

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

In re:))) AMES HOLDING CORP., et al.,¹))))) Debtors.) _____)	Chapter 11 Case No. 09-_____ () (Joint Administration Requested)
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MOTION OF DEBTORS AND DEBTORS-IN-POSSESSION FOR ENTRY OF INTERIM AND FINAL ORDERS (A) AUTHORIZING DEBTORS TO PAY OR HONOR PRE-PETITION OBLIGATIONS TO CERTAIN CRITICAL VENDORS AND (B) AUTHORIZING AND DIRECTING FINANCIAL INSTITUTIONS TO HONOR ALL RELATED CHECK AND ELECTRONIC PAYMENT REQUESTS

Ames Holding Corp. ("Ames Holding"), Axia Incorporated ("Axia"), TapeTech Tool Co., Inc. ("TapeTech"), and Ames Taping Tool Systems, Inc. ("Ames") (each a "Debtor;" collectively, the "Debtors") file this motion (the "Motion") for entry of an interim order and a final order, substantially in the forms attached hereto as Exhibit A and Exhibit B, respectively, (a) authorizing, but not directing, the Debtors to pay certain pre-petition claims of certain critical vendors and (b) authorizing and directing financial institutions to receive, process, honor and pay all related checks issued and electronic payment requests. The facts and circumstances supporting this Motion are set forth in the *Declaration of R. Andrew Garner in Support of Chapter 11 Petitions and First Day Motions* (the "Garner Declaration") being filed concurrently with this Motion. In further support of this Motion, the Debtors state as follows:

¹ The Debtors in these cases, along with the last four digits of the federal tax identification number for each of the Debtors, are Ames Holding Corp. (6130), Axia Incorporated (5251), TapeTech Tool Co., Inc. (7106), and Ames Taping Tool Systems, Inc. (6440). The Debtors' corporate offices are located at 3350 Breckinridge Boulevard, Suite 100, Duluth, Georgia 30096.

Jurisdiction and Venue

1. On December 14, 2009 (the "Petition Date"), the Debtors filed with this Court their petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors have retained possession of their respective assets and are authorized to continue the operation and management of their respective businesses as debtors-in-possession.

2. The Court has jurisdiction over this matter and over each Debtor pursuant to 28 U.S.C. §§ 157 and 1334.

3. Venue over these cases is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. This Motion constitutes a core proceeding which may be heard and determined by the Court pursuant to 28 U.S.C. §§ 157(b).

Background

5. On the Petition Date, each of the Debtors filed a voluntary petition for bankruptcy relief under chapter 11 of the Bankruptcy Code.

6. The Debtors are the leading designers, manufacturers, marketers and distributors of "automatic taping and finishing" ("ATF") tools used to increase productivity in interior drywall finishing. These ATF tools, invented by Ames beginning in 1939, enable interior finishing contractors to finish drywall joints substantially faster than less productive hand finishing methods.

7. Axia is a wholly-owned subsidiary of Ames Holding, and Ames and TapeTech are wholly-owned subsidiaries of Axia. Axia manufactures the ATF tools and then either sells or rents these tools to Ames and TapeTech. Axia also provides administrative services to Ames

and TapeTech, including accounting services, information technology support, marketing, human resources, and customer service, for which Ames and TapeTech pay a specified fee per month. TapeTech is engaged in the business of selling ATF tools wholesale through a network of independent tool dealers and distributors in the U.S. and internationally. These tools are purchased from Axia and sold under the brand name "TapeTech." Ames is engaged primarily in the business of renting ATF tools directly to interior finishing contractors to finish drywall joints prior to painting, wallpapering or other forms of final treatment. Ames offers these ATF tools through two avenues: (i) stores leased by Ames and (ii) franchises granted principally to drywall suppliers.

8. Prior to the Petition Date, to obtain the funds necessary to operate their respective businesses, Axia entered into that certain Amended and Restated Credit Agreement (the "Credit Agreement") dated as of April 1, 2008, with a group of lenders party thereto, pursuant to which the lenders agreed to extend certain term loans and a revolving line of credit to Axia. Ames Holding, TapeTech and Ames jointly and severally guaranteed full payment of the indebtedness owing by Axia under the Credit Agreement. To secure this indebtedness, each of the Debtors granted the lenders security interests in and liens upon all or substantially all of their personal property of every kind and nature. As of the Petition Date, the principal balance of the Debtors' indebtedness under the Credit Agreement totaled approximately \$161,000,000. Additional details regarding the Debtors' secured obligations are set forth in the Garner Declaration.

9. The financial viability of the Debtors has been severely impacted by the dramatic decline in commercial and residential construction in the United States, particularly as a result of declines in construction in late 2007. By late 2007, a widespread and dramatic downturn in the commercial and residential markets in the United States was occurring. Commercial and

residential construction levels plummeted as a result. This downturn was followed by a severe crisis in United States and global credit markets. This precipitous fall in the commercial and residential construction in the United States led to a significant decrease in the demand for and use of ATF tools and other products sold and rented by the Debtors and has, therefore, materially and adversely impacted the Debtors' revenue streams.

10. Faced with such substantially diminished revenues from sales and rentals of the ATF tools throughout the Debtors' regional markets, the Debtors were unable to generate the funds necessary to cover operating and maintenance costs, including amounts needed to service their secured indebtedness. Confronted by this rapid and dramatic decline in commercial and residential construction and the significantly reduced demand for the Debtors' products, beginning in late 2007, the Debtors pursued a number of actions to reduce fixed costs, including (i) reducing significantly the number of employees and the amount of wages and (ii) closing a number of the Ames' leased locations and negotiating lower monthly rental payments with the landlords for other Ames' locations.

11. Although through these efforts the Debtors were able to reduce their costs significantly, with insufficient revenues, quickly decreasing liquidity and no source of additional financing, the Debtors had no realistic choice but to file the Petitions to enable them to reorganize their affairs and to preserve the value of their business operations. The Debtors hope to achieve as soft a landing as possible by attempting to manage an orderly transition to a purchaser, through a section 363 sale within the first 90 days of bankruptcy, that is willing and able to purchase substantially all the Debtors' assets. The Debtors intend to file a motion early in these chapter 11 cases to establish and seek approval of bid procedures for a sale of substantially all of their assets in cooperation with the Lenders.

Relief Requested

12. Based on their books and records, the Debtors estimate they have approximately 370 vendors with outstanding pre-petition claims in the aggregate amount of approximately \$1,700,000. Of these vendors, the Debtors have identified 11 as critical to the Debtors' business operations (the "Critical Vendors"). The Debtors' Critical Vendors have outstanding pre-petition claims in the aggregate amount of approximately \$159,000 (the "Critical Vendor Claims").

13. The Debtors seek authority to pay, in their discretion, up to \$126,000 of the Critical Vendor Claims on an interim basis (the "Interim Critical Vendor Cap") and \$33,000 of the Critical Vendor Claims on a final basis (the "Final Critical Vendor Cap"). Any and all payments made to Critical Vendors shall be subject to and shall comply with the requirements of any order entered by the Court concerning the Debtors' use of cash collateral and any budget developed in connection therewith.

14. To identify their Critical Vendors, the Debtors and their advisors spent a substantial amount of time reviewing the accounts payable and pre-petition vendor lists to identify those creditors most essential to the Debtors' business operations. The criteria included: (a) whether a particular vendor is a "single source" supplier; (b) whether certain 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; (c) if a vendor supplies an unusually high volume of certain products, whether the Debtors have sufficient product in inventory to continue manufacturing operations while a replacement vendor is put in place; and (d) whether a vendor meeting the standards of (a), (b) or (c) is likely to refuse to ship product to the Debtors post-petition if its pre-petition balances are not paid. The Debtors also considered whether a Critical Vendor would continue shipping products or providing services in

exchange for payment of less than the full amount of its prepetition claim. The Debtors did not designate any vendors that have executory contracts with the Debtors as Critical Vendors.

15. The Debtors' Critical Vendors are primarily material vendors that supply, among other things, specialized materials and parts that are used in manufacturing the Debtors' products.

16. Many of the Debtors' Critical Vendors delivered goods to the Debtors within 20 days of the Petition Date, and are entitled to request an administrative expense priority claim under section 503(b)(9) of the Bankruptcy Code.²

Proposed Payment Terms for Critical Vendor Claims

17. In return for payment of Critical Vendor Claims, the Debtors will obtain favorable trade credit terms for the post-petition delivery of goods and services. These favorable terms are important because any significant reductions to or limit on the Debtors' trade credit by their Critical Vendors could jeopardize the Debtors' ability to fund their business operations post-petition. Thus, payments to Critical Vendors in exchange for agreed-upon trade terms will help ensure the success of these chapter 11 bankruptcy cases.

18. The Debtors propose to condition payment to Critical Vendors upon an agreement to continue supplying goods and services to the Debtors on terms that are acceptable to the Debtors in light of historical practices between the parties (the "Customary Trade Terms"). The Debtors reserve the right to negotiate Customary Trade Terms with any vendor demanding terms

² Section 503(b)(9) of the Bankruptcy Code provides: "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . including . . . the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9).

less favorable to the Debtors (to the extent the Debtors determine such terms are necessary to procure essential goods or services).

19. To commit the Critical Vendors to Customary Trade Terms, the Debtors propose that checks used to pay any pre-petition Critical Vendor Claim contain a legend substantially in the following form:

By accepting this check, the payee agrees: (a) to provide the payor and its affiliates with normalized trade credit and provide other business terms on a post-petition basis, including with respect to any applicable credit limits, pricing and the provision of equivalent levels of service, on terms the Debtors deem favorable for the duration of the payor's chapter 11 case, identified as Case No. _____ (_____), pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"); and (b) upon request, to release to the payor any property of the payor in the payee's possession. The payee hereby submits to the jurisdiction of the Bankruptcy Court for the enforcement of such agreement.

20. The Debtors further propose that a letter, substantially in the form of the letter attached hereto as Exhibit C, be provided to Critical Vendors and shall include, without limitation, the following terms in sum and substance:

- a. the amount of such Critical Vendor's estimated pre-petition trade claims, accounting for any setoffs, other credit and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors (but such amount shall be used only for the purposes of this letter and shall not be deemed a claim allowed by the Bankruptcy Court and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Bankruptcy Court);
- b. the Critical Vendor's agreement to be bound by the normal and customary trade terms, practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payment, allowances, rebates and other applicable terms and programs), which were most favorable to the Debtors and in effect between such Critical Vendors and the Debtors on a historical basis for the period within 180 days of the Petition Date, or such other trade terms as agreed by the Debtors and such Critical Vendors, or such other trade terms, practices and programs that are

at least as favorable as those that were in effect pre-petition in the Debtors' sole discretion;

- c. the Critical Vendor's agreement not to file or otherwise assert against any of the Debtors, their estates or any other person or entity, or any of their respective assets or property (real or personal) any lien (each, 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 Critical Vendors by the Debtors arising from agreements entered into prior to the Petition Date and, that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to the remove such Lien;
- d. the Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the order granting this Motion and consents to be bound hereby;
- e. the Critical Vendor's agreement that it will not separately assert or otherwise seek payment for reclamation claims pursuant to section 546(c) of the Bankruptcy Code outside of the terms of the order granting this Motion unless the Critical Vendor's participation in the trade payments authorized by the order granting this Motion is terminated; provided that such claims, if thereafter raised by the Critical Vendor as permitted by the order granting this Motion, shall be treated as though raised on the date of the order granting this Motion; and
- f. if either the trade payments authorized by the order granting this Motion or the Critical Vendor's participation therein terminates, or a Critical Vendor who has received payment of a pre-petition claim later refuses to continue to supply goods to the Debtors on Customary Trade Terms, subject to defenses, any payments received by the Critical Vendor on account of such Critical Vendor's pre-petition claim will be deemed to have been in payment of then outstanding post-petition obligations owed to such Critical Vendor and that such Critical Vendor shall immediately repay to the Debtors any payments made to them on account of such payments exceeding the post-petition obligations then outstanding, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims or otherwise.

21. Such a letter, once agreed to and accepted by a Critical Vendor, shall be the legally binding contractual arrangement between the parties governing the commercial trade relationship (each, a "Trade Agreement"). The Debtors seek authority to enter into Trade Agreements, if and at the time when they determine in their business judgment that such an agreement is necessary to their post-petition business operations. The Debtors also explicitly seek authority to make payments on account of such Critical Vendor's claims in the event that, after diligent efforts to do so, no Trade Agreement has been reached, if the Debtors determine, in the exercise of their business judgment, that failure to pay the Critical Vendor Claim is likely to result in irreparable harm to the Debtors' business operations. Nothing in this Motion should be construed as a waiver of any of the Debtors' rights to contest any invoices of a Critical Vendor under applicable non-bankruptcy law.

22. The Debtors shall maintain a matrix summarizing (a) the name of the Critical Vendor, (b) amount paid to Critical Vendor on account of its Critical Vendor Claim, and (c) the goods or services provided by such Critical Vendor. The Debtors shall provide copies of this matrix to counsel for UBS AG, Stamford Branch, the administrative agent (the "Agent") under the Credit Agreement, on a weekly basis.

23. The Debtors also request that the Court provide the Debtors with flexibility to deal with emergency situations. As discussed, it is possible that a vendor not meeting the Debtors' conditions set forth in this Motion may attempt to exert leverage against the Debtors by threatening (notwithstanding its existing legal obligations) to withhold shipments unless its pre-petition claim is paid. The Debtors anticipate that a small percentage of vendors that are either unfamiliar with the Bankruptcy Code or simply are recalcitrant will make such threats. To avoid

any disruptions in its operations, the Debtors request the ability to respond to such threats on an expedited, albeit provisional, basis.

24. Accordingly, the Debtors request they be granted the authority (but not the direction) to elect, in its sole discretion, to waive the conditions set forth in this Motion for payment of a claim under the Critical Vendor Cap (the “Waiver”) and conditionally to pay the claim of such threatening or non-conforming vendor (each, a “Non-Conforming Vendor”). In the event the Debtors elect to grant a Waiver to a Non-Conforming Vendor, the Debtors seek the authority to file a Notice of Waiver, substantially the form attached hereto as Exhibit D (the “Notice of Waiver”), and a proposed order to show cause, in substantially the form attached hereto as Exhibit E (the “Order to Show Cause”), with this Court within five (5) business days of payment pursuant to the Waiver.

25. The Debtors further propose to serve any such Notice of Waiver and Order to Show Cause on: (i) the Non-Conforming Vendor; (ii) each of the Debtors’ twenty (20) largest unsecured creditors; (iii) counsel to the Agent; and (iv) the United States Trustee for the District of Delaware.

26. The Debtors further propose that, at the first regularly-scheduled hearing occurring at least five (5) business days following entry of the Order to Show Cause by this Court, the Non-Conforming Vendor be required to appear before this Court and demonstrate why it should not be held in violation of the terms of the order granting the relief requested in this Motion or any applicable provision of the Bankruptcy Code. Should the Court determine that the Non-Conforming Vendor’s conduct has violated the terms of this order or any applicable provision of the Bankruptcy Code, the Debtors respectfully request that this Court require the Non-Conforming Vendor to disgorge the payments made by the Debtors pursuant to the Waiver,

plus attorneys' fees and interest within three (3) business days of entry of the order holding such Non-Conforming Vendor in violation. Furthermore, the Debtors expressly reserve their right to file any motions, adversary complaints or other pleadings that the Debtors determine, in their sole and absolute discretion, are necessary or appropriate to pursue other remedies including, without limitation, injunctive relief.

Basis for Relief

A. Ample Authority Exists to Support Payment of the Critical Vendor Claims.

27. Courts generally acknowledge that it is appropriate to authorize the payment or other special treatment of pre-petition obligations in appropriate circumstances. See, e.g., In re Wickes Holdings, LLC, No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); In re Tweeter Home Entm't Group, Inc., No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Pope & Talbot, Inc., No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); In re Hancock Fabrics, Inc., No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007); In re Dura Auto. Sys., Inc., No. 06-11202 (KJC) (Bankr. D. Del. Nov. 20, 2006); In re J.L. French Auto. Castings, Inc., No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006). In authorizing payments of certain pre-petition obligations, courts rely on several legal theories rooted in sections 1107(a), 1108, 363(b) and 105(a) of the Bankruptcy Code.

28. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors-in-possession are fiduciaries "holding the bankruptcy estate and operating the business for the benefit of its 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 fiduciary duties of any debtor-in-possession is the obligation to "protect and preserve the estate, including an operating business's going-concern value." Id. Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty "only . . . by the preplan satisfaction of a pre-petition claim." Id. The CoServ

court specifically noted the pre-plan satisfaction of pre-petition claims would be a valid exercise of the debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate . . ." Id.

29. Consistent with the debtor's fiduciary duties, courts have also authorized payment of pre-petition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. See, e.g., In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of pre-petition wages); see also Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.), 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to allow contractor to pay pre-petition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

30. In addition, the Court may authorize payment of pre-petition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code. Section 105(a), which codifies the inherent equitable powers of the bankruptcy court, empowers the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Under section 105(a), courts may permit pre-plan payments of pre-petition obligations when essential to the continued operation of the debtor's business. Specifically, the Court may use its power under section 105(a) to authorize payment of pre-petition obligations pursuant to the "necessity of payment" rule (also referred to as the "doctrine of necessity").

31. The "doctrine of necessity" or the "necessity of payment" rule originated in railway cases and was first articulated by the United States Supreme Court in Miltenberger v. Logansport, C.&S.W.R. Co., 106 U.S. 286 (1882). The doctrine was expanded to include non-

railroad debtors in the mid-century. See Dudley v. Mealey, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization case, that the court was not “helpless” to apply the rule to supply creditors of non-railroad debtors where the alternative was cessation of operations).

32. The United States Court of Appeals for the Third Circuit recognized the “necessity of payment” doctrine in In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of pre-petition claims if such payment was essential to the continued operation of the debtor. Id. (stating courts may authorize payment of pre-petition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); see also In re Penn Central Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); In re Just for Feet, Inc., 242 B.R. 821, 824-845 (Bankr. D. Del. 1999); (noting that, in the Third Circuit, debtors may pay pre-petition claims that are essential to continued operation of business); In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (same).

33. Today, the rationale for the necessity of payment rule—the rehabilitation of a debtor in reorganization cases—is “the paramount policy and goal of Chapter 11.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also In re Just For Feet, Inc., 242 B.R. at 826 (finding that payment of pre-petition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization”); In re Quality Interiors, Inc., 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code”, but “[a] general practice has developed . . . where

bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of pre-petition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.), 829 F.2d 1484, 1490 (9th Cir. 1987) (recognizing that allowance of “unequal treatment of pre-petition debts when necessary for rehabilitation . . .” is appropriate); Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 287 (S.D.N.Y. 1987) (authorizing payment of pre-petition worker’s compensation claims on grounds that the fundamental purpose of reorganization and equity powers of bankruptcy courts “is to create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately”); 3 Collier on Bankruptcy, ¶ 105.04[5][a] (15th ed. rev. 2004) (discussing cases in which courts have relied on the “doctrine of necessity” or the “necessity of payment” rule to pay pre-petition claims immediately).

34. Courts also have permitted post-petition payment of pre-petition claims pursuant to section 105(a) in other situations, such as if non-payment of a pre-petition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. See In re UNR Indus., 143 B.R. 516, 520 (Bankr. N.D. Ill. 1992) (permitting debtor to pay pre-petition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization); Ionosphere Clubs, 98 B.R. at 167-77 (finding that section 105 empowers bankruptcy courts to authorize payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor).

35. This flexible approach is particularly critical where a pre-petition creditor provides vital goods or services to a debtor that would be unavailable if the debtor did not satisfy its pre-petition obligations. In In re Structurlite Plastics Corp., 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), the bankruptcy court stated it “may exercise its equity powers under §105(a) [of the Bankruptcy Code] to authorize payment of pre-petition claims where such payment is necessary ‘to permit the greatest likelihood of survival of the debtors and payment of creditors in full or at least proportionately.’” Id. The court explained that “a *per se* rule proscribing the payment of pre-petition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” Id. at 932.

B. It is Essential that the Debtors are Able to Immediately Pay the Critical Vendor Claims To Preserve the Going-Concern Value of their Businesses.

36. The relief sought by this Motion is appropriate under each of the foregoing standards. As set forth above, set forth above, the Debtors have determined in the exercise of their sound business judgment that it is in the best interest of their respective bankruptcy estates and creditors to continue to operate their businesses with as little disruption as possible in order to preserve the value of their businesses as going concerns. As described above, payment of the Critical Vendor Claims is essential to the Debtor’s day-to-day operations.

37. Courts in this and other jurisdictions have repeatedly recognized the importance of critical vendors to certain debtors and granted relief similar to the relief requested herein. See, e.g., In re Buffets Holdings, Inc., No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008); In re American Home Mortgage Holdings, Inc., No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); In re Tweeter Home Entertainment Group, Inc., No. 07-10787 (PJW) (Bankr. D. Del. June 14, 2007); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005); In re Delphi

Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005); In re UAL Corp., No. 02-48191 (ERW) (Bankr. N.D. Ill. Dec. 11, 2002).

38. Most importantly, the Debtors intend to pursue the sale of substantially all of their assets in the first 90 days of these chapter 11 cases. Preservation of sale value is an important factor in authorizing payment of pre-petition trade claims. See In re Tropical Sportswear Int'l Corp., 320 B.R. 15 (Bankr. M.D. Fla. 2005) (recognizing that the debtors' suppliers were actually critical because replacing them would disrupt the debtor's business in light of the fact that the debtors had executed an asset purchase agreement under which the debtor was required to maintain its business).

39. Indeed, bankruptcy courts in this District have authorized debtors to pay the pre-petition obligations owed to critical vendors in the context of a sale of all or substantially all of a debtors' assets in this District and others. See, e.g., In re Pillowtex Corp., No. 03-12339 (PJW) (Bankr. D. Del. July 31, 2003) (authorizing payment of \$800,000 in pre-petition critical vendors' claims); Reorganized CMC formerly Cone Mills Corp., et. al., No. 03-12944 (MFW) (Bankr. D. Del. Nov. 6, 2003) (authorizing payment of \$4.5 million in pre-petition critical vendors' claims); In re SHC, Inc., No. 03-12002 (CSS) (Bankr. D. Del. July 2, 2003) (authorizing payment of \$3 million in pre-petition critical vendors' claims); In re Orion Refining Corp., No. 03-11483 (MFW) (Bankr. D. Del. June 5, 2003) (authorizing payment of \$5 million in pre-petition critical vendors' claims and \$21.6 million in fire vender, mechanics' and materialmen's' lien claims); In re Medical Wind Down Holdings II, Inc. f/k/a Maxxim Medical Group, Inc., No. 03-10438 (PJW) (Bankr. D. Del. March 19, 2003) (authorizing payment of \$5 million in pre-petition critical vendors' claims).

C. Failure to Authorize the Debtors to Pay the Critical Vendor Claims Within 21 Days of the Petition Date Will Cause Immediate and Irreparable Harm.

40. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a pre-petition claim within twenty-one days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm.

41. The Debtors' failure to pay Critical Vendor Claims pursuant to the terms and conditions set forth in this Motion plainly would result in immediate and irreparable harm. The refusal of any one of the Critical Vendors to continue transacting with the Debtors could halt the Debtors' manufacturing and distribution operations, prevent the Debtor from meeting their delivery schedules and, thus, cripple the Debtors' business operations. As a result, the Debtors would fail to meet their customer demand and would surely lose key customers. As described above, the Debtors' business operations are dependent on their relationships with their suppliers and customers. Without these relationships, the Debtors' businesses will suffer, jeopardizing the anticipated sale of the Debtors' assets through these chapter 11 cases, and therefore the recovery possible for their bankruptcy estates and creditors.

42. Accordingly, the Debtors submit they have satisfied the requirements of Bankruptcy Rule 6003 to support immediate payment of pre-petition obligations related to the Critical Vendor Claims.

D. Cause Exists to Authorize and Direct the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers.

43. The Debtors represent that sufficient funds exist to pay the amounts described in this Motion in the ordinary course of business by virtue of cash reserves, expected cash flows from ongoing business operations and anticipated access to cash collateral. Also, under the Debtors' existing cash management system, the Debtors represent that checks or wire transfer

requests can be readily identified as relating to an authorized payment made to satisfy a Critical Vendor Claim. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently. The Debtors, therefore, request that all applicable financial institutions be authorized and directed, when asked by the Debtors, to receive, process, honor and pay any and all checks or wire transfers related to the payment of any Critical Vendor Claims.

44. The Debtors further represent that any payments of the Critical Vendor Claims will be subject to and will comply with the requirements of any order entered by the Court concerning the Debtors' use of cash collateral and any budget developed in connection therewith.

Request for Waiver of Stay

45. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. 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 fourteen (14) days after entry of the order, unless the court orders otherwise." As set forth above, the immediate payment of the Critical Vendor Claims is essential to prevent potentially irreparable damage to the Debtors' business operations, the value of their assets, and their ability to reorganize their affairs. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

Reservation of Rights

46. Nothing contained herein is intended to or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice of a Critical

Vendor under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought in this Motion, any payment made pursuant to the Court's order is not intended to and should not be construed as an admission of the validity of any claim or a waiver of the Debtor's rights to dispute such claim subsequently.

Notice

47. No trustee, examiner, or statutory creditors' committee has been appointed in these chapter 11 cases. The Debtors will serve notice of this Motion on: (i) counsel to the Debtors' prepetition secured lenders; (ii) the United States Trustee for the District of Delaware; (iii) each of the Debtors' creditors holding the 20 largest unsecured claims against each Debtors' estates; and (iv) the Internal Revenue Service. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure for 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.

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

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter interim and final orders, substantially in the forms attached hereto as Exhibit A and Exhibit B, respectively, (a) authorizing, but not directing, the Debtors to pay the Critical Vendor Claims, (b) authorizing financial institutions to receive, process, honor and pay all checks presented for payment and electronic payment requests relating thereto; and (c) granting such other and further relief as the Court may deem just and proper.

[Signatures on the following page]

Dated: December 15, 2009
Wilmington, Delaware

Respectfully submitted,

Katherine Dord

Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
L. Katherine Good (No. 5101)
Drew G. Sloan (No. 5069)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

- and -

C. Edward Dobbs
Rufus T. Dorsey, IV
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303
Telephone: (404) 523-5300
Facsimile: (404) 522-8409

Proposed Counsel For the Debtors and Debtors-in-Possession

EXHIBIT A

Proposed Interim Order

U.S.C. §§ 1408 and 1409; and due and proper notice of this Motion having been provided; and it appearing that no other or further notice need be provided; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, that the Motion is granted on an interim basis until such time as the Court conducts a final hearing on this matter (the "Final Hearing Date"); and it is further

ORDERED, that the Final Hearing Date shall be on _____, 2010 at ___:___ a.m./p.m. (Eastern Standard Time) and any objections or responses to the Motion shall be filed on or before five business days prior to the Final Hearing Date and served on the parties required by Local Rule 2002-1(b); and it is further

ORDERED, that the Debtors' payment of pre-petition claims owed to Critical Vendors shall not exceed, in the aggregate, \$126,000 during the interim period (the "Interim Critical Vendor Cap") from the date of this Order until the date that a final order is entered in this matter, unless otherwise ordered by the Court; and it is further

ORDERED, that the Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay the pre-petition claims of Critical Vendors upon such terms and in the manner provided in this Order, and in the ordinary course of business, when due, and not on an accelerated basis, provided, however, that any Critical Vendor that accepts payment pursuant to the authority granted in this Order agrees to provide the Debtors with goods and services in accordance with the trade terms, practices and programs in effect between such Critical Vendor and the Debtors for the period within 180 days of the Petition Date, or such other trade terms as agreed by the Debtors and such Critical Vendors, or such other trade terms, practices and programs that are at least as favorable as those that were in effect pre-petition in the Debtors' sole discretion; and it is further

ORDERED, that any Critical Vendor who accepts payment of all or a portion of their pre-petition claims from the Debtors pursuant to this Order shall be deemed to (a) agree to the terms and provisions of this Order and (b) have waived, to the extent so paid, (i) any and all pre-petition claims, of any type, kind or priority (including any reclamation claim), against the Debtors, their assets and properties and any funds or amounts held in trust by the Debtors, and (ii) the right to demand a lump-sum payment for amounts outstanding but not yet payable upon consummation of the Debtors' plan of reorganization; and it is further

ORDERED, that the Debtors shall undertake all appropriate efforts to cause Critical Vendors to enter into an agreement with the Debtors substantially similar to Exhibit C to the Motion, including the following terms:

- a. The amount of such Critical Vendor's estimated pre-petition trade claims, accounting for any setoffs, other credit and discounts thereto, shall be as mutually determined in good faith by the Critical Vendors and the Debtors (but such amount shall be used only for the purposes of this letter and shall not be deemed a claim allowed by the Bankruptcy Court and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Bankruptcy Court);
- b. The Critical Vendor's agreement to be bound by the normal and customary trade terms, practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payment, allowances, rebates and other applicable terms and programs), which were most favorable to the Debtor and in effect between such Critical Vendors and the Debtor on a historical basis for the period within 180 days of the Petition Date, or such other trade terms as agreed by the Debtors and such Critical Vendors, or such other trade terms, practices and programs that are at least as favorable as those that were in effect pre-petition in the Debtors' sole discretion;
- c. The Critical Vendor's agreement not to file or otherwise assert against any or all of the Debtors, their estates or any other person or entity, 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

Critical Vendors by the Debtors arising from agreements entered into prior to the Petition Date and, that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to the remove such Lien;

- d. The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of this Order and consents to be bound hereby;
- e. The Critical Vendor's agreement that it will not separately assert or otherwise seek payment for reclamation claims pursuant to section 546(c) of the Bankruptcy Code outside of the terms of this Order unless the Critical Vendor's participation in the trade payments authorized by this Order is terminated; provided that such claims, if thereafter raised by the Critical Vendor as permitted by the order granting this Motion, shall be treated as though raised on the date of this Order; and,
- f. If either the trade payments authorized by this Order or the Critical Vendor's participation therein terminates, or a Critical Vendor who has received payment of a pre-petition claim later refuses to continue to supply goods to the Debtors on Customary Trade Terms, subject to defenses, any payments received by the Critical Vendor on account of such Critical Vendor's pre-petition claim will be deemed to have been in payment of then outstanding post-petition obligations owed to such Critical Vendor and that such Critical Vendor shall immediately repay to the Debtors any payments made to it on account of such payments exceeding the post-petition obligations then outstanding, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims or otherwise.

Such a letter, once agreed to and accepted by a Critical Vendor, shall be the legally binding contractual arrangement between the parties governing the commercial trade relationship (the "Trade Agreement"). This Order authorizes, but does not require, the Debtors to enter into Trade Agreements, it being the express intention of this Court that the Debtors are authorized to pay Critical Vendor Claims, subject to the Interim Critical Vendor Cap, even if -- after diligent efforts to do so -- the Debtors determine it is not appropriate to enter into a Trade Agreement with a particular Critical Vendor; and it is further

ORDERED, that the Debtors shall maintain a matrix summarizing (a) name of Critical Vendor, (b) amount paid to Critical Vendor on account of its Critical Vendor Claims, and (c) the goods or services provided by such Critical Vendor. The Debtors shall provide copies of this matrix to counsel to the Agent on a weekly basis.

ORDERED, that the Debtors are granted the authority to elect, in their sole discretion, to waive the conditions set forth in the Motion for payment of a claim within the Interim Critical Vendor Cap (the “Waiver”) and to conditionally pay the claim of a non-conforming vendor (the “Non-Conforming Vendor”) that threatens to withhold shipments unless its pre-petition claim is paid. After electing to grant a Waiver to a Non-Conforming Vendor, Debtors are directed to file a Notice of Waiver and proposed order to show cause (the “Order to Show Cause”) with this Court within three (3) business days of payment pursuant to the Waiver. At the first regularly scheduled hearing occurring at least five (5) business days following entry of the Order to Show Cause by this Court, the Non-Conforming Vendor will be required to appear before this Court and demonstrate why the Non-Conforming Vendor is not in violation of the Automatic Stay. Should this Court determine that the Non-Conforming Vendor violated the automatic stay, the payments made by the Debtors will be disgorged pursuant to the Waiver, plus attorney’s fees and interest accrued or such other higher rate as this Court specifies, within three (3) business days of entry of the order holding such Non-Conforming Vendor in violation, and it is further

ORDERED, that the form of Notice of Waiver attached to the Motion as Exhibit D and the form of Order to Show Cause attached to the Motion as Exhibit E are hereby approved by this Court in all respects for use in accordance with the provisions of the foregoing paragraph; and it is further

ORDERED, that the Debtors shall not pay any pre-petition claims that are inconsistent with the Debtors' books and records and nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtors may have to contest the amount of or basis for any pre-petition obligations owed to any Critical Vendor; and it is further

ORDERED, that all Trade Agreements shall be deemed to have terminated, together with the other benefits to Critical Vendors as contained in this Order, upon entry of an order converting any of the Debtors' chapter 11 cases to a chapter 7; and it is further

ORDERED, that notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors any order regarding the use of cash collateral, or budget in connection therewith; and it is further

ORDERED, that the requirements set forth in Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") are satisfied by the contents of the Motion or otherwise deemed waived; and it is further

ORDERED, that in accordance with this Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the claims that the Debtors request authority to pay in the Motion are authorized and directed to honor checks presented for payment and to honor all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in such accounts; and it is further

ORDERED, that each of the Debtors' banking institutions is authorized, subject to the terms of this Order, to debit the Debtors' accounts in the ordinary course of business on account of the relief requested in the Motion without the need for further order of the Court for: (i) all checks drawn on the Debtors' accounts which are cashed at such bank's counters or exchanged

for cashier's checks by the Critical Vendors prior to the Petition Date; (ii) all checks or other items deposited in one of the Debtors' accounts with such bank prior to the Petition Date which have been dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtors were responsible for such items prior to the Petition Date; and (iii) all undisputed pre-petition amounts outstanding as of the date hereof, if any, owed to any bank as service charges for the maintenance of the cash management systems; and it is further

ORDERED, that any of the Debtors' banks may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and such bank shall not have any liability to any party for relying on such representations by the Debtors as provided for herein; and it is further

ORDERED, that nothing in the Motion or this Order, nor as a result of the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as: (a) an admission as to the validity or priority of any claim against the Debtors; (b) a waiver of the Debtors' rights to dispute any claim; or (c) an approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code; and it is further

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

ORDERED, that notwithstanding the possible applicability of Rules 6004(h), 7062 and 9014 of the Bankruptcy Rules, 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

EXHIBIT B

Proposed Final Order

Motion having been provided; and it appearing that no other or further notice need be provided; and after due deliberation and sufficient cause appearing therefore, it is hereby

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

ORDERED, that the Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay the pre-petition claims of Critical Vendors upon such terms and in the manner provided in this Order; and it is further

ORDERED, that the Debtors' payment of pre-petition claims owed to Critical Vendors shall not exceed, in the aggregate, \$159,000 unless otherwise ordered by the Court; and it is further

ORDERED, that the Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay the pre-petition claims of Critical Vendors upon such terms and in the manner provided in this Order, and in the ordinary course of business, when due, and not on an accelerated basis, provided, however, that any Critical Vendor that accepts payment pursuant to the authority granted in this Order agrees to provide the Debtors with goods and merchandise in accordance with the trade terms, practices and programs in effect between such Critical Vendor and the Debtors for the period within 180 days of the Petition Date, or such other trade terms as agreed by the Debtors and such Critical Vendors, or such other trade terms, practices and programs that are at least as favorable as those that were in effect pre-petition in the Debtors' sole discretion; and it is further

ORDERED, that any Critical Vendor who accepts payment of all or a portion of their pre-petition claims from the Debtors pursuant to this Order shall be deemed to (a) agree to the terms and provisions of this Order and (b) have waived, to the extent so paid, (i) any and all pre-petition claims, of any type, kind or priority (including any reclamation claim), against the

Debtors, their assets and properties and any funds or amounts held in trust by the Debtors, and (ii) the right to demand a lump-sum payment for amounts outstanding but not yet payable upon consummation of the Debtors' plan of reorganization; and it is further

ORDERED, that the Debtors shall undertake all appropriate efforts to cause Critical Vendors to enter into an agreement with the Debtors substantially similar to Exhibit C to the Motion, including the following terms:

- a. The amount of such Critical Vendor's estimated pre-petition trade claims, accounting for any setoffs, other credit and discounts thereto, shall be as mutually determined in good faith by the Critical Vendors and the Debtors (but such amount shall be used only for the purposes of this letter and shall not be deemed a claim allowed by the Bankruptcy Court and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Bankruptcy Court);
- b. The Critical Vendor's agreement to be bound by the normal and customary trade terms, practices and programs (including, without limitation, credit limits, pricing, cash discounts, timing of payment, allowances, rebates and other applicable terms and programs), which were most favorable to the Debtor and in effect between such Critical Vendors and the Debtor on a historical basis for the period within 180 days of the Petition Date, or such other trade terms as agreed by the Debtors and such Critical Vendors, or such other trade terms, practices and programs that are at least as favorable as those that were in effect pre-petition in the Debtors' sole discretion;
- c. The Critical Vendor's agreement not to file or otherwise assert against any or all of the Debtors, their estates or any other person or entity, 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 Critical Vendors by the Debtors arising from agreements entered into prior to the Petition Date and, that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to the remove such Lien;

- d. The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of this Order and consents to be bound hereby;
- e. The Critical Vendor's agreement that it will not separately assert or otherwise seek payment for reclamation claims pursuant to section 546(c) of the Bankruptcy Code outside of the terms of this Order unless the Critical Vendor's participation in the trade payments authorized by this Order is terminated; provided that such claims, if thereafter raised by the Critical Vendor as permitted by the order granting this Motion, shall be treated as though raised on the date of this Order; and,
- f. If either the trade payments authorized by this Order or the Critical Vendor's participation therein terminates, or a Critical Vendor who has received payment of a pre-petition claim later refuses to continue to supply goods to the Debtors on Customary Trade Terms, subject to defenses, any payments received by the Critical Vendor on account of such Critical Vendor's pre-petition claim will be deemed to have been in payment of then outstanding post-petition obligations owed to such Critical Vendor and that such Critical Vendor shall immediately repay to the Debtors any payments made to it on account of such payments exceeding the post-petition obligations then outstanding, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims or otherwise.

Such a letter, once agreed to and accepted by a Critical Vendor, shall be the legally binding contractual arrangement between the parties governing the commercial trade relationship (the "Trade Agreement"). This Order authorizes, but does not require, the Debtors to enter into Trade Agreements, it being the express intention of this Court that the Debtors are authorized to pay Critical Vendor Claims, subject to the cap imposed by this Order (the "Final Critical Vendor Cap"), even if -- after diligent efforts to do so -- the Debtors determine it is not appropriate to enter into a Trade Agreement with a particular Critical Vendor; and it is further

ORDERED, that the Debtors shall maintain a matrix summarizing (a) name of Critical Vendor, (b) amount paid to Critical Vendor on account of its Critical Vendor Claims, and (c) the

goods or services provided by such Critical Vendor. The Debtors shall provide copies of this matrix to counsel to the Agent on a weekly basis.

ORDERED, that the Debtors are granted the authority to elect, in their sole discretion, to waive the conditions set forth in the Motion for payment of a claim within the Final Critical Vendor Cap (the “Waiver”) and to conditionally pay the claim of a non-conforming vendor (the “Non-Conforming Vendor”) that threatens to withhold shipments unless its pre-petition claim is paid. After electing to grant a Waiver to a Non-Conforming Vendor, Debtors are directed to file a Notice of Waiver and proposed order to show cause (the “Order to Show Cause”) with this Court within three (3) business days of payment pursuant to the Waiver. At the first regularly scheduled hearing occurring at least five (5) business days following entry of the Order to Show Cause by this Court, the Non-Conforming Vendor will be required to appear before this Court and demonstrate why the Non-Conforming Vendor is not in violation of the Automatic Stay. Should this Court determine that the Non-Conforming Vendor violated the automatic stay, the payments made by the Debtors will be disgorged pursuant to the Waiver, plus attorney’s fees and interest accrued or such other higher rate as this Court specifies, within three (3) business days of entry of the order holding such Non-Conforming Vendor in violation, and it is further

ORDERED, that the form of Notice of Waiver attached to the Motion as Exhibit D and the form of Order to Show Cause attached to the Motion as Exhibit E are hereby approved by this Court in all respects for use in accordance with the provisions of the foregoing paragraph; and it is further

ORDERED, that the Debtors shall not pay any pre-petition claims that are inconsistent with the Debtors’ books and records and nothing in this Order or the Motion shall be construed

as prejudicing any rights the Debtors may have to contest the amount of or basis for any pre-petition obligations owed to any Critical Vendor; and it is further

ORDERED, that all Trade Agreements shall be deemed to have terminated, together with the other benefits to Critical Vendors as contained in this Order, upon entry of an order converting any of the Debtors' chapter 11 cases to a chapter 7; and it is further

ORDERED, that notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors any order regarding the use of cash collateral, or budget in connection therewith; and it is further

ORDERED, that the requirements set forth in Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") are satisfied by the contents of the Motion or otherwise deemed waived; and it is further

ORDERED, that in accordance with this Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the claims that the Debtors request authority to pay in the Motion are authorized and directed to honor checks presented for payment and to honor all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in such accounts; and it is further

ORDERED, that each of the Debtors' banks is authorized, subject to the terms of this Order, to debit the Debtors' accounts in the ordinary course of business on account of the relief requested in the Motion without the need for further order of the Court for: (i) all checks drawn on the Debtors' accounts which are cashed at such bank's counters or exchanged for cashier's checks by the Critical Vendors prior to the Petition Date; (ii) all checks or other items deposited in one of the Debtors' accounts with such bank prior to the Petition Date which have been

dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtors were responsible for such items prior to the Petition Date; and (iii) all undisputed pre-petition amounts outstanding as of the date hereof, if any, owed to any bank as service charges for the maintenance of the Cash Management Systems; and it is further

ORDERED, that any bank may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Order, and such bank shall not have any liability to any party for relying on such representations by the Debtors as provided for herein; and it is further

ORDERED, that notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtor under any order regarding the use of cash collateral, or budget in connection therewith; and it is further

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

ORDERED, that notwithstanding the possible applicability of Rules 6004(h), 7062 and 9014 of the Bankruptcy Rules, or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED, that all time periods set forth in this order shall be calculated in accordance with Rule 9006(a) of the Bankruptcy Rules; 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: _____, 2010
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

(Form of Trade Agreement)

FORM OF TRADE AGREEMENT

_____, 2010

TO: [Vendor]

Dear Valued Vendor:

As you are no doubt aware, _____ (the "Company") filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on December ____, 2009 (the "Petition Date"). On the Petition Date, the Company requested the Bankruptcy Court's authority to pay certain vendors in recognition of the critical nature of its relationship with such vendors and its desire that the bankruptcy cases have as little effect on these critical vendors as possible. On [], the Bankruptcy Court entered an order (the "Order") authorizing the Company, under certain conditions, to pay a portion of the pre-bankruptcy claims of critical vendors that agree (a) to the terms set forth below, and (b) to be bound by the terms of the Order. A copy of the Order is enclosed.

To receive payment on pre-bankruptcy claims, each trade vendor must agree to continue to supply goods to the Company based on "Customary Trade Terms." In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, and allowances), which were most favorable to the Company and in effect between such vendor and the Company on a historical basis within 180 days of the Petition Date or such other trade terms, practices or programs that are at least as favorable as those that were in effect before the Petition Date.

For purposes of administration of this vendor payment program as authorized by the Bankruptcy Court (the "Vendor Payment Program"), the Company and you agree as follows:

1. The estimated balance of the pre-bankruptcy trade claim owed by the Company, including for these purposes its non-debtor Canadian affiliates (net of any setoffs, credits or discounts) (the "Trade Claim") is \$[[]].
2. The Company will provisionally pay you \$[[]] of your Trade Claim
3. You will provide open credit terms as follows (if more space is required, attach continuation pages) (the "Customary Trade Terms").

4. The open trade balance or credit line that you will extend to the Company for shipment of goods after the Petition Date is \$[[]] (which shall not be less than the greater of the open trade balance outstanding (a) on the Petition Date or (b) on normal and customary terms on a historical basis for the period 180 days before and up to the Petition Date). You agree to use commercially reasonable steps to fully service the Company as requested pursuant to the terms set forth herein.
5. In consideration for payment of a portion of your Trade Claim, you agree not to file or otherwise assert against the Company, their assets or any other person or entity (or any of their respective assets or property whether real or personal), any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining pre-bankruptcy amounts allegedly owed to you by the Company arising from agreements entered into prior to the Petition Date. Furthermore, if you have taken steps to file or assert such a lien prior to entering into this Trade Agreement, you agree to take the necessary steps to remove such lien as soon as possible.
6. You agree that you shall not require a lump sum payment upon confirmation of a plan in these chapter 11 cases on account of any administrative expense priority claim that you may assert, but instead agree that such claims will be paid in the ordinary course of business after confirmation of a plan under applicable Customary Trade Terms, if the plan provides for the ongoing operations of the Company.
7. You will hereafter extend to the Company all Customary Trade Terms (as defined in the Order).

Any payment of your Trade Claim in the manner set forth in the Order may only occur upon execution of this Trade Agreement by a duly authorized representative of your company and the return of this Trade Agreement to the Company. Your execution of this Trade Agreement and return of the same to the Company constitutes an agreement by you and the Company:

1. to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Trade Claim set forth above;
2. that, for a period of no less than one year from the Petition Date, you will continue to supply the Company with goods pursuant to the Customary Trade Terms, and that the Company will pay for such goods in accordance with the Customary Trade Terms;
3. that you have reviewed the terms and provisions of the Order and that you consent to be bound by such terms;

4. that you will not separately seek payment for reclamation and similar claims outside the terms of the Order unless your participation in the Vendor Payment Program is terminated; and
5. that if either the Vendor Payment Program or your participation therein terminates as provided in the Order, or you later refuse to continue to supply goods to the Company on Customary Trade Terms, any payments received by you on account of your Trade Claim will be deemed to have been in payment of then outstanding post-petition obligations owed to you and that you will immediately repay to the Company any payments made to you on account of your Trade Claim to the extent that the aggregate amount of such payments exceeds the post-petition obligations then outstanding without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or otherwise.

The Company and you also hereby agree that any dispute with respect to this Trade Agreement, the Order and/or your participation in the Vendor Payment Program shall be determined by the Bankruptcy Court.

If you have any questions about this Trade Agreement or our financial restructuring, do not hesitate to call [[]] at [[]].

Sincerely,

By: _____

Title: _____

Date: _____

Agreed and Accepted by:

[Name of Vendor]

By: _____

Title: _____

Dated: _____

EXHIBIT D

(Notice of Waiver)

PLEASE TAKE FURTHER NOTICE that contemporaneously herewith the Debtors are filing a proposed Order to Show Cause requesting that the Bankruptcy Court order Vendor to appear before the Bankruptcy Court at a hearing to be held at _____ a.m./p.m. (Eastern Standard Time) on _____ before The Honorable [[]], United States Bankruptcy Judge, in the Bankruptcy Court, [[]], Wilmington, Delaware 19801 (the "Hearing") and demonstrate why Vendor should not be held in violation of the automatic stay provisions of 11 U.S.C. § 362.

Dated: _____, 20____
Wilmington, Delaware

Respectfully submitted,

Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
L. Katherine Good (No. 5101)
Drew G. Sloan (No. 5069)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

- and -

C. Edward Dobbs
Rufus T. Dorsey, IV
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303
Telephone: (404) 523-5300
Facsimile: (404) 522-8409

Proposed Counsel For the Debtors and Debtors-in-Possession

EXHIBIT E

(Order to Show Cause)

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

In re:)	Chapter 11
)	
AMES HOLDING CORP., et al.,¹)	Case No. 09-_____ (____)
)	
Debtors.)	(Joint Administration Requested)
_____)	

ORDER TO SHOW CAUSE

Upon the motion, dated _____, 2009 (the "Motion²"), of the above-captioned debtors and debtors-in-possession (the "Debtors"), for Motion of Debtors and Debtors-in-Possession for Entry of Interim and Final Orders (a) Authorizing Debtors to Pay or Honor Pre-Petition Obligations to Certain Critical Vendors and (b) Authorizing and Directing Financial Institutions to Honor all Related Check and Electronic Payment Requests, and upon the order of this Court, entered _____, 2010 (the "Order"), granting the relief requested in the Motion; and upon the Debtors' notice of waiver, dated _____, 2010, with respect to [NAME OF VENDOR] ("Vendor"); and it appearing that proper and adequate notice of the Debtors' request for entry of this Order to Show Cause (the "Show Cause Order") has been given and that no other or further notice is necessary; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

¹ The Debtors in these cases, along with the last four digits of the federal tax identification number for each of the Debtors, are Ames Holding Corp. (6130), Axia Incorporated (5251), TapeTech Tool Co., Inc. (7106), and Ames Taping Tool Systems, Inc. (6440). The Debtors' corporate offices are located at 3350 Breckinridge Boulevard, Suite 100, Duluth, Georgia 30096.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Debtors have complied with the procedures provided in the Order in determining to waive the conditions for payment of a pre-petition claim under the Critical Vendor Claims Cap (as defined in the Motion) with respect to Vendor and conditionally paying \$[[]] of the pre-petition claim of Vendor on [DATE].

2. Vendor is hereby ordered to show cause before this Court at a hearing to be held at _____ a.m./p.m.. Eastern Time on _____ before The Honorable [[]], United States Bankruptcy Judge, in the Bankruptcy Court, [[]], Wilmington, Delaware 19801 (the "Hearing") why the Vendor should not be held in violation of the automatic stay provision of 11 U.S.C. § 362 for willfully threatening to withhold essential goods from the Debtors under one or more contracts between the Debtors and Vendor, which action was automatically stayed by the Debtors' filing of voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code.

3. Service of this Order to Show Cause is to be made by service upon (a) the Non-Conforming Vendor; (b) the Office of the United States Trustee for the District of Delaware; (c) all secured creditors of the Debtors; and (d) creditors holding the twenty (20) largest unsecured claims. No further notice of the Hearing or of the entry of this Order to Show Cause need be served by the Debtors.

4. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: _____, 2010
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE