

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

In re:

BEAVEX HOLDING CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 19-10316 (\_\_\_\_)

Joint Administration Requested

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL  
ORDERS AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION  
CLAIMS FOR SHIPPER AND COMMON CARRIER OBLIGATIONS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby file this motion (this “Motion”) for entry of interim and final orders, substantially in the form attached hereto as Exhibit A (the “Proposed Interim Order”) and Exhibit B (the “Proposed Final Order,” and together with the Proposed Interim Order, the “Proposed Orders”), pursuant to sections 105, 363(b), 503, 1107, and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), (a) authorizing, but not directing, the Debtors to pay certain prepetition claims incurred for shipping and/or storing goods as necessary or appropriate to obtain the release of goods in the possession of third parties and to satisfy liens regarding amounts owed to such parties and (b) authorizing the banks and other financial institutions at which the Debtors hold accounts (collectively, the “Banks”) to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of the Debtors as to which checks are issued and

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: BeavEx Holding Corporation (7740); BeavEx Acquisition, Inc. (5497); BeavEx Incorporated (7355); JNJW Enterprises, Inc. (4963); and USXP, LLC (2997). The headquarters for the above-captioned Debtors is located at 2120 Powers Ferry Road SE, Suite 300, Atlanta, GA 30339.

authorized to be paid in accordance with this Motion. The facts and circumstances supporting this Motion are set forth in the concurrently-filed *Declaration of Donald Van der Wiel in Support of Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration"),<sup>2</sup> filed contemporaneously herewith. In further support of this Motion, the Debtors respectfully represent as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are sections 105, 363, 503, 1107, and 1108 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1(m).

### **BACKGROUND**

3. On the date hereof (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections

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

1107(a) and 1108 of the Bankruptcy Code. No official committees have been appointed in these chapter 11 cases, and no request has been made for the appointment of a trustee or examiner.

4. Additional information regarding the Debtors' business, capital structure and the circumstances leading to the filing of these chapter 11 cases is set forth in the First Day Declaration.

#### **SHIPPER AND COMMON CARRIER OBLIGATIONS**

5. In the ordinary course of business, the Debtors regularly engage certain third-party shippers and common carriers to transport their clients' goods to, from, and between terminals. In connection therewith, the Debtors incur a number of costs, including fees and expenses related to shipping and freight (the "Shipping Expenses") to third-party shippers, haulers, commercial airlines, common carriers, and other transporters (collectively, the "Shippers").

6. The Debtors transact with a number of third parties, including, but not limited to, the Shippers, that could potentially assert liens against the property of the Debtors' customers that is being shipped for amounts the Debtors owe to those third parties (the "Lien Claimants," and together with the Shippers, the "Possessory Claimants"). Delays in the payment of the Shipping Expenses with respect to goods that are in the possession of the Possessory Claimants as of the Petition Date could result in the assertion, under applicable law, of possessory liens upon the Debtors' clients' property in possession of such parties. The Debtors also rely on the Shippers for the prompt and consistent delivery of goods to, from, and between the Debtors' 67 terminals all across the country.

7. In connection with the coordination and management of the Shippers and the Debtors' independent contractor couriers (the "Contract Couriers"),<sup>3</sup> the Debtors utilize dispatch software provided by CXT Software (the "Dispatch Software"). The Dispatch Software allows the Debtors to import customers' orders and shipping requests to optimize the shipping routes and Contract Couriers' driving schedules. The Contract Couriers can download the Dispatch Software smartphone application to receive automatic updates and notifications. In addition, the Dispatch Software provides real-time GPS tracking of goods, proof of delivery notifications, and provides support for driver manifests, barcoding, chain of custody and billing control. The Debtors pay approximately \$60,000 per month in connection with the Dispatch Software (the "Software Expenses," and together with the Shipping Expenses, the "Distribution Charges").

8. The Debtors believe that payment of the Distribution Charges is necessary to ensure that the Debtors will be able to continue to perform their customer commitments and keep their distribution and supply chain intact. The Debtors' distribution network is vital to their business because customers rely on the Debtors to provide a prompt and consistent delivery of products. A supply disruption would decrease revenues, erode customer goodwill and risk dramatically reducing the value of the Debtors' assets. In addition, delays in payment of the Shipping Expenses with respect to goods that are in the possession of the Possessory Claimants could result in the assertion, under applicable law, of possessory liens upon the Debtors' property in the possession of such parties.

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<sup>3</sup> Concurrent herewith, the Debtors have filed the *Debtors' Motion for Entry of Interim and Final Orders, Pursuant to Sections 105(a), 363, 507(a)(4), 1107(a) and 1108 of the Bankruptcy Code, (I) Authorizing the Debtors to Pay Certain Prepetition Claims of Contract Couriers and Third-Party Service Providers, (II) Authorizing Banks to Honor and Process Check and Electronic Transfer Requests Related Thereto, and (III) Granting Certain Related Relief* (the "Contract Courier Motion") filed concurrently herewith. The independent contract couriers are described in further detail in the Contract Courier Motion and any relief requested with respect to the payment of independent contract couriers is requested therein. The Debtors engage the independent contract couriers to perform the vast majority of their expedited delivery business by servicing dedicated routes and supporting specific customers. The remainder of the Debtors' expedited delivery services are performed by the non-contract courier Shippers on an ad-hoc basis.

9. Accordingly, to avoid undue delay and to facilitate the continued operation of the Debtors' business, the Debtors seek immediate authority, but not direction, to pay and discharge, on a case-by-case basis, in their discretion, the Distribution Charges, including the claims of any and all potential Possessory Claimants. As of the Petition Date, the Debtors estimate that the outstanding prepetition amounts are approximately \$1.7 million for Shipping Expenses and \$220,000 for Software Expenses. All of the amounts due for Shipping Expenses and Software Expenses are presently due or will come due in the first thirty days following the Petition Date.

10. Further, the Debtors propose that, as a condition of accepting payment, a Possessory Claimant must agree to a set of conditions set forth in the "Relief Requested" section, *infra*, and the Proposed Orders. Each Possessory Claimant to be paid pursuant to the Proposed Orders shall be provided a copy of the relevant order prior to payment, and as a condition of payment, shall agree to be bound by the terms of such order. If any Possessory Claimant accepts payment and thereafter does not continue to provide services to the Debtors on Customary Trade Terms (as defined below), then any payment of the Distribution Charges made under the Proposed Orders to such Possessory Claimant would be deemed an unauthorized postpetition transfer under section 549 of the Bankruptcy Code and, therefore, would be avoidable and recoverable by the Debtors in cash upon written request, subject to a Possessory Claimant's right to contest such treatment and request that the Debtors schedule a hearing on such matter. Upon any recovery by the Debtors, the Possessory Claimant's claim would be reinstated as a prepetition claim in the amount so recovered, less the Debtors' reasonable costs in recovering such amounts.

**RELIEF REQUESTED**

11. By this Motion, the Debtors seek entry of the Proposed Orders (a) authorizing, but not requiring, the Debtors to pay, in the ordinary course of business, the Distribution Charges, consistent with the parties' customary practices in effect prior to the Petition Date, in an amount not to exceed \$685,000 on an interim basis and, in an amount not to exceed \$1.92 million; and (b) authorizing the Banks to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the Distribution Charges and to rely on the representations of the Debtors as to which checks are issued and authorized to be paid in accordance with the relief granted in connection herewith.

12. The Debtors propose that any payments made to the Possessory Claimants, on account of Shipping Expenses, pursuant to the Proposed Orders be subject to the applicable interim or final cap and the following conditions:

a. The Debtors, in their sole discretion, shall determine which parties, if any, are entitled to payment under the Proposed Orders;

b. If a Possessory Claimant accepts payment under the Proposed Orders, such party is deemed to have agreed to (i) release any liens it may have on the goods or property in its possession for which the Debtors have contracted; *provided, however*, that should such party fail promptly to release such lien and/or interest upon payment by the Debtors, any such lien and/or interest shall be deemed released and expunged, without necessity of further action, and an order on this Motion, together with proof of payment, shall be all that is required to evidence such release and expungement, and (ii) subject to subparagraph (d) below, continue to provide services to the Debtors on Customary Trade Terms during the pendency of the chapter 11 cases. "Customary Trade Terms" means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Possessory Claimant and the Debtors during the one-year period preceding the Petition Date<sup>4</sup> or (ii) such other trade terms as the Debtors and the Possessory Claimant may mutually agree upon;

c. Subject to subparagraph (d) below, if a Possessory Claimant accepts payment under the Proposed Orders and thereafter does not continue to provide goods or services

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<sup>4</sup> In the event the relationship between the party accepting payment under the Proposed Orders and the Debtors does not extend to one year preceding the Petition Date, the Customary Trade Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtors in the reasonable exercise of their business judgment.

to the Debtors on the Customary Trade Terms during the pendency of these chapter 11 cases, then (i) any payment on a prepetition claim received by such party shall be deemed to be an unauthorized voidable postpetition transfer under section 549 of the Bankruptcy Code and, therefore, recoverable by the Debtors in cash upon written request and (ii) subject to subparagraph (f) below, upon recovery by the Debtors, any such prepetition claim shall be reinstated as if the payment had not been made, less the Debtors' reasonable costs in recovering such amounts;

d. In the event of the assertion of a possessory lien against property for which the Debtors have contracted that prevents the Debtors from accessing such property without payment of the prepetition claim giving rise to the lien, the Debtors may, in their sole discretion, determine to pay the claim without regard to subparagraphs (b)(ii) and (c) above;

e. Prior to making a payment to a party under the Proposed Orders, the Debtors may, in their sole discretion, settle all or part of the prepetition claims of such party for less than their face amount, without further notice or hearing to anyone except the Debtors' prepetition secured lenders and proposed post-petition secured lender; in any event, the Debtors may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to the provisions of the Bankruptcy Code; and

f. If the Debtors seek to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (a "Request") to the Debtors to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtors received the Request, of which hearing the Debtors will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of the Court.

### **BASIS FOR RELIEF REQUESTED**

#### **A. Payment of the Distribution Charges is Appropriate Pursuant to Section 363 of the Bankruptcy Code**

13. Section 363(b) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(1). "A bankruptcy court is empowered pursuant to § 363 of the Bankruptcy Code to authorize a debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *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 authorize a contractor to pay the prepetition claims of some suppliers who were potential lien claimants because the payments were necessary to induce general contractors to release funds owed to the debtors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (Bankr. M.D. Fla. 2005) (recognizing section 363 as a source of authority and allowing payment of the prepetition claims of vendors whose supplies would take four to six weeks to replace).

14. To obtain such approval under section 363(b), “the debtor must articulate some business justification, other than mere appeasement of major creditors . . . .” *Ionosphere Clubs*, 98 B.R. at 175. Where a debtor has articulated a valid business justification for a proposed transaction, courts generally apply the business judgment rule in evaluating such transaction. *See Lange v. Schropp (In re Brook Valley VII, Joint Venture)*, 496 F.3d 892, 900 (8th Cir. 2007) (“In general, courts do not second-guess business decisions made in good faith.”); *In re ALH Holdings LLC*, 675 F. Supp. 2d 462, 477 (D. Del. 2009) (“[A] court will not disturb the business decisions of loyal and informed directors ‘if they can be attributed to any rational business purpose.’”) (quoting *Sinclair Oil Corp. v. Levien*, 280 A. 2d 717, 720 (Del. 1971)). As discussed above, the Debtors have determined, after careful consideration, that the failure to pay the Distribution Charges would likely have a material adverse impact on their business operations and, thus, their efforts to maximize the value of their estates for all stakeholders.

15. In addition, section 363(c) allows a debtor in possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips Inc.*, 29 B.R. at 395 n.2 (“Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.”).



16. Many of the Possessory Claimants possess goods that the Debtors need in order for the Debtors to continue their ongoing business operations. Indeed, the Debtors' customers specifically contract with the Debtors for the sole purpose of ensuring the safe and expedient delivery of such goods. Absent payment of the applicable Distribution Charges, the Possessory Claimants may refuse to deliver these necessary goods to the Debtors or their customers and/or may prevent the Debtors or their customers from recovering these goods. The Possessory Claimants may refuse to deliver goods in their possession to the Debtors because, under applicable state law, these Possessory Claimants may have a lien on the goods in their possession that secures the Debtors' obligations to pay for their services. Thus, the Possessory Claimants may be unwilling to release the goods in their possession to which they may be entitled to liens, because releasing possession of the goods may convert their claims against the Debtors from secured to unsecured.

17. The Debtors' inability to pay the Distribution Charges would cause a detrimental delay in the Debtors' operations and, in the event of a sufficiently substantial supply disruption, could cause a total shutdown of the Debtors' operations and trigger late delivery penalties under the Debtors' customer contracts. Because the Debtors' business depends upon providing the timely delivery of products, avoiding such a scenario is vital to the Debtors' continuing business operations and the success of these cases. The Debtors submit that the amounts of the Distribution Charges are small relative to the value that would be lost if the Debtors experienced even a minimal disruption in their operations, which would likely occur absent payment of these charges and fees.

18. In addition, because the Possessory Claimants may have secured claims against the Debtors' estates, payment of the Distribution Charges is unlikely to provide the Possessory

Claimants with any greater priority than they would otherwise have if the relief requested herein were not granted. Accordingly, the Debtors' other creditors will suffer no impairment by payment of the Distribution Charges and will benefit by the Court's empowering the Debtors to negotiate payment of the Distribution Charges to facilitate a smooth transition into bankruptcy.

19. The Debtors' payment of the Distribution Charges to obtain needed goods and to ensure delivery of such goods belonging to the Debtors' customers is an action within the ordinary course of the Debtors' business. As such, the Debtors submit that Court approval of the Debtors' payments is not necessary because of the authority granted to them by section 363(c) of the Bankruptcy Code. Nonetheless, out of an abundance of caution and to provide assurances to all interested parties, the Debtors request that the Court grant the relief requested herein and enter the Proposed Orders authorizing, but not directing, them to pay the Distribution Charges in the ordinary course of the Debtors' business.

**B. Payment of the Distribution Charges is in Furtherance of the Debtors' Fiduciary Duties Under Sections 1107(a) and 1108 of the Bankruptcy Code**

20. The Debtors, operating their businesses as debtors in possession under Bankruptcy Code sections 1107(a) and 1108, 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 duties of chapter 11 debtors in possession is the duty "to protect and preserve the estate, including an operating business's going-concern value." *Id.*

21. Courts have noted that there are instances in which debtors in possession can fulfill their fiduciary duties "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,” 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.*

22. Payment of the Distribution Charges meets each element of the *CoServ* court’s standard. First, as described above, the Possessory Claimants have possession of certain critical goods which the Debtors need to continue operations. Second, the cost of replacing such goods in the Possessory Claimants’ possession would be significantly more than the prepetition claim that the Debtors would have to pay. Additionally, any disruption in the Debtors’ distribution network would potentially devastate the Debtors’ businesses, which would cost the Debtors’ estate a substantial amount in lost revenue. Accordingly, the harm and economic disadvantage that would stem from the failure to pay any of the Distribution Charges is grossly disproportionate to the amount of the prepetition claims that would have to be paid. And, finally, with respect to each of the Distribution Charges, the Debtors have determined that, to avoid significant disruption of the Debtors’ business operations, no practical or legal alternative to payment of the Distribution Charges exists. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code through payment of the Distribution Charges.

**C. The Court May Also Authorize Payment of the Distribution Charges Pursuant to Section 105(a) of the Bankruptcy Code and the “Necessity of Payment” Doctrine**

23. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the 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). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor’s business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

24. Numerous courts have used their section 105(a) powers under the “doctrine of necessity” to authorize payment of prepetition obligations where, as here, such payment is an essential element of the preservation of the debtor in possession’s potential for rehabilitation. *See In re CoServ, L.L.C.*, 273 B.R. at 497 (reasoning that because the debtor in possession has fiduciary duties it must meet, it is logical that the bankruptcy court may “use Section 105(a) of the [Bankruptcy] Code to authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate”); *In re Synteen Techs., Inc.*, No. 00-02203-W, 2000 WL 33709667, at \*2 (Bankr. D.S.C. Apr. 14, 2000) (noting that courts have permission to “allow payment of a prepetition claim when essential to the continued operation of the debtor” (citation omitted)); *In re Just For Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (“courts have used their equitable power under section 105(a) . . . to authorize the payment of pre-petition claims when such payment is

deemed necessary to the survival of a debtor in a chapter 11 reorganization”); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“Under [section 105] the court can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *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.”).

25. The “doctrine of necessity” is frequently invoked early in reorganization cases, during the so-called “breathing spell,” when preservation of the estate is most critical and often extremely difficult. *See* 2 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 105.02[4][a] (16th ed. 2018) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately). For example, in *In re Structurlite Plastics Corp.*, the court embraced “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtor . . . .’” 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (quoting *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987)). The court explained that “a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932. Flexibility of payment is particularly critical

when the prepetition creditor provides vital goods or services to the debtor.

26. As stated above, the payment of the Distribution Charges is essential to the uninterrupted operation of the Debtors' business. In turn, the maintenance of the Debtors' business during these chapter 11 cases is crucial to the Debtors' ability to maximize value for the benefit of all stakeholders. Accordingly, this Court should exercise its equitable powers to grant the relief requested herein.

**D. The Court Should Authorize Applicable Banks to Honor Checks and Electronic Fund Transfers in Accordance with the Motion**

27. The Debtors also request the Court 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 the Proposed Orders.

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

28. Pursuant to Bankruptcy Rule 6003(b), 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." Fed. R. Bankr. P. 6003(b). The Debtors believe that, among other things, the success of their chapter 11 efforts and the ability to maximize the value of the Debtors' estates will require them to pay the Distribution Charges.

29. 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)**

30. 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 the Distribution Charges would be detrimental to the Debtors, their estates and creditors, as the Debtors’ ability to manage and run their business without any unexpected or inopportune interruptions requires, in part, that the Debtors remain current with such obligations.

31. 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).

**DEBTORS’ RESERVATION OF RIGHTS**

32. 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 and their estates, (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. The Debtors expressly reserve their rights to contest any invoice or claim with respect to any Distribution Charges in accordance with applicable law and to assume or reject any agreements with such parties in accordance with the applicable provisions of the Bankruptcy Code. Likewise, if this Court grants the relief sought

herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or waiver of the Debtors' rights to subsequently dispute such claim.

**NOTICE**

33. 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 on a consolidated basis; (v) counsel to the Debtors' prepetition and proposed postpetition secured lender; and (vi) the Debtors' banks. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
February 18, 2019

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Donald J. Bowman, Jr.*

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*Proposed Counsel for the Debtors  
and Debtors in Possession*



**EXHIBIT A**

**PROPOSED INTERIM ORDER**

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

In re:

BEAVEX HOLDING CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 19-10316 (\_\_\_)

Jointly Administered

Ref. Docket No.: \_\_\_\_

**INTERIM ORDER AUTHORIZING THE DEBTORS TO PAY CLAIMS FOR  
PREPETITION SHIPPER AND COMMON CARRIER OBLIGATIONS**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for the entry of interim and final orders, pursuant to sections 105, 363(b), 503, 1107, and 1108 of title 11 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004 (i) authorizing, but not directing, the Debtors, in their discretion, to pay Distribution Charges in the ordinary course of business and (ii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that venue of these cases and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that due and sufficient notice of the Motion has been given under the particular circumstances and that no other or further notice of the Motion need be given; and

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: BeavEx Holding Corporation (7740); BeavEx Acquisition, Inc. (5497); BeavEx Inc. (7355); JNJW Enterprises, Inc. (4963); and USXP, LLC (2997). The headquarters for the above-captioned Debtors is located at 2120 Powers Ferry Road SE, Suite 300, Atlanta, GA 30339.

<sup>2</sup> All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and upon consideration of the First Day Declaration; and a hearing having been held to consider the relief requested in the Motion; and upon the record of the hearing and all of the proceedings had before this Court; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates, their creditors and all other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; 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, to pay prepetition payments on account of the Distribution Charges in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date, in an amount not to exceed \$685,000 (the "Interim Cap") on an interim basis.
3. The Debtors are authorized, in their sole discretion, to pay the Possessory Claimants for claims on account of Shipping Expenses subject to the Interim Cap and the following terms and conditions:
  - a. The Debtors, in their sole discretion, shall determine which parties, if any, are entitled to payment under this Interim Order;
  - b. If a Possessory Claimant accepts payment under this Interim Order, such party is deemed to have agreed to (i) release any liens it may have on the goods or property in its possession for which the Debtors have contracted; *provided, however*, that should such party fail to promptly release such lien and/or interest upon payment by the Debtors, any such lien and/or interest shall be deemed released and expunged if the parties so agree or there is a further order of this Court and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtors on Customary Trade Terms during the pendency of these chapter 11 cases. "Customary Trade Terms" means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Possessory Claimant and the Debtors during the one-year

period preceding the Petition Date<sup>3</sup> or (ii) such other trade terms as the Debtors and the Possessory Claimant may mutually agree upon;

c. Subject to subparagraph (d) below, if a Possessory Claimant accepts payment under this Interim Order and thereafter does not continue to provide goods or services to the Debtors on the Customary Trade Terms during the pendency of these chapter 11 cases, then any payment such Possessory Claimant receives may be deemed a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code and the Debtors may take any and all appropriate steps to cause the Possessory Claimant to repay any payments it received to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding;

d. In the event of the assertion of a possessory lien against the Debtors' customers' property that prevents the Debtors from accessing goods or property without payment of the prepetition claim giving rise to the lien, the Debtors may, in their sole discretion, determine to pay the claim without regard to subparagraphs (b)(ii) and (c) above;

e. Prior to making a payment to a party under this Interim Order, the Debtors may, in their sole discretion, settle all or part of the prepetition claims of such party for less than their face amount, without further notice or hearing to anyone except the Debtors' prepetition secured lenders and proposed postpetition secured lender; in any event, the Debtors may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to the provisions of the Bankruptcy Code; and

f. If the Debtors seek to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (a "Request") to the Debtors to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtors received the Request, of which hearing the Debtors will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of this Court.

4. Upon the payment of any amounts pursuant to this Interim Order, any property of the Debtors' customers held by or within the control of a Shipper shall be released and delivered to its destination as directed by one or more of the Debtors consistent with their customary practices in the ordinary course of business.

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<sup>3</sup> In the event the relationship between the party accepting payment under this Interim Order and the Debtors does not extend to one year preceding the Petition Date, the Customary Trade Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtors in the reasonable exercise of their business judgment.

5. 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 Interim 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 Interim Order.

6. The Final Hearing shall take place on \_\_\_\_\_, 2019 at \_\_: \_\_ .m. (prevailing Eastern Time). Any party-in-interest objecting to the relief sought at the Final Hearing or the Proposed Final Order shall file and serve a written objection, which objection shall be served upon (i) the Debtors, 2120 Powers Ferry Road SE, Suite 300, Atlanta, GA 30339 (Attn: Donald Van der Wiel ([dvanderwiel@beavex.com](mailto:dvanderwiel@beavex.com))); (ii) counsel to the Debtors; (ii) counsel to the Debtors, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Joseph M. Barry, Esq. ([jbarry@ycst.com](mailto:jbarry@ycst.com)), Matthew B. Lunn, Esq. ([mlunn@ycst.com](mailto:mlunn@ycst.com)), and Donald J. Bowman, Jr., Esq. ([dbowman@ycst.com](mailto:dbowman@ycst.com))); (iii) counsel to the Debtors' prepetition secured lenders and proposed postpetition secured lenders, Winston Strawn, LLP, 200 Park Avenue, New York, NY 10166 (Attn. Carey D. Schreiber, Esq. ([cschreiber@winston.com](mailto:cschreiber@winston.com))) and, Ashby & Geddes, 500 Delaware Avenue, P.O. 1150, Wilmington, Delaware 19899 (Attn. Gregory Taylor, Esq. ([gtaylor@ashbygeddes.com](mailto:gtaylor@ashbygeddes.com))); and (iv) counsel to any statutorily appointed committee in the Chapter 11 Cases so as to be received no later than \_\_\_\_\_, 2019 at 4:00 p.m. (ET). If no objections to the entry of the

Proposed Final Order are timely filed, this Court may enter the Proposed Final Order without further notice or a hearing.

7. Nothing in this Interim 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 and their estates, (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, (c) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action against any Authority, or (d) shall be construed as a promise to pay a claim.

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

9. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

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

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

Dated: \_\_\_\_\_, 2019  
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**

In re:

BEAVEX HOLDING CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 19-10316 (\_\_\_)

Jointly Administered

Ref. Docket Nos.: \_\_\_ & \_\_\_\_\_

**FINAL ORDER AUTHORIZING THE DEBTORS TO PAY CLAIMS FOR  
PREPETITION SHIPPER AND COMMON CARRIER OBLIGATIONS**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”), for the entry of interim and final orders, pursuant to sections 105, 363(b), 503, 1107, and 1108 of title 11 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004 (i) authorizing, but not directing, the Debtors, in their discretion, to pay Distribution Charges in the ordinary course of business and (ii) authorizing the Banks to honor and process check and electronic transfer requests related to the foregoing; and this Court having reviewed the Motion; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012; this Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and it appearing

<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: BeavEx Holding Corporation (7740); BeavEx Acquisition, Inc. (5497); BeavEx Inc. (7355); JNJW Enterprises, Inc. (4963); and USXP, LLC (2997). The headquarters for the above-captioned Debtors is located at 2120 Powers Ferry Road SE, Suite 300, Atlanta, GA 30339.

<sup>2</sup> All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.



that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and this Court having considered the First Day Declaration; and this Court having previously entered the *Interim Order Authorizing the Debtors to Pay Claims for Prepetition Shipper and Common Carrier Obligations* [Docket No. \_\_\_]; and this Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein; and this Court having determined that the relief sought in the Motion is in the best interests of the Debtors and their estates; 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, to pay prepetition payments on account of Distribution Charges in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date, in an amount not to exceed \$1.92 million (the "Final Cap").
3. The Debtors are authorized, in their sole discretion, to pay the Possessory Claimants for claims on account of Shipping Expenses subject to the Final Cap and the following terms and conditions:
  - a. The Debtors, in their sole discretion, shall determine which parties, if any, are entitled to payment under this Final Order;
  - b. If a Possessory Claimant accepts payment under this Final Order, such party is deemed to have agreed to (i) release any liens it may have on the goods or property in its possession for which the Debtors have contracted; *provided, however*, that should such party fail to promptly release such lien and/or interest upon payment by the Debtors, any such lien and/or interest shall be deemed released and expunged if the parties so agree or there is a further order of this Court and (ii) subject to subparagraph (d) below, continue to provide goods or services to the Debtors on Customary Trade Terms during the pendency of these chapter 11 cases. "Customary Trade Terms" means (i) the most favorable trade terms and conditions, including credit terms, in effect between the Possessory Claimant and the Debtors during the one-year

period preceding the Petition Date<sup>3</sup> or (ii) such other trade terms as the Debtors and the Possessory Claimant may mutually agree upon;

c. Subject to subparagraph (d) below, if a Possessory Claimant accepts payment under this Final Order and thereafter does not continue to provide goods or services to the Debtors on the Customary Trade Terms during the pendency of these chapter 11 cases, then any payment such Possessory Claimant receives may be deemed a voidable postpetition transfer pursuant to section 549(a) of the Bankruptcy Code and the Debtors may take any and all appropriate steps to cause the Possessory Claimant to repay any payments it received to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding;

d. In the event of the assertion of a possessory lien against the Debtors' customers' property that prevents the Debtors from accessing goods or property for which they have contracted without payment of the prepetition claim giving rise to the lien, the Debtors may, in their absolute discretion, determine to pay the claim without regard to subparagraphs (b)(ii) and (c) above;

e. Prior to making a payment to a party under this Final Order, the Debtors may, in their absolute discretion, settle all or part of the prepetition claims of such party for less than their face amount, without further notice or hearing to anyone except the Debtors' prepetition secured lenders and proposed postpetition secured lender; in any event, the Debtors may elect to only pay part of a prepetition claim under the authorization requested, leaving the remainder of the claim to be addressed pursuant to the provisions of the Bankruptcy Code; and

f. If the Debtors seek to recover payments under subparagraph (c) above, nothing shall preclude a party from contesting such treatment by making a written request (a "Request") to the Debtors to schedule a hearing before this Court. If such a Request is made, the hearing on the Request will be the next scheduled hearing date not less than thirty (30) days after the Debtors received the Request, of which hearing the Debtors will provide notice to the requesting party and other interested parties in accordance with the Bankruptcy Code and the orders of this Court.

4. Upon the payment of any amounts pursuant to this Final Order, any property of the Debtors' customers held by or within the control of a Shipper shall be released and delivered to its destination as directed by one or more of the Debtors consistent with their customary practices in the ordinary course of business.

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<sup>3</sup> In the event the relationship between the party accepting payment under this Final Order and the Debtors does not extend to one year preceding the Petition Date, the Customary Trade Terms shall mean the terms that the party generally extends to its customers or such terms as are acceptable to the Debtors in the reasonable exercise of their business judgment.

5. 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 Final 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 Final Order.

6. Nothing in this Final 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 and their estates, (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, (c) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to any and all claims or causes of action against any Authority, or (d) shall be construed as a promise to pay a claim.

7. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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

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

Dated: \_\_\_\_\_, 2019  
Wilmington, Delaware

\_\_\_\_\_  
United States Bankruptcy Judge