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AND DEBTORS-IN-POSSESSION**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re: VITRO ASSET CORP., et al.,[1] Former Alleged Debtors.	§ § § § § §	Case No. 11-32600 Jointly Administered
In re: Vitro America, LLC In re: Super Sky Products, Inc. In re: Super Sky International, Inc. In re: VVP Finance Corporation Debtors.[2]	§ § § § § § § §	Chapter 11 Case No. 11-32602 Case No. 11-32604 Case No. 11-32605 Case No. 11-32611 (Jointly Administered under Case No. 11-32600)

DEBTORS' MOTION FOR ORDER APPROVING AND AUTHORIZING THE IMPLEMENTATION OF THE KEY EMPLOYEE INCENTIVE PROGRAM PURSUANT TO SECTIONS 105(A) AND 363 OF THE BANKRUPTCY CODE

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

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[1] The Former Alleged Debtors are: Vitro Packaging, LLC ("Packaging"), Vitro Chemical, Fibers and Mining, LLC ("Chemical"), VVP Auto Glass, Inc. ("Auto Glass"), Vitro Asset Corp. (f/k/a American Asset Holdings Corp.) ("Asset Corp."), Troper Services, Inc. ("Troper"), VVP Holdings, LLC ("VVP Holdings"), Amsilco Holdings, Inc. ("Amsiclo"), B.B.O. Holdings, Inc. ("*BBO Holdings*"), Binswanger Glass Company (f/k/a Troper Inc.) ("Binswanger"), Crisa Corporation ("Crisa"), V-MX Holdings, LLC (f/k/a Crisa Holdings Corp.) ("V-MX").

[2] The Debtors are: Vitro America, LLC ("Vitro America") (Case No. 10-47473), Super Sky Products, Inc. ("Super Sky Products") (Case No. 10-47475), Super Sky International, Inc. ("Super Sky International") (Case No. 10-47476), and VVP Finance Corporation ("VVP Finance") (Case No. 10-47482).

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), hereby submit this Motion (the "Motion") for Order Approving and Authorizing the Implementation of the Key Employee Incentive Program (the "KEIP") Pursuant to Sections 105(a) and 363 of the Bankruptcy Code, and respectfully state as follows:

I. JURISDICTION AND VENUE

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

II. RELIEF REQUESTED

2. By this Motion, the Debtors seek entry of an order under Bankruptcy Code sections 105(a) and 363(b)(1) (i) approving the KEIP, which consists of (a) a "Sale Bonus Plan" for certain essential non-insider employee participants and (b) an "Incentive Plan" for two key officers of the Debtors, as described below, (ii) authorizing the Debtors to implement the KEIP, and (iii) allowing all payments thereunder as administrative expenses of the estates.

III. BACKGROUND

A. Introduction

3. On November 17, 2010 (the "Petition Date"), Knighthead Master Fund, L.P., Brookville Horizons Fund, L.P., Davidson Kempner Distressed Opportunities Fund, LP, and Lord Abbett Bond-Debenture Fund, Inc. (collectively, the "Petitioning Creditors"), filed an involuntary petition against each Debtor under chapter 11 of the Bankruptcy Code (collectively, the "Involuntary Petitions").

4. On December 9, 2010, the then Alleged Debtors filed their Answer to the Involuntary Petitions, denying a number of allegations made in the Involuntary Petitions and asserting a number of affirmative defenses to the relief sought by the Petitioning Creditors.

5. On April 6, 2011 (the "Order for Relief Date"), orders for relief were entered with respect to Vitro America, Super Sky Products, Super Sky International, and VVP Finance. Since that date, the Debtors have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Debtors' chapter 11 cases.

6. On April 11, 2011, the Court entered its Order Denying Petitions for Relief Against Vitro Packaging, LLC, Vitro Chemical, Fibers and Mining, LLC, and VVP Auto Glass, Inc. and Continuing Under Advisement Status as to Petitions for Relief Against Other Alleged Debtors denying the Involuntary Petitions filed against Packing, Chemical and Auto Glass. On April 21, 2011, the Court entered its Order Denying Petitions for Relief Against Vitro Asset Corp., Troper Services, Inc., VVP Holdings, LLC, Amsilco Holdings, Inc., B.B.O. Holdings, Inc., Binswanger Glass Company, Crisa Corporation, and V-MX Holdings, LLC denying the Involuntary Petitions filed against Asset Corp., Troper, VVP Holdings, Amsilco, BBO Holdings, Binswanger, Crisa and V-MX.

7. On April 15, 2011, the United States Trustee for the Northern District of Texas (Fort Worth Division) (the "U.S. Trustee") appointed the Official Unsecured Creditors' Committee (the "Committee") in these Chapter 11 Cases pursuant to section 1102 of the Bankruptcy Code.

B. Overview of the Debtors' Corporate Structure and Businesses

8. The Debtors are indirect subsidiaries of Vitro, S.A.B., a corporation organized under the laws of Mexico. Vitro SAB is a holding company for an international enterprise (the entire Vitro SAB enterprise, including the Debtors, collectively known as "Vitro") that is the largest manufacturer of glass containers and flat glass in Mexico. Founded in 1909, Vitro has manufacturing facilities in 11 countries and distribution centers throughout the Americas and

Europe, and it exports its products to more than 50 countries worldwide. In 2010, Vitro had consolidated net sales of Ps. 23,991 million (i.e., more than $1.8 billion). As of December 31, 2010, Vitro had 16,807 employees.

9. VVP Finance and Super Sky International (collectively, the "Non-Operating Debtors")[3] have little or no third-party liabilities other than contingent and unliquidated liability, if any, under the Guarantees (as defined below) and to IFIC under the Vitro America IFIC Indemnity Agreement and the Super Sky IFIC Underwriting Agreement (both defined below). While being obligors on the Pre-Petition Loan Facility and the Guarantees (each, as defined below), the Non-Operating Debtors are either holding companies or provide certain specialized services to their affiliates and have no material ordinary course liabilities to third parties.

10. The remaining Debtors (the "Operating Debtors") consist of Vitro America and Super Sky Products. Vitro America is a leading fabricator, distributor, and installer of architectural glass and aluminum in the United States and has built its reputation by providing the highest quality products and services to meet the needs of the architect, designer, developer, and glazing contractor. With more than 20 distribution, manufacturing and fabrication facilities and 80 installation glass shops throughout the United States, Vitro America has helped construct some of the most well-known and recognizable structures in the United States, such as the iconic Vietnam Veterans Memorial in Washington, D.C., Chevron Towers (the headquarters of Chevron) in Houston, Texas, the Dallas Convention Center in Dallas, Texas, the University of North Carolina – Charlotte, in Charlotte, North Carolina, and Apple stores nationwide.

11. Similarly, Super Sky Products is the leader and a pioneer, worldwide, of custom extruded aluminum skylighting, which it designs, fabricates and installs for commercial

[3] The Non-Operating Debtors are Super Sky International and VVP Finance.

buildings and private residences. Super Sky Products is known for its beautiful work in, among others, the George Bush Presidential Library and Museum in College Station, Texas, the Palazzo in Las Vegas, Nevada, the Circus Circus Hotel & Casino in Las Vegas, Nevada, the Center for the Intrepid-Brooke Army Medical Center in Ft. Sam Houston, Texas, the Westfield Topanga Mall in Canoga Park, California, the New York Times Building, in New York, New York, and the George Foreman residence.

12. For the fiscal year ended December 31, 2010, the Debtors recorded net sales of approximately $261 million.

C. <u>Events Leading to the Bankruptcy Filing</u>

13. Vitro's financial difficulties were precipitated by the global financial crisis and severe economic recession beginning in the second half of 2008, which affected each of its major markets – Mexico, the United States, and Spain. The sharp decline in demand for new cars and trucks in the automobile industry and for new homes and buildings in the construction industry, as well as reduced beer bottle demand from one of Vitro's significant clients for glass containers, resulted in a 36.8% decline in Vitro's consolidated operating income for 2008 compared to 2007, and a further 22.3% decline for 2009 compared to 2008. Even though the economy began showing moderate signs of recovery during 2010, some of Vitro's markets are still experiencing contraction and excess capacity, including the construction sector in the United States and Spain.

14. Vitro's glass container furnaces are large consumers of natural gas, consuming approximately 20 million British Thermal Units ("<u>MMBTU</u>") in 2008 and 17 MMBTUs in 2009. Accordingly, Vitro was strongly negatively affected by a sharp price increase for natural gas in the first seven months of 2008 from $6.51 to $12.60 per MMBTU. During this period, in order to hedge against further increases in natural gas prices, Vitro entered into various derivative financial instruments that were different in characteristics and notional amounts from the

derivative contracts Vitro had historically been party to. The ensuing high volatility in commodity and currency markets in the second half of 2008[4] placed additional financial pressure on Vitro's hedging positions and forced Vitro to unwind the majority of its open positions in the fourth quarter of 2008. The unwinding of these hedging positions not only led to substantial claims, but also triggered cross-default provisions in the majority of Vitro's debt instruments, including the Indentures.

15. As a result of the factors discussed above, in February 2009, Vitro SAB stopped making interest payments on the Notes and announced its intention to restructure the Notes and certain other debt (collectively, the "Restructured Debt"),[5] including the guarantees of the Notes by its affiliates, including the Debtors (the "Note Guarantees"). Thereafter, Vitro SAB engaged in negotiations regarding a potential restructuring with various creditor constituencies, including the *ad hoc* committee of the holders of the Notes (the "Steering Committee"). Unfortunately, those negotiations did not result in an agreement, as the Steering Committee rejected three separate restructuring proposals by Vitro SAB between August 2009 and July 2010.

16. On January 4, 2010, a group of entities claiming to hold at least 25% of the outstanding principal amount of the Notes sent purported acceleration notices to Vitro SAB with respect to the 2017 Notes and the 2012 Notes, and, on April 7, 2010, the indenture trustee for the 2013 Notes sent an acceleration notice with respect to the 2013 Notes (collectively, the "Acceleration Notices"). In addition, in April 2010, Vitro SAB and certain of its Mexican subsidiaries were found liable by the Supreme Court of New York in the DFI Litigation. These

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4 Specifically, between July 2008 and December 2008, natural gas prices plummeted more than 50%, and the Mexican peso registered a 30% devaluation against the dollar, reversing the appreciation trend experienced in the first seven months of the year and making it substantially more expensive for Vitro to service its U.S. dollar-denominated debt.

5 The Restructured Debt consists of (i) $1.216 billion in outstanding principal amount under the Notes, (ii) $253 million relating to the settlement of certain derivatives-related litigation (the "DFI Litigation"), and (iii) $58.5 million of certain medium-term peso-denominated notes and other unsecured debt.

developments, among other things, led Vitro SAB to explore alternative means to implement a restructuring, such as an in-court restructuring in Mexico.

17. Accordingly, Vitro SAB formulated a new proposal (the "*Concurso* Plan") for restructuring of the Restructured Debt that (a) would be effectuated through a tender offer (the "Tender Offer") and an exchange offer and consent solicitation (the "Exchange Offer and Consent Solicitation," and, together with the Tender Offer, the "Offers") followed by a *concurso mercantil* proceeding (the "*Concurso* Proceeding") under the *Ley de Concursos Mercantiles* (the "Mexican Business Reorganization Act").

18. The Steering Committee announced its opposition to Vitro SAB's restructuring proposal, and six days prior to the launch of the Offers, issued a press release denouncing the yet-to-be-publicly-disclosed terms of the Offers as allegedly providing an "unacceptably poor economic outcome" for the holders of the Notes, and encouraged all holders of the Notes to reject the proposal.

19. As stated above, subsequently, on November 17, 2010, the Involuntary Petitions were filed in Fort Worth, Texas, against Vitro America, Super Sky International, Super Sky Products, and VVP Finance, along with eleven other alleged debtors.

D. The Debtors' Objective

20. The Debtors previously filed a *Motion, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Rules 2002, 6004, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure, for Entry of an Order: Approving the Sale of Substantially All of the Debtors' Assets* (the "Sale Motion") on April 7, 2011. The Debtors submit that the Sale is essential to stabilize the value of the Debtors' assets and to preserve the Debtors' operations.

21. The Debtors' key employees are an important element of the Debtors' efforts to maximize the value of their bankruptcy estates. Since the Petition Date, the Debtors' key

employees have been required to accept increased responsibilities without increases in their respective salaries. Given the Debtors' current situation and the burdens of bankruptcy, its management and key employees have few assurances of future employment. To realign the goals of management and certain key personnel that the Debtors have determined are critical to the continued day-to-day operations of their business and for the completion of a successful Sale, the Debtors have determined that they must provide a financial incentive to such key employees to assure them that they will be rewarded for dedicated service toward the Debtors' ultimate Sale. The Debtors have determined that they are likely to experience significant attrition if they do not implement program to incentivize these key employees to remain dedicated to their jobs despite the current situation the Debtors are in. It is only as a result of the Debtors' key employees' skills, extensive institutional, industry, systems, production and scientific knowledge, and understanding of the Debtors' infrastructure, operations, their relationships with the Debtors' customers, vendors, advisors and other employees, and their dedication and efforts in an extremely trying situation, that the Debtors are positioned to market and sell their assets.

IV. BASIS FOR RELIEF

A. The KEIP, Generally

22. The Debtors have created, with the assistance of its financial advisor, Alvarez & Marsal, a Key Employee Incentive Program (the "KEIP") designed to incentivize and properly and fairly compensate the performance of certain key personnel essential to the Debtors' contemplated bankruptcy sale process, as described above. The KEIP is a two-part program, whereby (a) fifteen vital non-insider personnel of the Debtors will be eligible to receive a percentage of their annual income upon fulfillment of certain criteria (the "Sale Bonus Plan," and employees eligible to participate therein, the "Participants"); and (b) two key officers essential to the sale process will be eligible to receive an incentive payment over and above any sale price

exceeding $44 million (the "Incentive Plan," and the officers eligible to participate therein, the "Key Participants"), each as described more fully below.

23. The Participants and Key Participants (together, the "Employees") eligible under the KEIP have been carefully selected by management as persons that are essential to the successful operation of the Debtors through the bankruptcy and sale process, and are critical to (i) maximizing the value of the Debtors' assets leading up to a section 363 sale and/or (ii) participation in and closing of a section 363 sale of substantially all of the Debtors' assets.

24. The KEIP is necessary and will benefit the Debtors' estates. As part of the Debtors' changing business environment and efforts to market and sell its assets, the Employees have been called upon to undertake additional responsibilities and expend significantly more working-hours than contemplated by the normal terms of their employment. Additional responsibilities include (or are expected to include) reviewing sale solicitation materials, preparing business plans, gathering and coordinating the dissemination of due diligence information, reviewing, commenting on and negotiating the term of any asset purchase agreement and related documents and preparation of materials required in this bankruptcy case. The efforts of these Employees have been, and continue to be, critical to the Debtors' efforts to consummate a sale of the Debtors' assets for the highest and best possible price. The KEIP will aid the Debtors' retention of the Employees and will incentivize the Employees to expend the additional efforts and time necessary to maximize the value of the Debtors' assets through a section 363 sale process.

B. <u>The Sale Bonus Plan for Participants</u>

25. The Sale Bonus Plan calls for payment of a "Sale Bonus Payment" equal to 12.5% of the annual base salary of each of the fifteen eligible Participants.

26. Each Participant is a non-insider employee of the Debtors, as that term is defined in section 101(31)(B) of the Bankruptcy Code.[6] And to maintain eligibility under the Sale Bonus Plan, the Participant must be employed by one or more of the Debtors on the date the sale of substantially all of the Debtors' assets closes

27. If a Sale Bonus Payment is earned by a Participant, such payment will be made thirty days following the closing of the sale of substantially all of the Debtors' the assets.

28. In the Debtors' business judgment, the fifteen Participants identified below have been deemed critical to the sale process. The Participants have developed extensive institutional, industry, systems, production and scientific knowledge that cannot be replaced by the Debtors and have been, and continue to be, required from the Debtors during the bankruptcy sale process. The Debtors employ approximately 1,700 employees, and only these fifteen personnel, plus the CEO and CFO, have been deemed critical key employees with critical and necessary functions that are essential to the preservation and maximization of the estate and that cannot be replaced. Notably, various management personnel senior to the Participants have not been included in the Sale Bonus Plan due to the non-essential nature of their job functions as it relates to a sale process or because they have been included in a separate incentive plan.

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[6] The Participants are not insiders of any of the Debtors, as they do not serve, nor have they ever served, as an officer, director, person in control, or relative of any such person.

29. The breakdown of the amounts each of the Sale Bonus Participants would receive are as follows:

PARTICIPANT	POTENTIAL SALE BONUS PAYMENT
Employee 1	$30,230.38
Employee 2	$26,572.75
Employee 3	$22,959.25
Employee 4	$21,249.00
Employee 5	$20,000.00
Employee 6	$17,500.00
Employee 7	$17,250.00
Employee 8	$16,484.75
Employee 9	$16,067.75
Employee 10	$14,823.13
Employee 11	$14,653.63
Employee 12	$13,750.00
Employee 13	$13,331.75
Employee 14	$11,875.00
Employee 15	$11,000.00
	$267,747.39

30. The total anticipated cost of the Sale Bonus Plan is approximately $267,747.39, which does not include applicable employer-paid taxes. Accordingly, the Debtors request authority to set aside an amount of $267,747.39 (the "Sale Bonus Payment Pool") for payment of Participants pursuant to the Sale Bonus Plan.

31. The Debtors believe that the anticipated costs associated with the Sale Bonus Plan are reasonable, modest, fully warranted and absolutely necessary. The Debtors considered a number of factors in designing the Sale Bonus Plan, including industry standards, the Debtors' historic practices, and the nature of the Debtors' business. The potential costs associated with the loss of the Participants would be far in excess of the combined costs of the Sale Bonus Plan. In addition, the benefits offered within the Sale Bonus Plan are competitive with those offered by other companies under similar circumstances. Finally, without the Sale Bonus Plan, the Debtors

believe that the Participants will in fact leave the employ of the Debtors, causing an interruption in business operations and irreversible harm to the value of the estates' assets.

32. Defections in the work force would cause the Debtors to incur significant costs in recruiting and attracting similarly qualified replacements, to the extent such replacements exist, and hiring qualified employees would be extremely difficult given that the Debtors are in bankruptcy. Loss of any of the Participants may make it impossible to conduct a competitive bidding process for the Debtors' assets and would likely negatively impact the value of the assets due to the Debtors and their creditors.

C. The Incentive Plan for Key Participants

33. The Incentive Plan is designed to provide for potential incentive payments (the "Incentive Payments") to Mr. Arturo Carrillo, President and CEO, and Mr. Ricardo Maiz, Vice President and CFO, (together, the "Key Participants"),[7] upon the closing of a sale of substantially all of the Debtors' assets.

34. Any Incentive Payments earned by the Key Participants shall be indexed to the amount of gross sale proceeds resulting from the sale of the Debtors' assets pursuant to section 363 of the Bankruptcy Code. Accordingly, to the extent that the Debtors' assets are not sold, or are not sold for an amount in excess of the $44 million, the Key Participants will not receive any Incentive Payments.

35. The Key Participants are employees who have substantial oversight and control over the Debtors' business affairs. They must be prepared to respond to inquiries from, and provide information and make management presentations to, potential bidders and financing sources relevant to the Debtors' efforts to reorganize. Moreover, the Key Participants are vital in

[7] The Key Participants are each insiders of the Debtors, as that term is defined by section 101(31)(B) of the Bankruptcy Code.

assuring operation of the Debtors' business and maintaining – and growing – the value of the Debtors' assets as it continues its chapter 11 efforts. The Key Participants will also play a critical role in supervising the sale of the Debtors' assets and winding-up the Debtors' business operations.

36. By the Incentive Plan, the Debtors seek to reward and incentivize its two most essential officers for maximizing the value of the estates via continuing their substantial efforts relating to the sales process and operating the businesses under uncertain economic and financial conditions. The Incentive Plan is thus designed to compensate the Key Participants for the additional time and effort expended in connection with selling the Debtors' assets for a price in excess of $44 million.

37. The proposed Incentive Plan is straightforward and designed to provide the Key Participants with greater compensation in return for their substantial contributions to the Debtors' estates and return to its creditors. Under the plan, the Key Participants[8] will receive payment from an "Incentive Pool," as follows:

(a) If the gross sale proceeds are less than or equal to $44 million (i.e., the "Incentive Threshold"), the Incentive Pool shall be $0.

(b) If the gross sale proceeds are greater than the Incentive Threshold but less than or equal to $50 million, the Incentive Pool shall be equal to 3.75% of the amount by which such gross sale proceeds exceed the Incentive Threshold.

(c) If the gross sale proceeds are greater than $50 million, the Incentive Pool shall be equal to the amount calculated in subparagraph (b) plus 4.25% of the amount by which such sales proceeds exceed $50 million.

[8] Mr. Carrillo will be allocated 65% of the Incentive Pool, while Mr. Maiz will be allocated 35% of the Incentive Pool.

38. Notwithstanding the actual sale amount of the Debtors' assets and the size of the Incentive Pool, in no event will a Key Participant be entitled to receive any incentive payment that exceeds two times his current base salary.[9]

39. Accordingly, the Debtors request authority to set aside an Incentive Pool in the amount of $1,020,600,[10] the maximum amount payable to the Key Participants under the Incentive Plan.

D. <u>Authority for Approving and Implementing the KEIP</u>

40. Bankruptcy Code § 363(b)(1) provides 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). The use, sale, or lease of property of the estate, other than in the ordinary course of business, is authorized when a "sound business purpose" justifies such action. *See, e.g., In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program, stated that "in determining whether to authorize the use, sale, or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions"); *see also In re Continental Air Lines*, 780 F.2d 1223, 1226 (5th Cir. 1986); *In re Quality Beverage Co.*, 181 B.R. 887, 895 (Bankr. S.D. Tex. 1995); *In re San Jacinto Glass Indus.*, 93 B.R. 934, 944 (Bankr. S.D. Tex. 1988).

41. Once a debtor articulates a valid business justification for a particular form of relief, the Court reviews the debtor's request under the "business judgment rule." The business judgment rule "is a presumption that in making a business decision the directors of a corporation

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[9] Mr. Maiz's salary is deemed to include the value of his annual expatriate package.

[10] Because the amount of the Incentive Payments are directly tied to and contingent upon the gross proceeds of a sale of substantially all of the Debtors' assets, the $1,020,600 maximum amount would only be reached upon the sale of the Debtors' assets whereby the gross proceeds amount to $74,594,969.

acted on an informal basis, in good faith and in the honest belief that the action was in the best interests of the company." *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (D. Del. 1985)).

42. The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. *See id.*; *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee's judgment concerning use of property under Bankruptcy Code section 363(b) when there is a legitimate business justification); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program, stating that "in determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions").

43. Courts have specifically found that a debtor's use of reasonable retention bonuses and other incentives to retain employees is a valid exercise of a debtor's business judgment. *See, e.g., In re Gadzooks, Inc.*, 04-31486, 2005 Bankr. LEXIS 3244 *6 (July 21, 2005) (holding that "a sound business purpose existed justifying the severance payment" under the KERP); *In re America West Airlines, Inc.*, 171 B.R. 674, 678 (Bankr. D. Ariz. 1994) (holding that it is the proper use of a debtors' business judgment to propose bonuses for employees who helped propel the debtor successfully through the bankruptcy process); *In re Interco Inc.*, 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991) (holding that "debtors' business judgment" was controlling in the approval of a "performance/retention program").

44. Moreover, section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(1).

45. As discussed above, the Debtors must implement the KEIP in order to maximize the value of their bankruptcy estates. Absent the implementation of the KEIP, the Employees, and in particular, the Participants, are likely to seek alternative employment and prematurely resign their positions with the Debtors. The Employees are highly skilled individuals, each of whom is particularly knowledgeable of the operations, management, and business concerns of the Debtors. As such, the Employees, who make the day-to-day decisions that determine the profitability of the Debtors and who interact with customers and vendors, are extremely valuable to the Debtors. Further, as a result of the filing of these bankruptcy cases, the Employees have been required to accept additional responsibilities without the certainty of future employment.

46. The loss of any of the Employees would have an adverse effect on the Debtors' business operations and the value inherent therein. This effect would be compounded by the fact that it is unlikely the Debtors could hire a comparable, competent replacement for any lost Employee, given the pending cases and timing in relation to the Debtors' asset sale.

47. In contrast to the substantial effect of the loss of any Employees, the cost of the KEIP is relatively minimal. The range of the cost of the KEIP would be no less than $267,747.39 to a maximum of no more than $1,288,347.39,[11] and $1,020,600 of this amount is directly tied to and contingent upon selling the Debtors' assets for an amount greater than $44 million. As compared to the expected value returned to the Debtors' estates upon sale of the assets (i.e., greater than $44 million), the cost of the KEIP is modest and necessary.

48. Accordingly, it is the Debtors' business judgment that they should implement the KEIP in order to maximize the value of the Debtors' bankruptcy estates, maintain uninterrupted operation of the Debtors' business, and ensure a successful exit from chapter 11.

[11] Because the amount of the Incentive Payments are directly tied to and contingent upon the gross proceeds of a sale of substantially all of the Debtors' assets, the $1,020,600 maximum amount would only be reached upon the sale of the Debtors' assets whereby the gross proceeds amount to $74,594,969.

WHEREFORE, the Debtors respectfully request that the Court (i) enter an order substantially in the form of the proposed Interim Order; (ii) after the Final Hearing, enter the Final Order substantially in the form that shall be filed with the Court; and (iii) such other and further relief as is just.

Dated: May 4, 2011

Respectfully Submitted,

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