. See, e.g., Tropical Sportswear Int’l Corp., 320 B.R. 15, 20 (Bankr. M. D. Fla. 2005) (“Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks.”). Courts have likewise acknowledged that “[u]nder [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 In re Ionosphere Clubs, Inc., 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989)); see In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999) (citing In re Penn Central Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972)) (holding that the court is authorized under section 105(a) of the Bankruptcy Code to allow immediate payment of pre-petition claims of vendors found to be critical to the debtor’s continued operation).

45. In a long line of well-established cases, federal courts consistently have permitted post-petition payment of pre-petition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. See, e.g., Miltenberger v. Logansport, C. & S. W. Ry. Co., 106 U.S. 286, 312 (1882) (payment of pre-receivership claim permitted to

prevent “stoppage of [crucial] business relations”); In re Lehigh & New Eng. Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (holding that “if payment of a claim which arose prior to [the commencement of the bankruptcy case] is essential to the continued operation of the . . . [business] during [the bankruptcy case], payment may be authorized even if it is made out of [the] corpus”); Dudley v. Mealey, 147 F.2d 268, 271 (2d Cir. 1945) (extending doctrine for payment of pre-petition claims beyond railroad reorganization cases).

46. This legal principle—known as the “doctrine of necessity”—functions in chapter 11 cases as a mechanism by which a bankruptcy court can exercise its equitable power to allow payment of critical pre-petition claims not explicitly authorized by the Bankruptcy Code. See Just for Feet, 242 B.R. at 826 (finding that “to invoke the necessity of payment doctrine, a debtor must show that payment of the pre-petition claims is critical to the debtor’s [continued operation].”); In re Columbia Gas Sys., Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a pre-petition claim is essential to the continued operation of [the debtor], payment may be authorized”); In re Boston & Me. Corp., 634 F.2d 1359, 1382 (1<sup>st</sup> Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation). The doctrine is frequently invoked early in a bankruptcy case, particularly in connection with those Bankruptcy Code sections that relate to payment of pre-petition claims. In one case, the court indicated its accord with “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of pre-petition claims where such payment is necessary ‘to permit the greatest likelihood of . . . payment of creditors in full or at least proportionately.’” In re Structurelite Plastics Corp., 86 B.R. 922, 931 (Bankr. S. D. Ohio 1988).

47. As explained above, the goods and services provided by the Vendors are essential to ensure that there is not an unexpected or inopportune interruption to the operation of the Debtors' business. The Debtors submit that the total amount to be paid to the Vendors is minimal compared to the importance and necessity of the Debtors' uninterrupted receipt of the necessary goods and services provided by the Vendors. Moreover, the Debtors do not believe there are cost-effective or readily accessible alternatives to the Vendors.

48. Accordingly, the Debtors submit that the Court should exercise its equitable power to grant the relief requested herein.

**III. The Court Should Authorize Payment of Vendor Claims as a Valid Exercise of the Debtors' Fiduciary Duties**

49. Authority for satisfying Vendor Claims also may be found in sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors, operating their business as a debtor in possession under sections 1107(a) and 1108, are fiduciaries "holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to protect and preserve the estate, including an operating business's going-concern value." Id.

50. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." Id. The CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," Id., and also when the payment was to "sole suppliers of a given product." Id. at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id.

51. Payment of Vendor Claims meets each element of the CoServ court's standard. As described above, the Debtors believe that the Vendor Claims encompass the claims of those vendors that: have claims against PACA Trust Assets or PASA Trust Assets; are able to assert and perfect liens against the Debtors' property; are entitled to administrative priority claims that must be satisfied in full under any chapter 11 plan; or would otherwise refuse, or would be unable to, provide goods and services to the Debtors on a post-petition basis if their pre-petition balances are not paid, thereby creating the significant risk that the Debtors will experience an unexpected or inopportune interruption to their operations. Any such interruption would diminish estate value and frustrate the Debtors' chapter 11 efforts. The harm and economic disadvantage that would stem from the failure of any of the Vendors to perform is disproportionate to the amount of the Vendor Claims.

52. Finally, the Debtors have examined other options short of payment of Vendor Claims and have determined that, to avoid an unexpected or inopportune interruption to their business operations, there exists no practical alternative to their payment of Vendor Claims. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of Vendor Claims.

#### **IV. Payment of PACA/PASA Claims In the Ordinary Course of Business Is Warranted**

53. The prompt and full payment of PACA/PASA Claims should be authorized by the Court. As described above, assets governed by PACA and PASA do not constitute property of the Debtors' estates. See In re Kornblum & Co., 81 F.3d 280, 284 (2d Cir. 1995); Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F. Supp. 346, 348 (S.D.N.Y. 1993). As a result, the distribution of assets to holders of PACA/PASA Claims falls outside the priority scheme set forth in the Bankruptcy Code, and such holders are entitled to payment from the PACA Trust Assets or the PASA Trust Assets, as applicable, ahead of the Debtors' other creditors. See, e.g., In re Magic Rests., Inc., 205 F.3d 108, 110 (3d Cir. 2000); Consumers Produce Co. v. Volante Wholesale Produce, Inc., 16 F.3d 1374, 1377-78 (3d Cir. 1994). Moreover, the disposition of any PACA Trust Assets and PASA Trust Assets is subject to the jurisdiction of the bankruptcy court. See Monterey Mushrooms, Inc. v. Carolina Produce Distribs., Inc., 110 B.R. 207, 209 (W.D.N.C. 1990); Allied Growers Co-Op, Inc. v. United Fruit & Produce Co., 86 B.R. 14, 16 (Bankr. D. Conn. 1988). Accordingly, the relief requested herein with respect to PACA/PASA Claims does not prejudice the Debtors' creditors or any party in interest in the chapter 11 cases.

54. Furthermore, payment of PACA/PASA Claims will inure to the benefit of the Debtors' estates by preserving goodwill between the Debtors and the PACA/PASA Vendors. Any delays in satisfying amounts owed to the PACA/PASA Vendors could adversely affect the Debtors' ability to obtain certain consumable goods, thereby undercutting the Debtors' efforts in connection with these chapter 11 cases. Failing to pay PACA/PASA Claims in the ordinary course of business could subject the Debtors to numerous claims and adversary proceedings, including motions by the PACA/PASA Vendors for relief from the automatic stay and/or

injunctive relief, which would result in the unnecessary expenditure of time, effort, and money by the Debtors, their management team and their professional advisors.

55. Lastly, in certain circumstances, officers or directors of a corporate entity who are in a position to control trust assets but breach the fiduciary duty to preserve those assets may be held personally liable under PACA and PASA. See Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 283 (9th Cir. 1997); see also Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc., 217 F.3d 348, 350 (5th Cir. 2000) (court will inquire (a) whether the individual's involvement with the corporation was sufficient to establish legal responsibility and (b) whether the individual, in failing to exercise any appreciable oversight of the corporation's management, breached a fiduciary duty owed to the PACA or PASA creditors, to determine personal liability). Thus, to the extent that any valid obligations arising under PACA or PASA remain unsatisfied by the Debtors, the Debtors' officers and directors may be subject to lawsuits during the pendency of these chapter 11 cases. Any such lawsuit (and the ensuing potential liability) would distract the Debtors and their officers and directors in their attempt to successfully prosecute these chapter 11 cases and, moreover, could lead to the assertion of substantial indemnification claims under the Debtors' governing documents, employment agreements, and applicable laws, to the detriment of all of the Debtors' stakeholders.

56. Finally, courts in this District have routinely granted similar relief with respect to the treatment of PACA and PASA claims. See, e.g., In re F & H Acquisition Corp., Case No. 13-13220 (KG) (Dec. 17, 2013).

**V. Payment of PACA/PASA Claims, Lien Claims and 503(b)(9) Claims Now Will Not Affect Creditor Recoveries In These Chapter 11 Cases**

57. The relief requested herein will not affect the recovery of creditors in these cases. As stated above, assets governed by PACA and PASA do not constitute property of the Debtors'

estates, and the PACA/PASA Vendors are entitled to payment from the PACA Trust Assets or PASA Trust Assets, as applicable, ahead of the Debtors' other creditors. The Debtors' requested relief therefore affects only the timing of the Debtors' payment for PACA/PASA Claims, and will not prejudice the recovery of other creditors.

58. Additionally, in instances where the amounts owed to the Lien Vendors is less than the value of the goods that could be held to secure the related Lien Claims, such parties are arguably fully-secured creditors of the Debtors' estates. In such instances, payment now only provides such parties with what they would be entitled to receive under a chapter 11 plan, only without any interest costs that might otherwise accrue during these chapter 11 cases.

59. Also, certain vendors may be entitled to request an administrative expense priority claim under section 503(b)(9) of the Bankruptcy Code to the extent that the Debtors received goods, in the ordinary course of business, within the twenty-day period immediately prior to the Petition Date. Because such claims are entitled to priority status under section 503(b)(9) of the Bankruptcy Code, the Debtors must pay the claims in full to confirm a chapter 11 plan. See 11 U.S.C. § 1129(a)(9)(A) (requiring payment in full of claims entitled to priority). Although section 503(b)(9) of the Bankruptcy Code does not specify a time for payment of these expenses, bankruptcy courts have the discretion to allow for distributions to administrative claimants prior to confirmation if the debtor has the ability to pay and there is a need to pay. Indeed, nothing in the Bankruptcy Code prohibits the Debtors from paying such claims sooner if they choose to do so, or the Court from exercising its discretion to authorize the postpetition payment of such obligations prior to confirmation of a chapter 11 plan. Thus, payment of 503(b)(9) Claims affects the timing, but not the amount, of such payment. As a result, the Debtors respectfully submit that they should have the authority (but not the direction) to pay such claims, in the



ordinary course of business, during the pendency of these cases, to the extent necessary to preserve and maximize the value of their estates.

60. Since the enactment of section 503(b)(9) of the Bankruptcy Code, courts in this jurisdiction have exercised their discretion and have routinely authorized the payment of prepetition claims under section 503(b)(9) of the Bankruptcy Code at the outset of a chapter 11 case. See, e.g., In re Perkin's & Marie Callender's Inc., Case No. 11-11795 (KG) (June 14, 2011). Indeed, in granting a request for similar relief, at least one judge in this District asked an objecting United States Trustee, “[a]rguably, would you agree that the debtor would be able to pay the 503(b)(9) claims without Court approval?” Transcript of Hearing Held on Oct. 31, 2006, at 24:14-16, In re Dura Auto., Case No. 06-11202 (KJC) (approving payment of claims under section 503(b)(9) of the Bankruptcy Code as part of “first day” relief).

61. As explained above, it is critical to the Debtors’ chapter 11 efforts that they continue to receive goods and services, as applicable, from the Vendors on an uninterrupted basis throughout the chapter 11 process. The Debtors believe that without the relief requested herein, many of the Vendors may cease delivering goods and providing services to the Debtors, which could have devastating consequences for the Debtors and their estates.

62. Reflecting the recognition that payment of pre-petition claims of certain essential suppliers and vendors is, in fact, critical to a debtor’s ability to preserve and maximize creditor recoveries, courts in this district regularly grant relief consistent with that which the Debtors are seeking in this Motion. See, e.g., In re Longview Power, LLC, Case No. 13-12211 (BLS) (Sept. 4, 2013, interim order, and Sept. 24, 2013, final order) (authorizing payment of critical vendor claims); In re F & H Acquisition Corp., Case No. 13-13220 (KG) (Dec. 17, 2013) (authorizing payment of lien claims and 503(b)(9) claims).

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

**B. The Court Should Authorize the Banks to Honor and Process the Debtors' Payments on Account of Vendor Claims**

64. The Debtors also request the Court to authorize the Banks, when requested by the Debtors, in their discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations described herein, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Debtors further request that all of the Banks be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion.

**SATISFACTION OF BANKRUPTCY RULE 6003(b)**

65. Pursuant to Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code or to satisfy prepetition claims within twenty-one days of the Petition Date requires the Debtors to demonstrate that such relief "is necessary to avoid immediate and irreparable harm." The failure of any Vendor to deliver necessary goods and services to the Debtors would have immediate and detrimental consequences to the Debtors' business and would jeopardize the Debtors' efforts to preserve and maximize the value of their estates, to the detriment and prejudice of all of the Debtors' stakeholders. The Debtors cannot risk even the perception that their business is unable to offer anything but a high quality casino entertainment and hospitality experience to their customers. Moreover, it is the Debtors' business judgment that continuation of their positive relationship with the Vendors is critical to avoid any unexpected or inopportune interruption to their operations and increases the likelihood of

successfully prosecuting these chapter 11 cases. Thus, if the relief requested herein is not granted, the Debtors' failure to satisfy Vendor Claims would cause the Debtors' estates immediate and irreparable harm by detracting from, and potentially derailing, the Debtors' chapter 11 efforts.

66. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

**WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)**

67. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, any delay in paying Vendor Claims would be detrimental to the Debtors, their creditors and estates, as the Debtors' ability to manage and run their business operations without any unexpected or inopportune interruption requires, in part, that they continue to receive the goods and services provided by the Vendors.

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

**RESERVATION OF RIGHTS**

69. Nothing in the Proposed Orders or this Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors, (ii) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity,

priority or amount of any claim against the Debtors and their estates, or (iii) shall be construed as a promise to pay a claim.

**NOTICE**

70. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Office of the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the Debtors' thirty (30) largest unsecured creditors; (v) counsel to the First Lien Agent; (vi) the New Jersey Casino Control Commission; and (vii) the New Jersey Division of Gaming Enforcement. Notice of this Motion and any order entered hereon will be served in accordance with Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

**NO PRIOR REQUEST**

71. The Debtors have not previously sought the relief requested herein from this or any other Court.

***Remainder of page intentionally left blank***

**CONCLUSION**

WHEREFORE, the Debtors respectfully entry of the Proposed Orders, granting the relief requested herein and such other and further relief as is just and proper.

Dated: September 9, 2014  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Robert F. Poppiti, Jr.

Matthew B. Lunn (No. 4119)  
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*Proposed Counsel for the Debtors  
and Debtors in Possession*

**EXHIBIT A**

**Proposed Interim Order**



Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy PACA/PASA Claims in the ordinary course of their business up to an aggregate amount of \$100,000. Any PACA/PASA Vendor which accepts payment from the Debtors in satisfaction of its valid PACA/PASA Claim will be deemed to have waived any and all claims of whatever type, kind, or priority, against the Debtors, their property, their estates, and any PACA Trust Assets or PASA Trust Assets, as applicable, but only to the extent that payment has been received by such PACA/PASA Vendor on account of its PACA/PASA Claim.
3. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Lien Claims in the ordinary course of their business up to an aggregate amount of \$100,000.
4. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy 503(b)(9) Claims in the ordinary course of their business up to an aggregate amount of \$1,000,000.



5. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Critical Vendor Claims in the ordinary course of their business up to an aggregate amount of \$2,275,000.

6. The Debtors are authorized, but not directed, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendor.

7. The Debtors are authorized, but not directed, in their discretion, to enter into Trade Agreements with the Vendors, including, without limitation, on the following terms:

a. The amount of the Vendor's estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of this Order and shall not be deemed a claim allowed by this Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of this Court);

b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in this Order;

c. The Vendor's agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates or any of their respective assets or property (real or personal) any lien (a "**Lien**") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor shall immediately take all necessary actions to release such Lien;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of this Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of this Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor, such Vendor shall immediately repay to the Debtors any payments received on account of its pre-petition claim to the extent that the aggregate amount of such payments exceed the post-petition obligations then outstanding to such Vendor, without the right of setoff, recoupment or reclamation, and the Vendor's pre-petition claim shall be reinstated as a pre-petition claim in these chapter 11 cases and subject to the terms of any bar date order entered in these chapter 11 cases.

8. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Order.

9. A final hearing on the relief sought in the Motion shall be conducted on \_\_\_\_\_, 2014 at \_\_\_\_\_ (ET). The deadline by which objections to entry of the Proposed Final Order must be filed is \_\_\_\_\_, 2014 at 4:00 p.m. (ET). If no objections to entry of the Proposed Final Order are timely filed, this Court may enter the Proposed Final Order without further notice or a hearing.

10. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as

to the validity of any claim against the Debtors, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, or (c) shall be construed as a promise to pay a claim.

11. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

12. The requirements of Bankruptcy Rule 6003(b) are satisfied.

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

14. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: September \_\_\_\_\_, 2014  
Wilmington, Delaware

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United States Bankruptcy Judge

**EXHIBIT B**

**Proposed Final Order**

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

	-X	
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	:	
<b>In re:</b>	:	<b>Chapter 11</b>
	:	
<b>TRUMP ENTERTAINMENT RESORTS, INC., et al.,<sup>1</sup></b>	:	<b>Case No. 14-12103 (___)</b>
	:	
<b>Debtors.</b>	:	<b>Jointly Administered</b>
	:	
	:	<b>Ref. Docket No. _____</b>
	-X	

**FINAL ORDER, PURSUANT TO SECTIONS 105(a), 363(b), 503(b), 1107(a) AND 1108 OF THE BANKRUPTCY CODE, (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS (A) ARISING UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, (B) OF LIEN VENDORS, (C) ARISING UNDER SECTION 503(b)(9) OF THE BANKRUPTCY CODE AND (D) OF CRITICAL VENDORS AND SERVICE PROVIDERS, (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECK AND ELECTRONIC TRANSFER REQUESTS RELATED THERETO AND (III) GRANTING CERTAIN RELATED RELIEF**

Upon consideration of the motion (the “**Motion**”)<sup>2</sup> of Trump Entertainment Resorts, Inc. and its above-captioned affiliated debtors and debtors in possession (collectively, the “**Debtors**”) for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 503(b), 1107(a) and 1108 of title 11 of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in their discretion, to pay, in the ordinary course of business, (a) PACA/PASA Claims, (b) Lien Claims, (c) 503(b)(9) Claims and (d) Critical Vendor Claims, and (ii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing; and upon consideration of the Motion and all pleadings related thereto, including the First Day

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Trump Entertainment Resorts, Inc. (8402), Trump Entertainment Resorts Holdings, L.P. (8407), Trump Plaza Associates, LLC (1643), Trump Marina Associates, LLC (8426), Trump Taj Mahal Associates, LLC (6368), Trump Entertainment Resorts Development Company, LLC (2230), TER Development Co., LLC (0425) and TERH LP Inc. (1184). The mailing address for each of the Debtors is 1000 Boardwalk at Virginia Avenue, Atlantic City, NJ 08401.

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

Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and creditors; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy PACA/PASA Claims in the ordinary course of their business up to an aggregate amount of \$100,000. Any PACA/PASA Vendor which accepts payment from the Debtors in satisfaction of its valid PACA/PASA Claim will be deemed to have waived any and all claims of whatever type, kind, or priority, against the Debtors, their property, their estates, and any PACA Trust Assets or PASA Trust Assets, as applicable, but only to the extent that payment has been received by such PACA/PASA Vendor on account of its PACA/PASA Claim.
3. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Lien Claims in the ordinary course of their business up to an aggregate amount of \$100,000.
4. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy 503(b)(9) Claims in the ordinary course of their business up to an aggregate amount of \$1,000,000.

5. The Debtors are authorized, but not directed, in their discretion, to pay, honor or otherwise satisfy Critical Vendor Claims in the ordinary course of their business up to an aggregate amount of \$3,500,000.

6. The Debtors are authorized, but not directed, in their discretion, to condition the payment of a Vendor Claim on the agreement of the Vendor to continue supplying goods and services to the Debtors on the Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Vendor.

7. The Debtors are authorized, but not directed, in their discretion, to enter into Trade Agreements with the Vendors, including, without limitation, on the following terms:

a. The amount of the Vendor's estimated pre-petition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Vendor and the Debtors (but such amount shall be used only for purposes of this Order and shall not be deemed a claim allowed by this Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of this Court);

b. The amount and timing of any payment agreed to be paid in satisfaction of such estimated pre-petition claim by the Debtors, subject to the terms and conditions as set forth in this Order;

c. The Vendor's agreement to provide goods and services to the Debtors based upon the Customary Trade Terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability and other applicable terms and programs), or such other trade terms as are agreed to by the Debtors and the Vendor, and the Debtors' agreement to pay the Vendor in accordance with such terms;

d. The Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates or any of their respective assets or property (real or personal) any lien (a "**Lien**") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining pre-petition amounts allegedly owed to the Vendor by the Debtors arising from goods and services provided to the Debtors prior to the Petition Date, and that, to the extent that the Vendor has previously obtained such a Lien, the Vendor shall immediately take all necessary actions to release such Lien;

e. The Vendor's acknowledgment that it has reviewed the terms and provisions of this Order and consents to be bound thereby;

f. The Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims; and

g. If a Vendor which has received payment of a pre-petition claim subsequently refuses to provide goods and services to the Debtors on Customary Trade Terms or such other trade terms as are agreed to by the Debtors and the Vendor, then, without the need for any further order of this Court, any payments received by the Vendor on account of such pre-petition claim shall be deemed to have been in payment of any then outstanding post-petition obligations owed to such Vendor, such Vendor shall immediately repay to the Debtors any payments received on account of its pre-petition claim to the extent that the aggregate amount of such payments exceed the post-petition obligations then outstanding to such Vendor, without the right of setoff, recoupment or reclamation, and the Vendor's pre-petition claim shall be reinstated as a pre-petition claim in these chapter 11 cases and subject to the terms of any bar date order entered in these chapter 11 cases.

8. The Banks are authorized, when requested by the Debtors, in the Debtors' discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors, as provided for in this Order.

9. Nothing in this Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, or (c) shall be construed as a promise to pay a claim.



10. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted herein.

11. The requirements of Bankruptcy Rule 6003(b) are satisfied.

12. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: \_\_\_\_\_, 2014  
Wilmington, Delaware

\_\_\_\_\_

United States Bankruptcy Judge