

CRITICAL VENDOR TRADE AGREEMENTS IN CHAPTER 11 BANKRUPTCY

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INTRODUCTION

Large chapter 11 debtors often seek authorization from the bankruptcy court at the outset of the case to pay the pre-petition unsecured claims of certain key vendors. The theory behind these requests is that payment of these "critical vendor" claims is necessary to ensure the vendor's future performance, without which the debtor may be unable to continue operating during the bankruptcy process.¹

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¹ See *In re Kmart Corp.*, 359 F.3d 866, 868 (7th Cir. 2004) (concluding "[t]he theory behind the request is that some suppliers may be unwilling to do business with a customer that is behind in payment, and, if it

Using a comprehensive sample of 63 chapter 11 cases filed in the year 2013 formed by merging a variety of data sources, this Article demonstrates that the use of critical vendor orders remains prevalent in chapter 11 bankruptcy; critical vendor motions were filed—and approved—in close to 75% of the sample cases.² This result is consistent with the notion that a chapter 11 debtor's ability to obtain favorable trade terms from key vendors at the outset of the case is often critical to the survival and success of a struggling business.

The outline of this Article is as follows. Part I provides a brief review of the institutional and legal background regarding critical vendor orders and trade agreements, and presents an overview of critical vendors' participation in the chapter 11 process. Part II describes the data collection process, explaining the methodology employed and the general conclusions arrived at therefrom. Part III identifies the various term features and provisions of the critical vendor trade agreements examined, discussing the variations among them and the potential rationales for such discrepancies. Finally, this Article culminates with a sample trade agreement annexed hereto as Exhibit A.

I. INSTITUTIONAL BACKGROUND: THE USE OF CRITICAL VENDOR ORDERS AND TRADE AGREEMENTS IN CHAPTER 11

The Bankruptcy Code (the "Code") does not expressly provide for the payment of so-called "critical vendor" claims.³ In fact, the Code generally prohibits the payment of pre-petition claims, except through a plan of reorganization or liquidation.⁴ To that end, the Code establishes a specific distribution scheme for the equitable allocation of property among the debtor's creditors.⁵ This ensures that similarly situated creditors are treated equally, which is one of the fundamental purposes of the Code.⁶ The payment of pre-petition claims prior to confirmation of a plan therefore runs contrary to the Code's stated priority and distribution scheme.⁷

cannot obtain the merchandise that its own customers have come to expect, a firm such as Kmart may be unable to carry on, injuring all of its creditors").

² See generally *infra* Exhibit B.

³ Chapter 11 debtors frequently identify certain of their creditors as "critical" when they believe that the creditors' continued post-petition business is essential to the debtors' ability to continue operating during the chapter 11 reorganization process.

⁴ Various sections of the Code address how a chapter 11 debtor's pre-petition obligations are satisfied through a plan. See, e.g., 11 U.S.C. §§ 1123, 1124, 1129(b) (2012).

⁵ Section 507 of the Code establishes a priority to the payment of certain categories of unsecured claims, such as wages and taxes. See *id.* § 507. Apart from specific grants of priority status, the Code dictates that the remaining categories of creditors who hold pre-petition unsecured debts will share equally in any distributions made from the debtor's estate. See generally Jay M. Goffman & Grenville R. Day, *First Day Motions and Orders in Large Chapter 11 Cases: (Critical Vendor, DIP Financing and Cash Management Issues)*, 12 J. BANKR. L. & PRAC. 59 (2003).

⁶ For example, only similarly situated creditors may be placed in the same class under a chapter 11 plan of reorganization. See 11 U.S.C. § 1122(a). Furthermore, the same treatment must be afforded to each and every member of that class, unless a creditor who is receiving less favorable treatment consents otherwise. *Id.* § 1123(a)(4).

⁷ See *id.* §§ 507, 522(c).

Nevertheless, critical vendor motions are commonly filed, and approved, on the first day of a debtor's chapter 11 case.⁸ Bankruptcy courts regularly grant such orders in an exercise of their discretion, with the goal of facilitating the financial restructuring of the debtor company. As such, motions for critical vendor orders embody the conflict between two of the primary goals of chapter 11 bankruptcy: facilitating reorganization and treating similarly situated creditors equally.

Notwithstanding this conflict, bankruptcy courts regularly grant critical vendor motions at the outset of a chapter 11 case as part of so-called "first day" relief.⁹ Debtors often file several motions on the first day of their chapter 11 case, seeking authority from the court to continue certain practices to ensure their smooth transition into bankruptcy.¹⁰ For example, debtors often seek to continue, in the ordinary course of business, their existing insurance policies, employee compensation and benefit programs, and cash management system. As part of this relief, debtors request court authorization to pay any pre-petition amounts that fall in these categories, such as unpaid wages or insurance premiums, to ensure that there is no disruption to these essential programs once the chapter 11 case commences. Such requests generally are not controversial.

In contrast, critical vendor motions are often subject to careful scrutiny by creditors and other parties in interest. To obtain this relief, the debtor must demonstrate that paying these claims is necessary to the debtor's ability to continue operating while in bankruptcy.¹¹ Chapter 11 debtors therefore rely on business justifications and equity based arguments when seeking to pay pre-petition claims to specific vendors.¹² Frequently, debtors argue that losing these creditors' services or products would be fatal to the debtor's business.¹³ The theory behind these requests is that payment of pre-petition critical vendor claims maximizes the value of the debtor's estate to the benefit of all creditors because "without an order

⁸ See *infra* Exhibit C (detailing content and term features of critical vendor orders approved in 47 chapter 11 cases filed during 2013).

⁹ See *infra* Exhibit C.

¹⁰ "First day issues are generally those that require immediate attention at the beginning of a case to allow a debtor to continue to operate its business and preserve its going concern value." Goffman & Day, *supra* note 5, at 59.

¹¹ "The rationale for payment has been that paying certain critical vendors will allow the business to continue, thereby benefiting all creditors by maximizing the value of assets." Tina M. Sutorius, *Are Certain Creditors Too Big (or Important) to Fail?*, 6 BROOK. J. CORP. FIN. & COM. L. 263, 266 (2011).

¹² See *infra* Part I.A (discussing legal bases that bankruptcy courts rely upon in granting critical vendor motions).

¹³ For instance, a debtor's reorganization may depend on goods and services supplied by one or a few key vendors. See, e.g., *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (concluding that debtor retailer "cannot survive unless it has name brand sneakers and apparel to sell in its stores" because its customers expect certain name-brand goods). Other times, a debtor's inability to substitute a vendor can be based on specialized knowledge, special relationships, or long lead times. A debtor may not be able to locate adequate substitute goods simply due to the time constraints posed by the chapter 11 process. Therefore, the failure to pay a pre-petition claim could force the debtor's liquidation. See Travis N. Turner, *Kmart and Beyond: A Critical Look at Critical Vendor Orders and the Doctrine of Necessity*, 63 WASH. & LEE L. REV. 431, 437-38 (2006).

approving financing for critical vendors, for example, the debtor might collapse before reorganization can [even] occur."¹⁴

In certain instances, a vendor may be subject to an existing contract with the debtor, in which case the debtor may seek to condition payment of a pre-petition claim on the vendor's performance under the terms of the existing contract. However, in many instances, a vendor will have no legal obligation to continue providing the debtor with goods or services post-petition, and the debtor will have no other source available to provide these necessary goods or services. If the vendor is not contractually obligated to continue performance, and if alternative sources are not readily available, then it may be necessary for the debtor to pay pre-petition amounts owed to the vendor at the outset of the chapter 11 case in order to ensure the vendor's future performance.¹⁵

A. Legal Basis for Critical Vendor Motions

To obtain court authorization to pay certain vendors before paying other unsecured creditors, debtors rely on section 105(a) of the Code, section 363(b) of the Code, and the "doctrine of necessity," which is derived from the bankruptcy courts' inherent equitable powers.¹⁶ First, section 105(a) of the Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Code."¹⁷ In the context of "first day" relief, courts have noted that use of their equitable powers "to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept."¹⁸ Such relief will generally be

¹⁴ Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 574 n.8 (3d Cir. 2003). "The survival of the company is beneficial not only to the debtor, but to creditors as well, because the going-concern value of a corporation may exceed the liquidation value by a large margin." Bruce A. Henoch, *Postpetition Financing: Is There Life After Debt?*, 8 BANKR. DEV. J. 575, 577 (1991).

¹⁵ As detailed in Exhibit B, courts often impose caps on the total amount that can be spent to satisfy critical vendor payments. See *infra* Exhibit B. Also included in Exhibit B is a column entitled, "Claims Pool," wherein this author has attempted to identify whether there exists a correlation between these critical vendor payment caps and the total claims pool. See also *infra* note 66.

¹⁶ See 11 U.S.C. §§ 105(a), 363(b) (2012). It is important to note that particular types of claims, which are often included in critical vendor orders, have additional, independent legal bases that justify their payment at the outset of the chapter 11 case. For example, section 503(b)(9) claims are entitled to priority treatment under the Code. See *id.* § 503(b)(9) (providing priority treatment to pre-petition claims for goods received by the debtor in the ordinary course of business during the 20-day period prior to the petition date). Additionally, shipping and warehouse claims may give rise to statutory liens: state law generally gives shippers, haulers, and warehousemen possessory liens on property in their possession to secure payment of their fees. See U.C.C. § 7-307 (2003). Under 11 U.S.C. § 362(b)(3), perfection of such liens or interests, to the extent consistent with section 546(b), is expressly excluded from the automatic stay of section 362. Consequently, notwithstanding the automatic stay, shippers and other distributors could perfect and assert liens against a debtor's property if their pre-petition claims are not paid.

¹⁷ See 11 U.S.C. § 105(a) (granting bankruptcy courts broad equitable powers over administration of cases).

¹⁸ *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (explaining Supreme Court has used "doctrine of necessity"). See *In re Just for Feet, Inc.*, 242 B.R. at 824 ("Section 105(a) of the Code provides a statutory basis for the payment of pre-petition claims."). But see *In re Kmart Corp.*, 359 F.3d 866,

granted if the bankruptcy court determines that payment of pre-petition claims satisfies the two central policies of chapter 11: maximizing recovery for creditors and preserving the going-concern value of the debtor's estate.¹⁹

Second, bankruptcy courts may authorize payment of pre-petition obligations under section 363(b) of the Code when the debtor can demonstrate a sound business justification for doing so.²⁰ Section 363(b) provides that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."²¹ This decision must be based upon the sound business judgment of the debtor: "where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct."²² It is a well-settled principle that a debtor in possession has a fiduciary obligation to preserve the value of the debtor's estate to maximize recoveries for the debtor's creditors. Therefore, debtors argue that preserving key business relationships, particularly through the use of critical vendor orders, is often essential to maximizing the going-concern value of the debtor's business.²³

Third, debtors often rely on the "doctrine of necessity."²⁴ The "doctrine of necessity" is a judge-made rule—a creation of equity—that is usually cited as a complement to the bankruptcy court's section 105(a) equitable powers.²⁵ This doctrine is based on the common law "necessity of payment" rule, first articulated by the Supreme Court in *Miltenberger v. Logansport Railway*.²⁶ In the context of

871 (7th Cir. 2004) (expressly rejecting the notion that section 105(a) allows for payment of pre-petition critical vendor claims).

¹⁹ "[T]he paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor." *In re Ionosphere Clubs*, 98 B.R. at 176.

²⁰ See, e.g., *Comm. of Equity. Sec. Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, 1070 (2d Cir. 1983) ("[T]here must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b)."). See also *In re Chateaugay Corp.*, 90 B.R. 279, 286 (S.D.N.Y. 1987) (holding that rigidly adhering to the priorities contained in section 507 "would be inconsistent with the fundamental purpose of reorganization and of the Act's grant of equity powers to bankruptcy courts, which 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"); *In re Ionosphere Clubs*, 98 B.R. at 175; *In re Enron Corp.*, 335 B.R. 22, 27–28 (Bankr. S.D.N.Y. 2005).

²¹ 11 U.S.C. § 363(b)(1).

²² *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

²³ See, e.g., *Debtors' Mot. for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Suppliers, Freight Carriers and Section 503(b)(9) Claimants* ¶ 33, *In re Sch. Specialty, Inc.*, No. 13–10125 (Bankr. D. Del. Jan. 28, 2013).

²⁴ "This rule recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor." *In re Ionosphere Clubs*, 98 B.R. at 176 (extending the necessity of payment rule to an airline reorganization).

²⁵ "While this doctrine was not codified in the Bankruptcy Code, courts have used their equitable power under section 105(a) of the Code 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 Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999).

²⁶ 106 U.S. 286, 311 (1882) ("Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of property, for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property, under the

"first day" relief, courts will permit payment of certain pre-petition claims at the outset of a case when it is necessary to realize the goal of chapter 11—a successful reorganization.²⁷ Thus, as stated by the Third Circuit, courts may authorize such payment when there exists "the possibility that the creditor will employ an immediate economic sanction, failing such payment."²⁸

B. Trade Agreements

In practice, debtors may require that vendors agree to continue supplying the debtor with goods and/or services post-petition pursuant to a "trade agreement" as a condition to receiving a critical vendor payment. "A trade agreement may take the form of a separate written agreement between the debtor and the vendor or may come into existence by virtue of the terms of the critical vendor order and the vendor's acceptance of the critical vendor payment."²⁹ Regardless of its form, however, failure to comply with a trade agreement may result in the critical vendor payment being subject to avoidance as an unauthorized post-petition transfer pursuant to section 549 of the Code.³⁰

Typically, a trade agreement will require a vendor to continue providing the chapter 11 debtor with goods or services in accordance with "customary trade terms." The definition of "customary trade terms" varies from case to case. Generally speaking, however, debtors will require that critical vendors commit to providing trade terms that are better or at least as favorable as the terms that were in effect between the parties prior to the petition date. Trade agreements often include terms that govern the following: credit limits, pricing, cash discounts, timing of payments, allowances, rebates, and normal product mix and availability.³¹ The purpose of these agreements is to ensure that the justification for making these

order of the court, with a priority of lien."). Since the enactment of the 1978 Bankruptcy Code, courts have extended this common law doctrine beyond just the railroad context. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 176 (extending the necessity of payment rule to an airline reorganization); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) ("[T]he '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 shall have been paid.").

²⁷ *See supra* Part I.

²⁸ *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d at 581.

²⁹ *See generally* Gregory J. Mascitti, *The Springing Avoidance Action: Critical Vendor Orders, Trade Agreements, and 11 U.S.C. § 549*, 4TH ANN. MID-ATL. BANKR. WORKSHOP 612, 613 (2008) (discussing issues vendors should consider when applying for critical vendor status).

³⁰ 11 U.S.C. § 549 (2006) (permitting court to avoid transfer that is not authorized by Bankruptcy Code or court order). *See, e.g., In re Meridian Auto. Sys.-Composites Operations, Inc. (In re Meridian)*, 372 B.R. 710, 719-23 (Bankr. D. Del. 2007) (because order authorizing critical vendor payment was conditioned on extending trade and payment terms, vendor's refusal to abide by the terms of the agreement left it vulnerable to an avoidance of that payment).

³¹ *See, e.g., Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers, Ex. A*, at 2-4, *In re ATLS Acquisitions, LLC*, No. 13-10262-LSS (Bankr. D. Del. Apr. 4, 2013) (providing example of trade agreement with critical vendor detailing amounts to be paid, credit to be extended, and allowing remedies in case of breach by either side).

critical vendor payments, *i.e.*, that the vendor continue to work with the debtor and thereby avoid disrupting the operation of the debtor's business, is actually satisfied.

C. Compliance Issues

Research reveals that compliance issues in the context of critical vendor orders and trade agreements are seldom litigated.³² Nevertheless, there is one decision wherein a bankruptcy court ordered the disgorgement of a critical vendor payment due to the vendor's failure to comply with the agreed upon terms of a trade agreement.³³

In *In re Meridian Automotive Systems*, the chapter 11 debtor, Meridian Automotive Systems, Inc. ("Meridian"), filed a motion with the Bankruptcy Court for the District of Delaware seeking to compel one of its critical vendors, Plastech Engineered Products, Inc. ("Plastech"), to comply with the terms of the critical vendor order.³⁴ Pursuant to a first day critical vendor order, Meridian paid Plastech \$1.25 million on account of the vendor's pre-petition claims.³⁵ In exchange, Plastech agreed to be bound by and to continue supplying parts to Meridian in accordance with "Customary Trade Terms."³⁶ The parties entered into a written agreement (the "Trade Agreement") embodying the terms of the order, which identified "Customary Trade Terms" (including pricing and timing of payments) as those "most favorable to the Debtors and in effect between such Critical Vendor and the Debtors on a historical basis for the period within one-hundred twenty (120) days of the Petition Date, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor."³⁷

Approximately one year after signing the Trade Agreement, while Meridian was still in bankruptcy and before confirmation of any plan of reorganization, Plastech sought to increase its prices.³⁸ When Meridian rejected its demands for price increases, Plastech ceased its deliveries to Meridian. Meridian subsequently sent a letter to Plastech asserting that Plastech's refusal to supply service parts to

³² See Turner, *supra* note 13, at 441 (explaining critical vendor orders, their roles in bankruptcy proceedings, and market forces revolving around their use); See also Jon Fisher & Justin Wolbert, *The Story of Kmart's Reorganization*, UNIV. OF TENN. COLL. OF LAW 1, 39 (May 4, 2011) (reviewing Kmart's bankruptcy proceeding and role of critical vendors theory).

³³ See *In re Meridian*, 372 B.R. at 712.

³⁴ See generally Mot. Of Reorganized Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders at 1, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007) (moving pursuant to 11 U.S.C. section 105(a)).

³⁵ See *id.* ¶ 8 ("Under the Trade Agreement, Meridian paid Plastech \$1,250,000 on account of then-outstanding invoices for goods Plastech supplied to Meridian prior to the Petition Date[.]").

³⁶ See Final Order Authorizing The Payment Of Prepetition Claims Of Critical Vendors And Service Providers at 3, ¶ (b), *In re Meridian Auto. Sys., Inc.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Sept. 17, 2007).

³⁷ See *id.* at 3, ¶ (b).

³⁸ See Mot. Of Reorganized Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders ¶ 9, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007) (noting that Plastech sought a 250% price increase in 2005 and another 55% price increase in 2006).

Meridian constituted a willful breach of its obligations under the Trade Agreement and, "[a]s a result of such breach, pursuant to paragraph 5 of the Critical Vendor Agreement, Plastech is obligated to immediately return the [Trade] Payment to Meridian."³⁹ When Plastech refused, Meridian filed a motion with the bankruptcy court seeking an order to compel disgorgement of the \$1.25 million critical vendor payment that Plastech had received on the grounds that Plastech failed to comply with the terms of the Trade Agreement.⁴⁰

Plastech argued that neither the Trade Agreement nor the critical vendor order "expressly stated the actual price at which the product was to be sold or that prices could not be renegotiated."⁴¹ Accordingly, Plastech argued, it was permitted to request a price increase pursuant to the parties' Customary Trade Terms.⁴² The bankruptcy court disagreed and instead found that Plastech's request for a price increase "was exactly what the Trade Agreement and Critical Vendor Orders sought to bar."⁴³ Specifically, the Trade Agreement required that during the course of the bankruptcy case, Plastech provide Meridian with products at the same prices that had been in effect for the one-hundred and twenty day period prior to the petition date.⁴⁴

Plastech further argued that Meridian was not entitled to repayment of the \$1.25 million because the Trade Agreement was not terminated in accordance with the critical vendor order.⁴⁵ Plastech cited the parties' continued performance as evidence that the Trade Agreement was not properly terminated.⁴⁶ The Trade Agreement and the critical vendor order provided two instances in which Plastech could be required to return the critical vendor payment: (1) where its participation was terminated on notice from Meridian, or (2) where it refused to supply goods in accordance with the parties' Customary Trade Terms.⁴⁷ The bankruptcy court found that both circumstances were present: that Plastech refused to supply goods to Meridian in accordance with the parties' Customary Trade Terms, and that Meridian

³⁹ See *In re Meridian Auto. Sys.-Composite Operations, Inc.*, 372 B.R. 710, 715 (Bankr. D. Del. 2007) (alleging breach of contract and return of payment).

⁴⁰ *Id.* (seeking a court order to compel repayment due to failure to comply with Trade Agreement terms).

⁴¹ *Id.* at 716 (stating Trade Agreement did not allow renegotiation of product sold or price).

⁴² See Reply Trial Br. Of Plastech Engineered Products, Inc. In Opp'n To The Mot. Of Reorganized Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders at 29, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007).

⁴³ *In re Meridian*, 372 B.R. at 717 (holding Plastech was barred from seeking price increase pursuant to the Trade Agreement and Critical Vendors Order).

⁴⁴ See Final Order Authorizing The Payment Of Prepetition Claims Of Critical Vendors And Service Providers at 3, ¶ (b), *In re Meridian Auto. Sys., Inc.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Sept. 17, 2007).

⁴⁵ See Reply Trial Br. Of Plastech Engineered Products, Inc. In Opp'n To The Mot. Of Reorganized Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders at 15, *In re Meridian Automotive Systems-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007).

⁴⁶ *Id.* at 8-10.

⁴⁷ See *In re Meridian Auto. Sys.-Composites Operations*, 372 B.R. 710, 719-20 (Bankr. D. Del. 2007) (finding Meridian terminated agreement in accordance with terms of agreement and ordering supplier to return payment).

had properly terminated the Trade Agreement by providing Plastech with written notice of its defaults.⁴⁸ Although Plastech asserted that it was entitled to thirty days to cure the default, neither the Trade Agreement nor the Critical Vendor Order contained such a provision.⁴⁹ To the contrary, the Critical Vendor Order provided that a Trade Agreement is terminated "on the date the Debtors deliver notice to the Critical Vendor that the Critical Vendor has not complied with the terms and provisions of the Trade Agreement or has failed to continue to provide Customary Trade Terms to the Debtors."⁵⁰

Furthermore, Plastech unsuccessfully argued that because termination of the Trade Agreement was consensual, Meridian was therefore precluded from seeking such repayment, citing to the fact that there existed no provision requiring repayment upon a consensual termination.⁵¹ The court rejected this argument, noting that nowhere was a distinction made between consensual and non-consensual termination.⁵² Moreover, the court reasoned that if it were to accept Plastech's argument, then any defaulting critical vendor could avoid the penalty of returning its critical vendor payment by consenting to termination of the trade agreement.⁵³

Notwithstanding the sound logic of the *Meridian* case, it is the only reported decision this author has located regarding compliance with a critical vendor trade agreement—despite the fact that such agreements are prevalent in chapter 11 practice, as confirmed by this study. This Article will consider possible reasons for this in the sections below.

II. SAMPLE AND DATA

A. Sample Overview

The data that informs the analysis contained in this Article is based upon an examination of 63 chapter 11 cases filed in the year 2013.⁵⁴ The docket of each case

⁴⁸ See *id.* at 720 (finding Meridian terminated agreement in accordance with terms of agreement and ordering supplier to return payment).

⁴⁹ Unlike any other trade agreement examined, the trade agreement in *In re Meridian* contained a cure provision in the event of a debtor breach, but not a vendor breach, of the trade agreement.

⁵⁰ See Final Order Authorizing The Payment Of Prepetition Claims Of Critical Vendors And Service Providers at 3–4, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007).

⁵¹ See Reply Trial Br. Of Plastech Engineered Products, Inc. In Opp'n To The Mot. Of Reorganized Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders at 9, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Jan. 23, 2007).

⁵² See Order Denying Emergency Mot. Of Plastech Engineered Products, Inc., Pursuant To Fed. R. Bankr. P. 8005 And 8011, For A Stay Of Order Granting The Mot. Of Meridian Automotive Systems, Inc. To Compel Compliance With The Terms Of The Critical Vendor Orders Pending Appeal Compelling Compliance With Critical Vendor Orders, *In re Meridian Auto. Sys.-Composites Operations, Inc.*, No. 05-11168 (Bankr. D. Del. Sept. 17, 2007).

⁵³ See *id.*

⁵⁴ This sample is not intended to be a comprehensive examination of all 8,980 chapter 11 filings in 2013. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, U.S. BANKRUPTCY COURTS: Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12 Month Period Ending December 31,

was examined to determine whether the chapter 11 debtor filed a "critical vendor motion" as part of its first day pleadings. In cases where a critical vendor motion was filed (collectively, the "critical vendor cases"), all related orders and documents thereafter filed with the bankruptcy court were closely scrutinized and the content of each carefully studied.

This survey reveals that healthcare, manufacturing, and publishing were the biggest industries of concern regarding insolvency in 2013. The following industries have the highest representation in the sample: healthcare (10 cases), manufacturing (9 cases), and publishing (7 cases). Table 1 presents industry information for all 63 cases included in this sample.⁵⁵

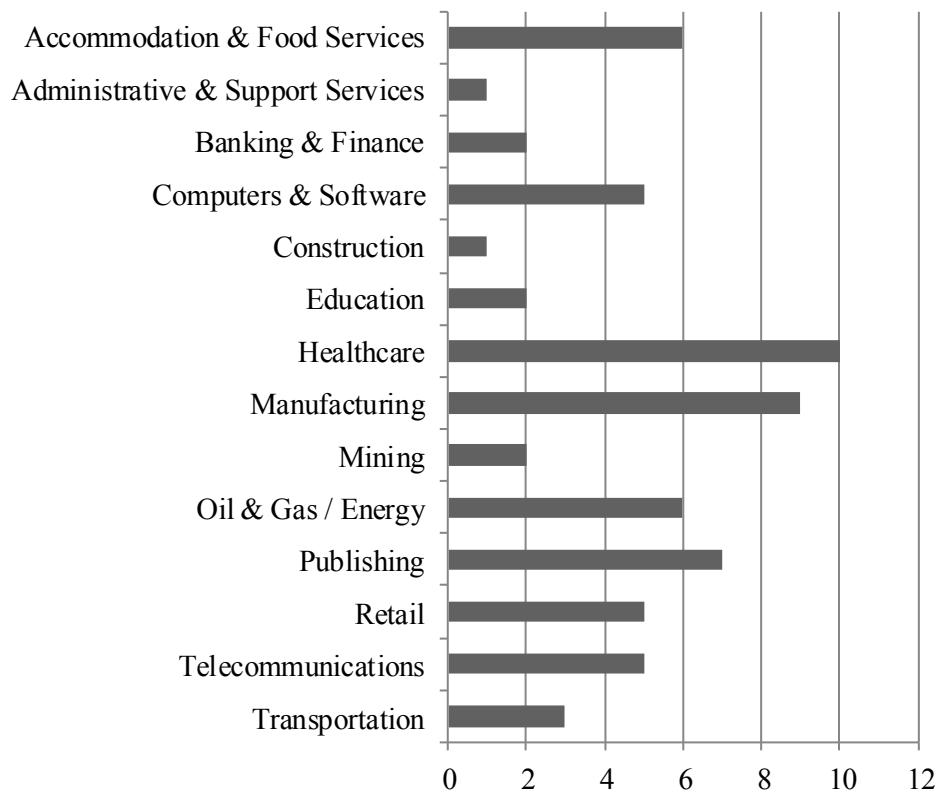
Of the 63 chapter 11 cases examined, critical vendor motions were filed in all but 16 cases. As such, this study confirms that critical vendor relief is commonly sought in large chapter 11 filings. Moreover, approximately 70% of those cases in which a critical vendor motion was

2013, at Table F-2, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf.

Rather, this survey focuses on larger 2013 chapter 11 bankruptcies, including the ten largest 2013 filings: Cengage Learning, Inc., Dex One Corp., Anchor Bancorp, SuperMedia, Central European Distribution Corp., Revel AC, GateHouse Media, RDA Holding, Exide Technologies, and Longview Power. *See Bankruptcy & Restructuring 2013 Year End Review: Largest Filings*, at 8, www.bloombergbrief.com. This Article focuses on large chapter 11 filings because the issue of critical vendor relief is most prevalent in those filings with substantial asset liability. This is evidenced by the fact that in the ten largest 2013 chapter 11 filings, a critical vendor motion was filed and approved in 80% of those cases.

⁵⁵ The following industries were represented in this survey: administrative and support services (1); accommodation and support services (6); banking and finance (2); computer and software (5); construction (1); education (2); healthcare and medical (10); manufacturing (9); mining (2); oil and gas (6); publishing (7); retail (5); telecommunications (5); and transportation (3). Industry classifications for purposes of this study were determined with reference to the Internal Revenue Service's U.S. Corporation Income Tax Return "principal business activity codes." *See* U.S. Corporation Income Tax Return, Instructions for Form 1120 (2014).

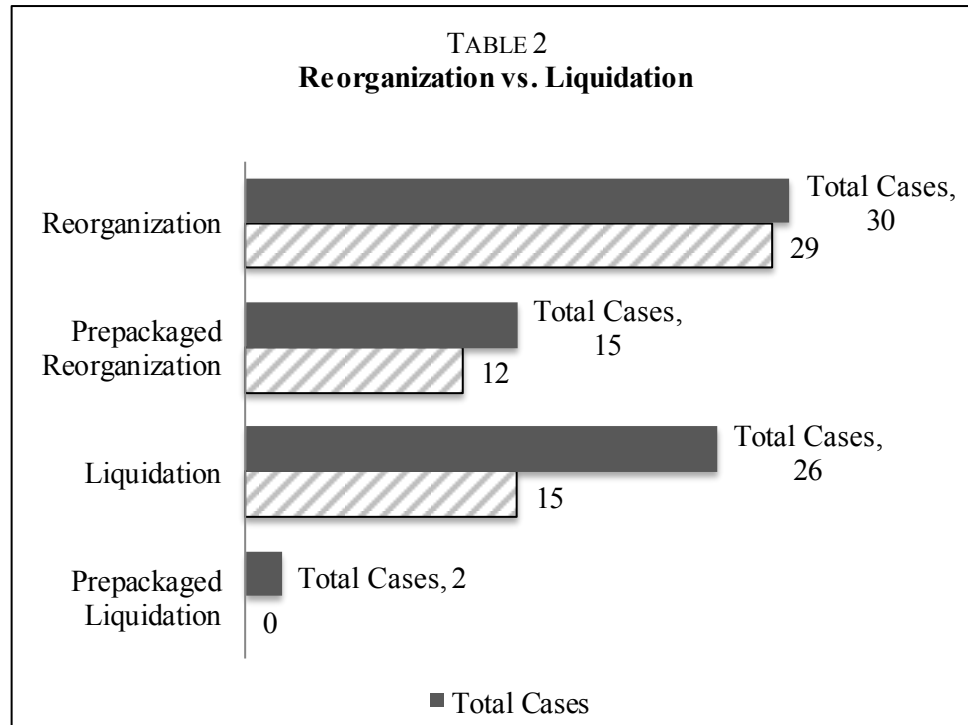
TABLE 1
2013 Chapter 11 Filings by Industry



not filed resulted in liquidation, and approximately 20% resulted in confirmation of a prepackaged plan of reorganization.⁵⁶ These findings are unsurprising. First, a company that files for chapter 11 bankruptcy intending to liquidate is not generally interested in the continued operation of its business. As such, the necessity for critical vendor relief is simply not present in such circumstances. Second, prepackaged reorganizations typically involve the restructuring of senior debt, while unsecured creditors ultimately get paid in full. Therefore, since unsecured creditors ride through and will be paid in the normal course, there is no need for critical vendor relief. Table 2, displayed below, identifies the outcome—liquidation or reorganization—for each of the 63 cases studied pursuant to this survey.⁵⁷

⁵⁶ In 3 of the 16 cases in which no critical vendor motion was filed, a prepackaged plan of reorganization was approved before the close of the year 2014. See Table 2, "Liquidation vs. Reorganization." See also *In re Anchor BanCorp Wis. LLC*, No. 13-14003 (Bankr. W.D. Wis. Aug. 30, 2013); *In re Cent. Eur. Distrib. Corp.*, No. 13-10738 (Bankr. D. Del. May 13, 2013); *In re Edu. Holdings I, Inc.*, No. 13-10101 (Bankr. D. Del. Mar. 7, 2013).

⁵⁷ For purposes of Table 2, "liquidation" includes the sale of substantially all assets in bankruptcy.



Each critical vendor motion filed by a chapter 11 debtor in the 63 cases examined in this sample was approved by the bankruptcy court.⁵⁸ In the critical vendor cases, the provisions and content of each order were carefully scrutinized for purposes of this Article. Exhibit C of this Article provides a chart summarizing the content of each provision contained in the critical vendor cases studied. This sample reveals that the features of critical vendor orders and trade agreements utilized in large chapter 11 bankruptcies are standardized, but only to an extent.⁵⁹ Terms features that vary from case to case are discussed in detail in Part III of this Article.

B. Sample Formation

This sample contains 2013 chapter 11 cases filed with the following three claims agents: Kurtzman Carson Consultants (kccclcc.net), The Garden City Group,

⁵⁸ Objections to the debtor's critical vendor motion, though overruled by the bankruptcy court, were filed in 4 of the 60 cases studied. See *In re Goldking Holdings, LLC*, No. 13-37200 (Bankr. D. Del. Oct. 31, 2013); *In re ATLS Acquisitions, LLC*, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013); *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Jan. 29, 2013); *In re Atari, Inc.*, No. 13-10176 (Bankr. S.D.N.Y. Jan. 21, 2013).

⁵⁹ See discussion *infra* Part III.

Inc. (gcginc.com), and Epiq Systems, Inc. (epiqsystems.com).⁶⁰ These three claims agents were singled out in 2013 as leading claims agents in large chapter 11 cases; they have collectively served for most major chapter 11 filings in recent years, including, for example, Lehman Brothers Holdings, Washington Mutual, Motors Liquidation Co., and WorldCom.⁶¹

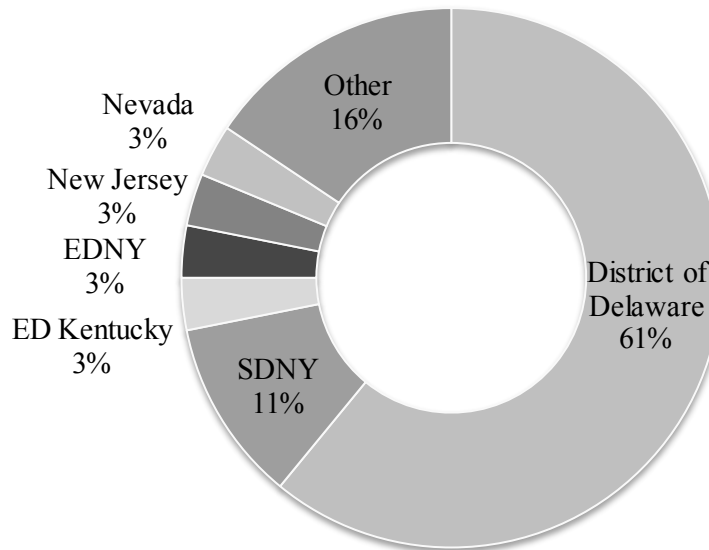
The websites maintained by such claims agents provide information about chapter 11 bankruptcy cases, including basic information about the cases, the date of filing,⁶² the type of filing, the complete court docket, and the outcome and duration of the chapter 11 process. Such information was subsequently crosschecked with Bloomberg Law and Public Access to Court Electronic Records ("PACER") whenever possible. Additionally, the information contained in this Article was supplemented at times with searches performed on Westlaw and LexisNexis.

⁶⁰ Five of the 63 cases studied did not employ one of the three above listed claims agents. As such, information regarding the four following cases was gathered via Bloomberg Law; the claims agents in these four cases were either Donlin Recano & Co., BMC Group, or Prime Clerk. See *In re PMGI Holdings, Inc.*, No. 13-12404 (Bankr. D. Del. Sept. 17, 2013); *In re Cengage Learning, Inc.*, No. 13-44106 (Bankr. E.D.N.Y. Jul. 2, 2013); *In re Conexant Sys., Inc.*, No. 13-10367 (Bankr. D. Del. Feb. 28, 2013); *In re Atari, Inc.*, No. 13-10176 (Bankr. S.D.N.Y. Jan. 21, 2013).

⁶¹ *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009) (handled by The Garden City Group, Inc., with pre-bankruptcy assets totaling \$91 billion); *In re Wash. Mutual, Inc.*, No. 08-12229 (Bankr. D. Del. Sept. 26, 2008) (handled by Kurtzman Carson Consultants, with pre-bankruptcy assets totaling \$327.9 billion); *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Sept. 15, 2008) (handled by Epiq Sys., Inc., with pre-bankruptcy assets totaling \$691 billion); *In re WorldCom, Inc.*, No. 02-13533 (Bankr. S.D.N.Y. Jul. 21, 2002) (handled by Epiq Systems, Inc., with pre-bankruptcy assets totaling \$103.9 billion).

⁶² This study uses the filing dates of parent companies in the event that there are also filings by subsidiaries. In practice, such cases typically get consolidated in the same court. Such "related filings" were crosschecked using either Bloomberg Law or PACER.

TABLE 4
2013 Chapter 11 Filings by District



Critical vendor motions were filed in all but 16 of the 63 cases included in this sample.⁶³ For the 47 cases in which a critical vendor motion was approved by the bankruptcy court, the content of each order and trade agreement was examined for the following term features: historical basis; customary trade terms; vendor and debtor breach provisions; debtor's ability to declare critical vendor payment a section 549 voidable post-petition transfer; continuing jurisdiction with the bankruptcy court; duration of the agreement; provisions providing for reinstatement of the vendor agreement; incorporation of sample trade agreements; vendor default cure provisions; consultation rights of the Official Committee of Unsecured Creditors; and provisions requiring the debtor to maintain a list of its critical vendors payments.⁶⁴ Exhibit B presents an overview of the sample findings for each

⁶³ The 16 cases in which the chapter 11 debtor did not file a critical vendor motion were excluded from all tables with the once exception of Exhibit B; Exhibit B provides an overview of the sample findings for all cases studied. These 16 cases were excluded from the remaining tables and charts contained herein because they focus on the terms features of critical vendor orders and trade agreements, and none of these 16 cases included such an order or agreement.

⁶⁴ For purposes of the analysis contained herein, "PACA (Perishable Agricultural Commodities Act) Claims" and "Customer Programs" are not included as "Critical Vendor Claims." PACA claims were excluded from this survey because the legal bases upon which courts grant debtors permission to pay these

case examined, while Exhibit C of this Article provides a chart detailing the term features of each critical vendor trade agreement examined.⁶⁵

III. TRADE AGREEMENTS: TERM FEATURES⁶⁶

There exists considerable variation among the specific features of trade agreement provisions, as explained in detail below.

A. Identifying Critical Vendors

This survey reveals that it is not standard chapter 11 practice for a debtor to identify by name those suppliers it deems to be "critical vendors" for purposes of its critical vendor motion—in only 4 of the critical vendor cases were such vendors specifically identified by name.⁶⁷ For example, the critical vendor order issued in *In re Simply Wheelz LLC* provided a list of the debtor's critical vendors, which was annexed to the order as "Exhibit 1."⁶⁸ Similarly, in *In re AppleILLINOIS, LLC*, the identity and amount to be paid to the debtor's four "critical vendors" was included in

pre-petition obligations fall outside the typical legal justification relied upon by courts when authorizing critical vendor relief. *See* discussion *supra* Part I.A (examining legal bases employed to justify granting critical vendor relief to chapter 11 debtors). Moreover, customer programs were excluded from the category of "critical vendors" for purposes of this study because such relief is often granted without a monetary cap or threshold; therefore, including such customer obligations as critical vendor claims would have skewed the calculations contained herein.

⁶⁵ It would be interesting to note what percentage of total unsecured debt and total trade debt is attributable to critical vendor claims. Attempts were made to obtain this information for purposes of this study. *See infra* Exhibit B ("Claims Pool"). However, accurate information about unsecured claims pools is generally not known until after the claims resolution process concludes, which can be several years after a company first enters bankruptcy. Nevertheless, this is an important factor to consider when analyzing critical vendor practice.

⁶⁶ Exhibit C provides a comprehensive overview of the trade agreement provisions and terms that were carefully examined for purposes of this study. The sample reveals that there is little variation among many of the term features contained in these agreements. For instance, every critical vendor order and trade agreement examined contained a provision providing for the continuing jurisdiction of the bankruptcy court over any and all issues that may arise in connection with these critical vendor orders, including compliance matters. *See, e.g.*, Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 21, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013) ("This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this order."). Another standard term in the context of trade agreements as revealed by this study is a provision providing for waiver by the vendor of any preferential transfer claims in the event the vendor received transfers from the debtor within the 90 days preceding the petition date.

⁶⁷ *See In re Simply Wheelz LLC*, No. 13-03332 (Bankr. S.D. Miss. Dec. 6, 2013); *In re RIH Acquisitions NJ, LLC*, No. 13-34483 (Bankr. D.N.J. Dec. 2, 2013) (identifying critical vendors in annexed "Verified Application"); *In re AppleILLINOIS, LLC*, No. 13-20723 (Bankr. E.D. Ky. May 1, 2013); *In re Trinity Coal Corp.*, No. 50364 (Bankr. E.D. Ky. Mar. 4, 2013).

⁶⁸ *See* Final Order On Debtor's Emergency Mot. For Mot. Authorizing Debtor To Pay Certain Prepetition Obligations To Critical Vendors, Ex. 1, *In re Simply Wheelz LLC*, No. 13-03332 (Bankr. S.D. Miss. Dec. 6, 2013).

the text of the order itself.⁶⁹ Nor is it common to spell out the factors or characteristics of a "critical vendor."⁷⁰

Comment: A chapter 11 debtor's preference not to disclose publically the list of its so-called "critical vendors" arguably provides more leverage for the debtor during negotiations with its other vendors; it maximizes the debtor's flexibility in determining which suppliers get the benefit of critical vendor status.

B. Historical Basis

Table 3, provided below, displays the content of the historical basis provisions for each trade agreements examined. A historical basis provision in a critical vendor agreement specifies a pre-petition period of time that will be used as a reference to establish the governing trade terms between the vendor and debtor for purposes of the critical vendor agreement. This study reveals that debtors use one of the four following pre-petition periods of time as historical bases for their trade agreements: 60 days, 120 days, 180 days, or one year.⁷¹ In addition, 13 of the agreements examined herein stated, in general terms, that the period of time "prior to the petition date" would be used to establish the historical basis.⁷² The remaining 18 trade agreements examined in this study failed to reference any historical basis for purposes of establishing the terms of the critical vendor agreement.

⁶⁹ See Order Granting Debtor's Mot. For An Order Authorizing Payments To Certain Prepetition Critical Trade Vendors ¶ 2, *In re Apple* ILLINOIS, LLC, No. 13-20723 (Bankr. E.D. Ky. May 1, 2013).

⁷⁰ However, 3 critical vendor orders examined pursuant to this survey did identify specific factors that the chapter 11 debtor should consider in determining which suppliers are to receive critical vendor status. The following is an excerpt from the Final Order issued by the bankruptcy court in *In re ATLS Acquisitions*:

The Debtors' determination of who is a Critical Vendor shall take into account, among other things, (a) whether the vendor in question is a "sole-source" or "limited source" provider, (b) whether the Debtors receive advantageous pricing or other terms from a vendor such that replacing the vendor postpetition would result in significantly higher costs to the Debtors, (c) the overall impact on the Debtors' operations if the vendor ceased or delayed shipments, and/or (d) whether the vendor might be able to obtain (or have obtained) mechanics liens, possessory liens, shippers liens or similar state law trade liens on property necessary to the Debtors' ongoing operations.

Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers ¶ 4, *In re ATLS Acquisitions*, LLC, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013); see Final Order Pursuant To 11 U.S.C. §§ 105(a) And 363(b) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors And Other Critical Vendors, And (II) Authorizing And Direction Financial Institutions To Honor And Process Related Checks And Transfers, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013). A similar provision was also included in paragraph two of the Final Order issued by the bankruptcy court in *In re Green Field Energy Servs., Inc.*, No. 13-12783 (Bankr. D. Del. Nov. 26, 2013).

⁷¹ Sixteen of the trade agreements studied herein employed one of these four time periods as its historical basis.

⁷² See, e.g., Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers, Ex. A, *In re ATLS Acquisitions*, LLC, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013).

Of the 29 agreements that reference a pre-petition period of time for purposes of establishing the governing trade terms of the critical vendor agreement, 66% used an exact number—either 60 days, 120 days, 180 days, or one year—as opposed to a more general reference to the terms that governed the relationship between the parties prior to the petition date.⁷³ Specifically, one trade agreement referenced 60 days prior to the petition date as its historical basis,⁷⁴ six referenced 120 days,⁷⁵ five referenced 180 days,⁷⁶ and three referenced one year.⁷⁷

⁷³ Sixteen agreements stated an exact numerical period of time—either 60 days, 120 days, 180 days, or one year—as the historical basis. Thirteen trade agreements simply referred to the terms that were in effect prior to the petition date.

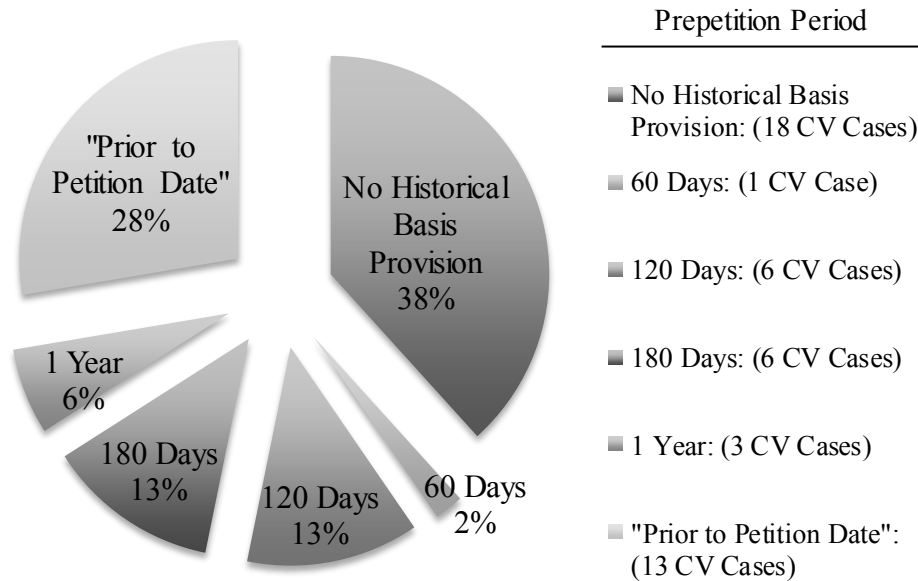
⁷⁴ See Final Order (I) Under 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers And (II) Under 11 U.S.C. §§ 105(a), 363(c) And 504(b)(1)(A) And Fed. R. Bankr. P. 6003 Confirming Administrative Expense Priority Status Of Debtors' Undisputed Obligations For Postpetition Delivery Of Goods And Services Suppliers Of Goods Entitled To Administrative Priority, Ex. C, "Trade Agreement", *In re OnCure Holdings, Inc.*, No. 13-11540 (Bankr. D. Del. Jul. 24, 2013).

⁷⁵ See Final Order Authorizing The Debtors To Pay Trade Vendor Claims In The Ordinary Course Of Business ¶ 2(c), *In re Excel Mar. Carriers, Ltd.*, No. 13-23060 (Bankr. S.D.N.Y. Aug. 5, 2013); Final Order Under U.S.C. §§ 105(A), 363(B), 364(B), 1107(A) And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of (I) Certain Prepetition Shipping, Warehousing And Related Claims, And (II) Certain Prepetition Import And Export Claims, *In re NE OPCO, Inc.*, No. 13-11483 (Bankr. D. Del. Jul. 11, 2013); Final Order Authorizing Debtors To Pay Prepetition Claims For Certain Critical Vendors And Lien Claimants ¶ 3(B), *In re TPO Holdings, Inc.*, No. 13-11327 (Bankr. D. Del. June 17, 2013); Final Order Pursuant To 11 U.S.C. §§ 105(A) And 363(B) (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors [Sic] And Other Critical Vendors, And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers at 2, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013); Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Critical Vendors, Foreign Suppliers, Freight Carriers And Section 503(B)(9) Claimants ¶ 6(B), *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Feb. 25, 2013).

⁷⁶ See Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers at 2, *In re OCZ Tech. Grp., Inc.*, No. 13-13126 (Bankr. D. Del. Dec. 19, 2013); Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(A), 363(B), 1107(A), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 3, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013); Final Order Granting Debtors' Mot. For Order Pursuant To Bankruptcy Code Section 105(A), 363(B), 1107(A), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 3, *In re Synagro Techs., Inc.*, No. 11041 (Bankr. D. Del. May 23, 2013); Final Order (I) Authorizing, But Not Directing Debtors To Pay Prepetition Claims Of Critical Vendors And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers ¶ 7, *In re Geokinetics Inc.*, No. 13-10472 (Bankr. D. Del. Apr. 2, 2013); Final Order (I) Authorizing But Not Directing, The Debtors To Pay Certain Necessary Prepetition Amounts Owed With Respect To (A) Shippers And Lien Claimants, (B) Insurance Programs, (C) Taxes, And (D) Essential Vendors And (II) Authorizing And Directing Financial Institutions To Receive, Process, Honor, And Pay All Checks Issued And Electronic Payment Requests Made Relating To The Foregoing At The Debtors' Direction, *In re Rodeo Creek Gold Inc.*, No. 13-50301 (Bankr. D. Nev. Mar. 29, 2013); Final Order Authorizing, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code, Payment Of Certain Prepetition Claims Of Critical Vendors, *In re Ormet Corp.*, No. 13-10334 (Bankr. D. Del. Mar. 20, 2013).

⁷⁷ See Order Pursuant to 11 U.S.C. §§ 105(a), 363(b), and 503(b)(9) (I) Authorizing Debtors To Pay Certain Prepetition Claims of 503(b)(9) Claimants, Lien Claimants, and PACA Vendors and (II) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers ¶ 2, *In re Global Aviation Holdings, Inc.*, No. 13-12945 (Bankr. D. Del. Dec. 9, 2013); Final Order, Pursuant To Bankruptcy Code Sections 363(B), 503(B)(9), And 105(A) And Bankruptcy Rules 6003 And 6004, Authorizing (A) Debtors To Pay The Prepetition Claims Of Certain Critical Domestic And Foreign Vendors And Administrative

TABLE 3
Historical Basis Provisions



In those trade agreements that used a specific pre-petition period of time as the historical basis, a handful provided that in the event the relationship between the debtor and vendor does not extend to the stated duration of time prior to the petition date, then an alternative period of time would be used to determine the historical basis for purposes of the trade agreement. For instance, the critical vendor order issued in *In re Excel Maritime Carriers, Ltd.* provided for the following: "In the event that the relationship between a Vendor accepting payment under this Order and the Debtors does not extend to 120 days before the Petition Date, the Customary Terms shall mean the terms that the Vendor generally extends to its customers or such terms as are acceptable to the Debtors in the reasonable exercise

Claimholders And (B) Financial Institutions To Honor And Process Prepetition Checks And Transfers To Certain Critical Vendors ¶ 3, *In re Furniture Brands Int'l, Inc.*, No. 13-12329 (Bankr. D. Del. Sept. 30, 2013); Supplement To Final Order Pursuant To Bankruptcy Code Sections 363(B) And 105(A) Authorizing (I) The Debtors To Pay The Prepetition Claims Of Certain Critical Vendors And Administrative Claimholders, And (II) Financial Institutions To Honor And Process Prepetition Checks And Transfers To Certain Critical Vendors And Administrative Claimholders at 1, *In re Rotech Healthcare, Inc.*, No. 13-10741 (Bankr. D. Del. May 16, 2013).

of their business judgment."⁷⁸ A provision similar to this is included in the Sample Trade Agreement appearing at the conclusion of this Article.⁷⁹

Comment: In most instances, the greater the historical basis, the more advantageous it is for the chapter 11 debtor. A company's course of dealings with vendors might change immediately prior to its entry into bankruptcy, when the debtor company is in distress. Therefore, as the company approaches bankruptcy, vendors and customers are likely to make terms more onerous for the debtor. As such, the greater the historical basis, the more likely it is that the trade terms will reflect the normalized course of dealings between the debtor and the vendor.

C. Vendor Breach Provisions

More than 60% of the trade agreements examined herein contain a provision detailing what is to happen in the event a vendor breaches the terms of the critical vendor agreement.⁸⁰ Of those provisions, 36% (17 of the total 47 trade agreements studied) include a provision providing that, in the event a vendor refuses to continue supplying goods or services to the debtor in accordance with the agreed upon trade terms, the debtor may declare the critical vendor payment a voidable post-petition transfer pursuant to section 549(a) of the Bankruptcy Code.⁸¹ These provisions further provide that the parties are to be returned to their original positions (*i.e.*, the positions they held immediately prior to entry of the critical vendor order), by reinstating the critical vendor claim as a general unsecured claim and demanding that the vendor immediately return the critical vendor payment to the debtor's estate.⁸²

In addition to the 17 trade agreements that contained a provision allowing the debtor to declare a critical vendor payment a section 549 post-petition transfer in the event of a vendor breach, another 12 trade agreements included a more generalized vendor breach provision.⁸³ For instance, the critical vendor order in *In*

⁷⁸ Final Order Authorizing The Debtors To Pay Trade Vendor Claims In The Ordinary Course Of Business ¶ 2(c), *In re Excel Mar. Carriers Ltd.*, Case No. 13-23060 (Bankr. S.D.N.Y. Aug. 5, 2013).

⁷⁹ See *infra* Exhibit A note 124.

⁸⁰ Of the 47 trade agreements and critical vendor orders examined herein, 29 included vendor breach provisions. See Exhibit C ("Vendor Breach Provision").

⁸¹ See 11 U.S.C. § 549(a) (2012). While 17 of the trade agreements examined contain a provision that specifically references section 549 by name, an additional 9 agreements reference it in sum and substance. For example, in *In re Ormet Corp.*, paragraph twelve of the Final Order authorizing critical vendor payments states that execution of trade agreement is not a waiver, by the debtor, of any cause of action including avoidance actions. See *In re Ormet Corp.*, No. 13-10334 (Bankr. D. Del. Mar. 20, 2013). As such, approximately 55% of the trade agreements which include a vendor breach provision do, either directly or in substance, state that the debtor, in the event of such a breach, may declare the critical vendor payment a voidable post-petition transfer pursuant to section 549(a) of the Code.

⁸² "In sum, the Debtors have the ability, in the event of a breach of a Vendor Agreement, to return the parties to their positions immediately before the entry of the order." Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants, Ex. 1: Procurement Policy ¶ (d), *In re Conexant Sys., Inc.*, 13-10367 (Bankr. D. Del. Mar. 1, 2013).

⁸³ These vendor breach provisions failed to specifically reference section 549 of the Code. While section 549 is arguably the only section of the Code that is applicable in regards to a debtor's available remedies in

re Rural/Metro Corp. contained a provision stating that "[t]he execution of a Trade Agreement by the Debtors shall not be declared a waiver of any other cause of action, including avoidance actions which may be held by the Debtors."⁸⁴ In *In re OCZ Technology Group, Inc.*, the critical vendor order specified that if a vendor refused to supply goods and/or services to the debtors pursuant to customary trade terms, the debtors "reserve their rights to take any and all actions necessary to return the parties to the positions they held immediately prior to the entry of this Order with respect to all prepetition claims."⁸⁵

Comment: Despite the frequency with which such language is included in a critical vendor order, as noted above, it appears that a critical vendor's breath is rarely litigated. Query whether this means that vendors always comply with the terms of critical vendor trade agreements, or whether debtors simply choose not to litigate disputes that arise therefrom for business or other reasons.

D. Debtor Breach Provisions

Only two of the critical vendor cases examined contained a trade agreement provision detailing what to do in the event of a debtor breach.⁸⁶ For instance, in *In re OCZ Technologies Group, Inc.*, the sample trade agreement provided that, if the debtor breaches the terms of the trade agreement, the vendor (1) "shall have no obligation to supply goods and/or services to the Company on Customary Trade Terms . . . until the Company cures such default," (2) "shall have the right to terminate this Agreement upon written notice to the Company detailing the Company's defaults (which the Company shall have the right to dispute)," and (3) in the event that the debtor fails "to cure such default within five (5) business days of such notice," the vendor "may retain all sums paid to it hereunder on account of its

the event of a vendor breach, failure to explicitly include this provision is of no consequence provided that the debtor has reserved all of its right in the event of such breach. The inclusion of a specific section 549 post-petition transfer provision is therefore a drafting, not a substantive choice.

⁸⁴ Final Order, Pursuant To Sections 105(a), 363(b), 503(b) And 507(a) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority ¶ 15, *In re Rural/Metro Corp.*, No. 13-11952 (Bankr. D. Del. Aug. 26, 2013). The critical vendor order in *In re School Specialty, Inc.* contained a similar provision: "The execution of a Trade Agreement by the Debtors shall not be declared a waiver of any cause of action, including any avoidance action that may be held by the Debtors." Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Critical Vendors, Foreign Suppliers, Freight Carriers And Section 503(b)(9) Claimants ¶ 11, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Jan 29, 2013).

⁸⁵ Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers ¶ 6, *In re OCZ Tech. Grp., Inc.*, No. 13-13126 (Bankr. D. Del. Dec. 19, 2013).

⁸⁶ See Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers, Ex. C ¶ (g), *In re OCZ Tech. Grp., Inc.*, No. 13-13126 (Bankr. D. Del. Dec. 19, 2013); Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 8, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013).

Critical Vendor Claim."⁸⁷ The sample trade agreement annexed to the debtor's critical vendor motion in *In re Exide Technologies, Inc.* contained an identical provision.⁸⁸

Comment: This asymmetry in breach provisions may be due to the fact that these agreements are designed primarily to benefit debtors, and may be reflective of the fact that sample agreements, attached to debtors' motions, are drafts proposed by debtors without input from creditors.

E. Reinstatement of Trade Agreement

Only eight of the total forty-seven trade agreements studied included a provision providing for the debtor's reinstatement of a trade agreement where the agreement was previously terminated by the debtor due to a vendor's alleged breach of the agreed upon trade terms.⁸⁹ However, in the eight trade agreements that did contain such a provision, the terms and wording of each were substantially similar.

The critical vendor orders issued in the following seven cases contained a reinstatement provision that was identical in form and substance: *Exide Technologies*, *Trinity Coal*, *Synagro Technologies*, *OCZ Technology*, *Geokinetics*, *Green Field Energy*, and *RDA Holding*. Each provision provided that the debtor may reinstate the trade agreement upon one of the following three occurrences: (1) after notice and a hearing following a motion from the critical vendor, the debtor's original decision to terminate the trade agreement due to a vendor breach is subsequently reversed by the bankruptcy court for good cause after it is shown that the determination was materially incorrect; (2) the underlying default is fully cured by the vendor no later than five business days following the debtor's notification to the vendor that a default has occurred; or (3) the debtor reaches a favorable alternative agreement with the vendor.⁹⁰ Critical vendor orders in the remaining two

⁸⁷ See Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers, Ex. C ¶ (g), *In re OCZ Tech. Grp., Inc.*, No. 13-13126 (Bankr. D. Del. Dec. 19, 2013).

⁸⁸ See Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors, Ex. A "Form of Trade Agreement" ¶ 7, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013).

⁸⁹ See, e.g., Final Order Granting Debtors' Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 5, *In re Synagro Techs., Inc.*, No. 11041 (Bankr. D. Del. May 23, 2013); see also Final Order Authorizing (I) Payment Of Certain Pre-Relief Claims Of Critical Vendors, And (II) Financial Institutions To Honor And Process Related Checks And Transfers ¶ 6, *In re Trinity Coal Corp.*, No. 50364 (Bankr. E.D. Ky. Mar. 4, 2013).

⁹⁰ See Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 7, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013); Final Order Granting Debtors' Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 5, *In re Synagro Techs., Inc.*, No. 11041 (Bankr. D. Del. May 23, 2013); Final Order (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Claims of Critical Vendors And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers ¶ 9, *In re Geokinetics Inc.*, No. 13-10472 (Bankr. D. Del. Apr. 2, 2013); Final

cases included a reinstatement provision that contemplated only the latter two occurrences.⁹¹

F. Consultation Rights of Official Committee of Unsecured Creditors

In *In re Trinity Coal Corp.*, the debtors were permitted to make critical vendor payments only "upon receiving the consent for such payments from counsel to the Official Committee of Unsecured Creditors in the Chapter 11 Cases."⁹² Similarly, in *In re GMX Resources Inc.*, the critical vendor order contained a provision dictating that the debtor, prior to making a critical vendor payment, provide counsel for the Official Committee of Unsecured Creditors with the name of the vendor, the amount of the anticipated payment, and the debtor's business justification for making such payment.⁹³ Furthermore, this provision provided that if the committee served a written objection on the debtor within three business days of receiving the debtor's request, the debtor could not proceed with making the payment without court approval.⁹⁴

However, in all other critical vendor orders that stipulated that the debtor must consult with the Official Committee of Unsecured Creditors with respect to future critical vendor payments, none specified that the debtor must receive actual consent prior to making such payment.⁹⁵ As such, use of the word "consult" as it appears in most trade agreements and critical vendor orders examined pursuant to this survey

Order Pursuant To 11 U.S.C. §§ 105(a) And 363(b) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors And Other Critical Vendors, And (II) Authorizing And Direction Financial Institutions To Honor And Process Related Checks And Transfers at 5, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013); Final Order Authorizing (I) Payment Of Certain Pre-Relief Claims Of Critical Vendors, And (II) Financial Institutions To Honor And Process Related Checks And Transfers ¶ 6, *In re Trinity Coal Corp.*, No. 50364 (Bankr. E.D. Ky. Mar. 4, 2013).

⁹¹ See Final Order, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority ¶ 6, *In re Rural/Metro Corp.*, No. 13-11952 (Bankr. D. Del. Aug. 26, 2013); Final Order (I) Under 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers And (II) Under 11 U.S.C. §§ 105(a), 363(c) And 504(b)(1)(A) And Fed. R. Bankr. P. 6003 Confirming Administrative Expense Priority Status Of Debtors' Undisputed Obligations For Postpetition Delivery Of Goods And Services Suppliers Of Goods Entitled To Administrative Priority ¶ 6, *In re OnCure Holdings, Inc.*, No. 13-11540 (Bankr. D. Del. Jul. 24, 2013).

⁹² See Final Order Authorizing (I) Payment Of Certain Pre-Relief Claims Of Critical Vendors, And (II) Financial Institutions To Honor And Process Related Checks And Transfers ¶ 2, *In re Trinity Coal Corp.*, No. 50364 (Bankr. E.D. Ky. Apr. 3, 2013).

⁹³ See Final Order Granting Mot. For Authority To Pay In The Ordinary Course (I) Undisputed Prepetition Joint Interest Billings And Other Obligations Owed Under Oil & Gas Leases; (II) Undisputed Prepetition Claims Subject To Statutory Liens; (III) Undisputed Obligations Or Taxes Owed To Governmental Authorities; And (IV) Certain Critical Vendors Relating To Oil And Gas Operations ¶ 2, *In re GMX Res., Inc.*, No. 13-11456 (Bankr. W.D. Okla. May 2, 2013).

⁹⁴ *Id.* ("The Debtors shall bear the burden of proof on the necessity of making such payment under applicable legal and business standards.").

⁹⁵ See, e.g., Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Critical Vendors, Foreign Suppliers, Freight Carriers And Section 503(b)(9) Claimants ¶ 8, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Feb. 25, 2013).

seems to operate as the functional equivalent of simply providing notice to the committee prior to making any critical vendor payment.

Comment: As the representative for unsecured creditors as a whole, the committee has an interest in ensuring that funds are used to benefit all creditors; as such, oversight in this context seems appropriate. However, a consent right might reduce a debtor's flexibility to the detriment of the debtor's business.

G. Disclosing Debtor's List of Critical Vendor Payments

Eighteen critical vendor agreements require that the debtor (1) maintain a summary list of any and all critical vendor payments made, and (2) provide such list to parties such as the Office of the United States Trustee, counsel to the debtor's proposed post-petition secured lenders, counsel to the debtor's pre-petition lenders, and counsel to any statutory committee appointed.⁹⁶ The information debtors are required to disclose pursuant to these provisions generally includes the following: the identity of the critical vendor, the goods and/or services provided by the vendor, and the amount paid to the vendor.⁹⁷

According to the trade agreements examined pursuant to this sample, these provisions require that the debtor provide a list of such critical vendor payments on either a biweekly,⁹⁸ monthly,⁹⁸ or bimonthly⁹⁹ basis. Fifty percent of these

⁹⁶ Six of the 17 trade agreements contained a provision requiring that the debtor disclose updated lists of its critical vendor payments when possible. In contrast, 4 of these 17 trade agreements required that the debtor only disclose this list to the committee and U.S. Trustee, while 4 required the disclosure of such list by the debtor to only the creditors' committee. One possible explanation for the exclusion of lenders from these provisions is that the lenders are otherwise receiving this information, for they receive regular reports on the debtor's cash payments. As such, their inclusion in this provision is thereby rendered unnecessary. The following 6 trade agreements included the debtor's lenders in this provision. *See* Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers ¶ 9, *In re* OCZ Tech. Grp., Inc., No. 13-13126 (Bankr. D. Del. Dec. 19, 2013); Final Order, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority ¶ 7, *In re* Rural/Metro Corp., No. 13-11952 (Bankr. D. Del. Aug. 26, 2013); Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 14, *In re* Exide Techs., Inc., No. 13-11482 (Bankr. D. Del. Jul. 10, 2013); Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers ¶ 5, *In re* ATLS Acquisitions, LLC, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013); Final Order (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Claims Of Critical Vendors And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers ¶ 13, *In re* Geokinetics Inc., No. 13-10472 (Bankr. D. Del. Apr. 2, 2013); Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants, Ex. 1: Procurement Policy ¶ (e), *In re* Conexant Sys., Inc., No. 13-10367 (Bankr. D. Del. Feb. 28, 2013).

⁹⁷ *See, e.g.*, Bankr. E.D. Mich. R. 4001-4 (stipulating information debtors must include when making critical vendor petition claims).

⁹⁸ *See* Interim Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants, Ex. 1: Procurement Policy ¶ (e), *In re* Conexant Sys., Inc., No. 13-10367 (Bankr. D. Del. Feb. 28, 2013).

agreements stated that the debtor must provide this list on a biweekly basis.¹⁰⁰ Two agreements required that the debtor "provide a confidential report of payments and the recipients thereof under this Order every three (3) days" to the United States Trustee.¹⁰¹ Moreover, at least one trade agreement stipulated that the debtor need only provide such a list upon request by the Office of the United States Trustee or professionals retained by the unsecured creditors committee.¹⁰²

At least six of the trade agreements require that the debtor provide the Official Committee of Unsecured Creditors with notice of its critical vendor payments.¹⁰³

⁹⁹ See Final Order (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Claims of Critical Vendors And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers ¶ 13, *In re Geokinetics Inc.*, 13-10472 (Bankr. D. Del. Apr. 2, 2013); Order (A) Authorizing Debtors To Pay Prepetition Claims Of Foreign Vendors, And (B) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers ¶ 6, *In re Geokinetics Inc.*, 13-10472 (Bankr. D. Del. Mar. 12, 2013).

¹⁰⁰ See, e.g., Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers ¶ 9, *In re OCZ Tech. Grp., Inc.*, No. 13-13126 (Bankr. D. Del. Dec. 19, 2013); Final Order (A) Authorizing RIH Acquisitions NJ, LLC To Pay Or Honor Prepetition Obligations To Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor All Related Checks And Electronic Payment Requests Related Thereto ¶ 11, *In re RIH Acquisitions NJ, LLC*, No. 13-34483 (Bankr. D.N.J. Dec. 2, 2013); Final Order, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority ¶ 7, *In re Rural/Metro Corp.*, No. 13-11952 (Bankr. D. Del. Aug. 26, 2013); Final Order Authorizing The Debtors To Pay Trade Vendor Claims In The Ordinary Course Of Business ¶ 3, *In re Excel Mar. Carriers, Ltd.*, No. 13-23060 (Bankr. S.D.N.Y. Aug. 5, 2013) (providing that debtor need only provide list of critical vendor payments on a biweekly basis for the first 45 days after the petition date); Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 14, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013); Final Orders Authorizing the Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Suppliers, Freight Carriers and Section 503(b)(9) Claimants ¶ 8, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Feb. 25, 2013).

¹⁰¹ See, e.g., Interim Order, Pursuant To Sections 105(a), 363, 364, 503(b), 1107(a) And 1108 Of The Bankruptcy Code, (I) Authorizing The Debtors To Pay Certain Prepetition Obligations Of Critical Vendors And (II) Authorizing Banks To Honor And Process Related Checks And Electronic Transfers ¶ 6, *In re Goldking Holdings, LLC*, No. 13-37200 (Bankr. D. Del. Oct. 31, 2013).

¹⁰² See, e.g., Final Order Pursuant To 11 U.S.C. §§105(A) And 363(B) (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors And Other Critical Vendors, And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013) (requiring, upon request, that debtor provide "a matrix summarizing (i) name of each Foreign Vendor or Other Critical Vendor paid, (ii) amount paid to each, and (iii) type of goods or services provided by each").

¹⁰³ "[D]ebtors shall provide information and notice of any payments made in connection with this Order to counsel to any official committee of unsecured creditors." Final Order Under Sections 105(a), 363(b) And 506(b) Of The Bankruptcy Code Authorizing Payment Of Certain Prepetition Customs, Shipper, Warehousemen And Common Carrier Obligations ¶ 6, *In re Loehmann's Holdings, Inc.*, No. 13-14050 (Bankr. S.D.N.Y. Jan. 16, 2013); see Final Order Granting Mot. for Authority to Pay in the Ordinary Course (I) Undisputed Prepetition Joint Interest Billings and Other Obligations Owed Under Oil & Gas Leases; (II) Undisputed Prepetition Claims Subject to Statutory Liens; (III) Undisputed Obligations or Taxes Owed to Governmental Authorities; and (IV) Certain Critical Vendors Relating to Oil and Gas Operations ¶ 2, *In re GMX Res., Inc.*, No. 13-11456 (Bankr. W.D. Okla. May 2, 2013); see also Final Order (I) Authorizing, But Not Directing, The Debtors To Pay Certain Necessary Prepetition Amounts Owed With Respect To (A) Shippers And Lien Claimants, (B) Insurance Programs (C) Taxes, And (D) Essential Vendors And (II) Authorizing And Directing Financial Institutions To Receive, Process, Honor And Pay All Checks Issued

For instance, in *In re ATLS Acquisition, LLC*, the critical vendor order required the debtor to advise the United States Trustee and any professionals retained by the Committee of Unsecured Creditors of any critical vendor payment within three business days of making such payment.¹⁰⁴ Furthermore, in *In re Exide Technologies, Inc.*, the critical vendor order specified that in the event of "exigent circumstances" where the debtor cannot reasonably provide advance notice to the committee, the committee retains "the right to object to such waiver and may request disgorgement of any payment made to a Critical Vendor pursuant to this paragraph."¹⁰⁵

Comment: As stated above, the committee, as the representative for all unsecured creditors, maintains an interest in knowing how the chapter 11 debtor's limited funds are spent.¹⁰⁶

H. Duration of Trade Agreement

Seventeen of the critical vendor cases studied herein specified the duration for which the critical vendor agreement would remain in effect. Most required that the vendor continue to provide goods or services in accordance with the agreed upon trade terms for the duration of the debtor's chapter 11 case.¹⁰⁷ Pursuant to the findings of this study, it appears that chapter 11 debtors require vendors with whom they enter into a trade agreement to continue supplying the debtor with goods and/or services for at least the duration of its chapter 11 case, if not longer. Interestingly, certain trade agreements included in this sample identified a specific number of months after execution of the trade agreement itself during which the vendor was required to continue providing the debtor with goods or services in

And Electronic Payment Requests Made Relating To The Foregoing At The Debtors' Direction at 3, *In re Rodeo Creek Gold Inc.*, No. 13-50301 (Bankr. D. Nev. Mar. 29, 2013); Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants ¶ 5, *In re Conexant Sys., Inc.*, No. 13-10367 (Bankr. D. Del. Feb. 28, 2013).

¹⁰⁴ See Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers ¶ 5, *In re ATLS Acquisitions, LLC*, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013). The critical vendor order in *In re Rodeo Creek Gold Inc.* contained a similar provision, authorizing the debtors to pay pre-petition amounts owed to shippers and lien claimants "upon three business days prior notice to the Official Committee of Unsecured Creditors." Final Order (I) Authorizing, But Not Directing, The Debtors To Pay Certain Necessary Prepetition Amounts Owed With Respect To (A) Shippers And Lien Claimants, (B) Insurance Programs, (C) Taxes, And (D) Essential Vendors And (II) Authorizing And Directing Financial Institutions To Receive, Process, Honor And Pay All Checks Issued And Electronic Payment Requests Made Relating To The Foregoing At The Debtors' Direction at 3, *In re Rodeo Creek Gold Inc.*, No. 13-50301 (Bankr. D. Nev. Mar. 29, 2013).

¹⁰⁵ See Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 5, *In re Exide Techs., Inc.*, No. 13-11482 (Bankr. D. Del. Jul. 10, 2013).

¹⁰⁶ See comment *supra* Part III.F.

¹⁰⁷ See, e.g., Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers, Ex. A ¶ 4, *In re ATLS Acquisitions, LLC*, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013) ("During the pendency of the Bankruptcy Cases, you will continue to extend to the Company all Governing Trade Terms.").

accordance with the trade terms specified in the agreement. For instance, in *In re RDA Holding Co.*, the agreement stated that the vendor "will hereafter extend to the Company all Customary Trade Terms (as defined in the Order) for at least 24 months after execution of this letter agreement."¹⁰⁸ Others specified a specific number of months after confirmation of the debtor's plan of reorganization during which the vendor was required to continue supplying the debtor with goods or services pursuant to the agreed upon trade terms. An example of such a provision is that included in the critical vendor order issued in *In re Conexant Systems, Inc.*: paragraph four of its "Vendor Agreement" states that the vendor is bound by the trade terms "for at least 18 months following the effective date of a plan of reorganization."¹⁰⁹ A similar provision was included in the critical vendor order issued in *In re Rotech Healthcare, Inc.*¹¹⁰ The order included the following provision: "[t]he Customary Trade Terms shall apply throughout the Debtors' chapter 11 cases and for the 12-month period commencing on the date the debtor's plan of reorganization is consummated, as long as the debtors agree to pay for such goods in accordance with such terms."¹¹¹

Comment: In order to get the maximum benefit for making these critical vendor payments, it is in the debtor's best interest to extend the terms of these trade agreements for as long as possible. Extending these terms beyond the duration of the bankruptcy case, however, seems to be pushing critical vendor relief beyond its intent, for the justification in allowing critical vendor payments and the reasoning that underlies such is outright necessity, in the moment, at the outset of a chapter 11 debtor's case.¹¹²

CONCLUSION

In regards to extending the terms of trade agreements post-bankruptcy, it is important to engage in a brief discussion of *In re School Specialty, Inc.* and *In re Groeb Farms, Inc.* In *School Specialty*, the chapter 11 debtor essentially offered the same type of preferential treatment to certain key vendors in the post-emergence

¹⁰⁸ Final Order Pursuant To 11 U.S.C. §§ 105(a) And 363(b) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors And Other Critical Vendors, And (II) Authorizing And Direction Financial Institutions To Honor And Process Related Checks And Transfers, Ex. A ¶ 6, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013).

¹⁰⁹ Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants, Ex. 2 ¶ 4, *In re Conexant Sys., Inc.*, 13-10367 (Bankr. D. Del. Apr. 18, 2013).

¹¹⁰ See Supplement to Final Order Pursuant To Bankruptcy Code Sections 363(b) And 105(a) Authorizing (I) The Debtors To Pay The Prepetition Claims Of Certain Critical Vendors And Administrative Claimholders, And (II) Financial Institutions To Honor And Process Prepetition Checks And Transfers To Certain Critical Vendors And Administrative Claimholders, *In re Rotech Healthcare, Inc.*, No. 13-10741 (Bankr. D. Del. May 16, 2013).

¹¹¹ See *id.*

¹¹² See discussion *supra* Part I.

context through its plan of reorganization.¹¹³ The reorganization plan confirmed in *School Specialty* provided that if vendors agreed to enter into a trade agreement with the debtor post-bankruptcy, they would receive higher recoveries under the plan as compared to other similarly situated creditors.¹¹⁴ The plan further provided for the appointment of an ombudsman to monitor compliance with these agreements.¹¹⁵ This plan was approved with support of the creditors' committee.

Similarly, vendors in *In re Groeb Farms* received higher recoveries under the plan in exchange for entering into post-bankruptcy trade agreements with the debtor.¹¹⁶ Like *School Specialty*, these agreements provided a means by which the debtor could monitor the vendor's compliance with its terms.¹¹⁷ Pursuant to the compliance audit provision in *Groeb Farms*, the debtor could request an audit to confirm a given supplier's compliance with the terms of the trade agreement: "[a]t any time during the term of this Agreement, if using good faith the Debtor has reasonable belief that the Supplier is not providing Customary Trade Terms . . . the Debtor may request an audit of Supplier to confirm that Supplier has provided the Debtor the Customary Trade Terms (a "Compliance Audit") in accordance with this New Trade Agreement."¹¹⁸ The provision continues by stating that within five (5) business days of a request for a compliance audit, the supplier must provide proof of such compliance, and if one party disputes that the other has not complied with the terms of the agreement, that dispute shall be resolved by the bankruptcy court.¹¹⁹

The provisions in *Groeb Farms* and *School Specialty* suggest the beginnings of a new trend whereby debtors are attempting to negotiate post-emergence trade agreements with their vendors that are substantially similar in form and content to

¹¹³ See Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Critical Vendors, Foreign Suppliers, Freight Carriers And Section 503(B)(9) Claimants, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Jan 29, 2013).

¹¹⁴ See Notice of Filing of Fifth Am. Supplement to Debtor's Am. Joint Plan of Reorganization Under Chapter 11 Of The Bankruptcy Code, at § IV, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Jun. 5, 2013) (providing for an increase in recovery from 20% to 45%).

¹¹⁵ See generally *School Specialty, Inc. Ombudsman Plan Supplement*, at § V.I.4, *In re Sch. Specialty, Inc.*, No. 13-10125 (Bankr. D. Del. Jun. 5, 2013). Specifically, the duties of the ombudsman included the following three responsibilities, among others: (1) to monitor the trade election; (2) to "monitor and pursue remedies or other protections to ensure that the provisions . . . of the Plan and the treatment afforded to holders of Allowed General Unsecured Claims and Allowed Trade Unsecured Claims are adhered to, including by seeking relief from the Bankruptcy Court"; and (3) to "attempt to resolve any disputes between General Unsecured Creditors or Trade Unsecured Creditors, on one hand, and the Reorganized Debtors, on the other hand, regarding Distributions to be made to holders of Allowed General Unsecured Claims and Allowed Trade Unsecured Claims." *Id.* at § 3.1(c), (e) ("In the event a consensual resolution cannot be reached . . . party to the dispute may request that the Ombudsman seek judicial determination of the dispute.").

¹¹⁶ See generally *Notice Of Filing Plan Supplement Doc. (New Trade Agreement) As Related To The Second Am. Plan, In re Groeb Farms, Inc.*, No. 13-58200 (Bankr. E.D. Mich. Oct. 3, 2013).

¹¹⁷ See *Notice Of Filing Plan Supplement Doc. (New Trade Agreement) As Related To The Second Am. Plan ¶ 12, In re Groeb Farms, Inc.*, No. 13-58200 (Bankr. E.D. Mich. Nov. 20, 2013).

¹¹⁸ See *id.*

¹¹⁹ This is consistent with the provision providing for the continued jurisdiction of the bankruptcy court over all matters and disputes arising between the parties in connection with the critical vendor order or trade agreement. This provision appeared in all trade agreements studied herein.

critical vendor trade agreements entered into at the outset of the debtor's chapter 11 case. Just as critical vendor relief is justified as ensuring the debtor's smooth transition into bankruptcy, these post-bankruptcy trade agreements parallel such rationale by ensuring the debtor's smooth transition out of bankruptcy.

EXHIBIT A

SAMPLE TRADE AGREEMENT¹²⁰

DATE

TO:[Critical Vendor]

[Name]

[Address]

As you may be aware, on _____, YEAR (the "**Petition Date**"), DEBTOR, together with certain of its affiliates (collectively, the "**Debtors**"), filed voluntary petitions (the "**Bankruptcy Cases**") under chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of _____ (the "**Bankruptcy Court**"). On the Petition Date, we requested the Bankruptcy Court's authority to pay certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers. On _____, YEAR, the Bankruptcy Court entered an order (the "**Order**") authorizing us, under certain conditions, to pay pre-bankruptcy claims of certain vendors and service providers that agree to be bound by the terms of the Order and to the terms set forth below.¹²¹ A copy of the Order is enclosed.

To receive payment on pre-bankruptcy claims, we require you to agree to supply goods and/or services to the Debtors based on "Customary Trade Terms." Customary Trade Terms are trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date or, if more favorable, that existed within the 180 day period¹²² prior to the Petition Date.¹²³

¹²⁰ Seventeen of the critical vendor cases included, as an exhibit to the bankruptcy court's order, a sample trade agreement. The format and layout of this Sample Trade Agreement is substantially similar to that used in *In re Sch. Specialty, Inc. No. 13-10125* (Bankr. D. Del. Jan. 29, 2013).

¹²¹ As explicated above, this survey reveals that debtors seldom identify, by name, those suppliers it deems to be "critical vendors." Specifically, in less than ten percent of the critical vendor motions studied did the chapter 11 debtor identify such vendors by name. *See* discussion *supra* Part III.A. ("Identifying Critical Vendors").

¹²² In the event that the relationship between a Vendor accepting payment under this Order and the Debtors does not extend to 180 days before the Petition Date, the Customary Trade Terms shall mean the terms that the Vendor generally extends to its customers or such terms as are acceptable to the Debtors in the reasonable exercise of their business judgment. *See, e.g.*, Final Order Authorizing The Debtors To Pay Trade Vendor Claims In The Ordinary Course Of Business ¶ 2(c), *In re Excel Mar. Carriers Ltd.*, Case No. 13-23060 (Bankr. S.D.N.Y. Aug. 5, 2013).

¹²³ *See* Table 3, "Historical Basis Provisions." Of the 47 critical vendor orders examined pursuant to this survey, 13 referred to terms in effect prior to the petition date as the historical basis, while 16 referred to an exact numerical pre-petition period of time—either 60 days, 120 days, 180 days, or one year. *See* discussion *supra* Part III.B. This Sample Trade Agreement uses a 180-day period prior to the petition date as its historical basis because, as described in Part III.B, the greater the historical basis, the more advantageous it is for the debtor.

For purposes of administration of this trade program as authorized by the Bankruptcy Court (the "**Trade Payment Program**"), the Debtors and you agree as follows:

1. For purposes of this Trade Agreement, the estimated balance of your prepetition claim (accounting for any setoffs, credits, or discounts) (the "**Critical Vendor Claim**") that will be paid to you by the Debtors is \$ _____. The Prepetition Claim will be paid as follows: [_____]. You hereby agree to accept payment in the amount of the Prepetition Claim in full and complete satisfaction of any and all amounts owed to you by the Debtors for the period ending on the Petition Date, and you hereby waive any right to assert or seek payment of any amount for the period prior to the Petition Date that exceeds the Prepetition Claim.
2. The open trade balance or credit line that you will extend to the Debtors for delivery of postpetition goods or performance of postpetition services is \$ _____ (which shall not be less than the greater of the open trade balance outstanding: (a) on _____, YEAR, or (b) on normal and customary terms on an historical basis for the period prior to the Petition Date or, if more favorable, within the 180 day period prior to the Petition Date).¹²⁴
3. In consideration for the payment described herein, you agree 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**"), a claim for reclamation (a "**Reclamation Claim**"), or a claim under Bankruptcy Code Section 503(b)(9) (a "**503(b)(9) Claim**"), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date; and, to the extent you have already obtained or otherwise asserted such a Lien, Reclamation Claim, or 503(b)(9) Claim, you shall take (at your own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless your participation in the Trade Payment Program authorized by the Order is terminated.¹²⁵

¹²⁴ This provision is a standardized term according to the sample trade agreements studied herein. *See, e.g.*, Final Order Authorizing The Debtors To Pay Trade Vendor Claims In The Ordinary Course Of Business ¶ 2(c), *In re Excel Mar. Carriers Ltd.*, Case No. 13-23060 (Bankr. S.D.N.Y. Aug. 5, 2013).

¹²⁵ This provision was adapted from the sample trade agreement used in *In re Synagro Techs., Inc.* *See* Final Order Granting Debtors' Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors, Ex. A ¶ (e), *In re Synagro Techs., Inc.*, No. 11041 (Bankr. D. Del. May 23, 2013).

4. If your Prepetition Claim arises under a contract with the Debtors, you also agree not to file a motion to compel assumption or rejection of the contract.¹²⁶
5. You will hereafter extend to the Debtors all Customary Trade Terms (as defined herein) for at least twenty-four (24) months after execution of this letter agreement.¹²⁷

[ADD INDIVIDUALIZED SET OF CUSTOMARY TRADE / SERVICE TERMS OR ATTACH / CROSS-REFERENCE TERM FROM AN EXISTING AGREEMENT]¹²⁸

¹²⁶ This provision was adapted from the sample trade agreement used in *In re OnCure Holdings, Inc.* See Final Order (I) Under 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers And (II) Under 11 U.S.C. §§ 105(a), 363(c) And 504(b)(1)(A) And Fed. R. Bankr. P. 6003 Confirming Administrative Expense Priority Status Of Debtors' Undisputed Obligations For Postpetition Delivery Of Goods And Services Suppliers Of Goods Entitled To Administrative Priority ¶ 4, *In re OnCure Holdings, Inc.*, No. 13-11540 (Bankr. D. Del. Jul. 24, 2013).

¹²⁷ As discussed in Part III.H of this Article, it is in the debtor's best interest to extend the terms of a trade agreement for as long as possible, for it serves to maximize the benefit that the debtor gets in return for making these critical vendor payments at the outset of its case.

¹²⁸ Ten of the 16 trade agreements surveyed herein contained a similar provision providing space for the debtor to insert trade terms applicable to the specific vendor. See Final Order On Debtor's Emergency Mot. For Mot. Authorizing Debtor To Pay Certain Prepetition Obligations To Critical Vendors, *In re Simply Wheelz LLC*, No. 13-03332 (Bankr. S.D. Miss. Dec. 6, 2013); Final Order, Pursuant To Bankruptcy Code Sections 363(b), 503(b)(9), And 105(a) And Bankruptcy Rules 6003 And 6004, Authorizing (A) Debtors To Pay The Prepetition Claims Of Certain Critical Domestic And Foreign Vendors And Administrative Claimholders, And (B) Financial Institutions To Honor And Process Prepetition Checks And Transfers To Certain Critical Vendors, *In re Furniture Brands Int'l, Inc.*, No. 13-12329 (Bankr. D. Del. Sept. 30, 2013); Final Order, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority, *In re Rural/Metro Corp.*, No. 13-11952 (Bankr. D. Del. Aug. 26, 2013); Final Order (I) Under 11 U.S.C. §§ 105(a), 363(b), 364, 1107(a) And 1108 And Fed. R. Bankr. P. 6003 Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers And (II) Under 11 U.S.C. §§ 105(a), 363(c) And 504(b)(1)(A) And Fed. R. Bankr. P. 6003 Confirming Administrative Expense Priority Status Of Debtors' Undisputed Obligations For Postpetition Delivery Of Goods And Services Suppliers Of Goods Entitled To Administrative Priority, *In re OnCure Holdings, Inc.*, No. 13-11540 (Bankr. D. Del. Jul. 24, 2013); Final Order, Pursuant To Sections 105(A), 363(B), 503(B) And 507(A) Of The Bankruptcy Code And Bankruptcy Rules 6003 And 6004, Authorizing Debtors To Pay Prepetition Claims Of Critical Vendors And Suppliers Of Goods Entitled To Administrative Priority, *In re Rotech Healthcare, Inc.*, No. 13-10741 (Bankr. D. Del. May 16, 2013); Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers, *In re ATLS Acquisitions, LLC*, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013); Final Order (I) Authorizing, But Not Directing, Debtors To Pay Prepetition Claims of Critical Vendors And (II) Authorizing And Directing Financial Institutions To Honor And Process Related Checks And Transfers, *In re Geokinetics Inc.*, 13-10472 (Bankr. D. Del. Apr. 2, 2013); Final Order Pursuant To 11 U.S.C. §§ 105(a) And 363(b) Authorizing, But Not Directing, Debtors To Pay Prepetition Obligations Of Foreign Creditors And Other Critical Vendors, And (II) Authorizing And Direction Financial Institutions To Honor And Process Related Checks And Transfers, *In re RDA Holding Co.*, No. 13-22233 (Bankr. S.D.N.Y. Mar. 25, 2013); Final Order Authorizing (I) Payment Of Certain Pre-Relief Claims Of Critical Vendors, And (II) Financial Institutions To Honor And

Payment of your Prepetition Claim in the manner set forth in the Order may occur upon execution of this letter by a duly authorized representative of your company and the return of this letter to the Debtors. Your execution of this letter agreement and the return of the same to the Debtors constitutes an agreement by you and the Debtors:

- (a) to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Prepetition Claim set forth above;
- (b) that, for at least during the pendency of the Bankruptcy Cases,¹²⁹ you will continue to supply the Debtors with goods and/or services under the Customary Trade Terms and any terms set forth herein and that the Debtors will pay for such goods and/or services in accordance with the terms hereof;
- (c) that you have reviewed the terms and provisions of the Order and acknowledge that you are bound by such terms;
- (d) Vendor Breach: that if either the Trade Payment Program or your participation therein terminates as provided in the Order, or if you later refuse to continue to supply goods to the Company on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments you receive on account of your Critical Vendor Claim (including claims arising under section 503(b)(9) of the Bankruptcy Code) will be deemed voidable post-petition transfers pursuant to Bankruptcy Code section 549(a). You will immediately repay to the Debtors any payments made to you on account of your Critical Vendor Claim to the extent that the aggregate amount of such payments exceeds the post-petition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Your Critical Vendor Claim shall be reinstated in such an amount so as to restore the Debtors and you to

Process Related Checks And Transfers, *In re* Trinity Coal Corp., No. 50364 (Bankr. E.D. Ky. Mar. 4, 2013); Final Order Authorizing The Debtors To Pay Prepetition Claims Of Certain Critical Vendors, Foreign Suppliers, Freight Carriers And Section 503(b)(9) Claimants, *In re* Sch. Specialty, Inc., No. 13-10125 (Bankr. D. Del. Jan 29, 2013).

¹²⁹ Sixteen of the 47 trade agreements examined specified the duration for which the agreement would remain in effect. 13 of those 16 agreements required that the vendor continue to supply the debtor with goods and/or services, in accordance with the agreed upon trade terms for the duration of the debtor's chapter 11 case. *See supra* Part III.H ("Duration of Trade Agreement"). *See, e.g.*, Final Order (A) Authorizing The Debtor To Pay All Or A Portion Of The Prepetition Claims Of Certain Critical Vendors, And (B) Authorizing Financial Institutions To Honor And Process All Related Checks And Transfers, Ex. A ¶ 4, *In re* ATLS Acquisitions, LLC, No. 13-10262 (Bankr. D. Del. Apr. 4, 2013) ("During the pendency of the Bankruptcy Cases, you will continue to extend to the Company all Governing Trade Terms.").

the same positions as would have existed if payment of the Critical Vendor Claim had not been made.¹³⁰

- (e) Debtor Breach: If the Debtors shall be in default under this Agreement, you shall have no obligation to supply goods and/or services to the Debtors on Customary Trade Terms until the Debtors cure such default, and you shall have the right to terminate this Agreement upon written notice to the Debtors detailing the Debtors' defaults hereunder (which the Debtors shall have the right to dispute). If the Debtors' fail to cure such default within five (5) business days of such notice, you may retain all sums paid to it hereunder on account of its Critical Vendor Claim,¹³¹ and
- (f) Vendor Payment List: The Debtors shall maintain a summary list of all critical vendor payments and shall provide, on a biweekly basis,¹³² updated copies of such list to the Office of the United States Trustee, counsel to the Debtors' proposed postpetition secured lenders, counsel to the Debtors' prepetition lenders, and counsel to any statutory committee appointed in these chapter 11 cases.¹³³

¹³⁰ Sixteen of the trade agreements studied explicitly granted the debtor the right to declare a critical vendor payment a section 549 voidable post-petition transfer in the event a vendor fails to comply with the terms of the trade agreement. An additional 10 trade agreements in this sample contained a vendor breach provision that more generally referred to a debtor's remedy in the event of a vendor breach, without directly referencing section 549 of the Code. See discussion *supra* Part III.C ("Vendor Breach Provisions"). As previously mentioned, failure to specifically refer to section 549 of the Code in a vendor breach provision is of no consequence provided that the debtor reserves its rights to take any and all actions necessary to return the parties to the positions they held immediately prior to the entry of the critical vendor order. See discussion *supra* note 83.

¹³¹ This provision is substantially similar in form and content to the debtor breach provisions used in *In re* OCZ Technology Group, Inc. and *In re* Exide Technologies, Inc. See Final Order Pursuant Order Authorizing Payment Of Prepetition Claims Of Certain Critical Vendors And Service Providers, Ex. C ¶ (g), *In re* OCZ Tech. Grp., Inc., No. 13-13126 (Bankr. D. Del. Dec. 19, 2013); Final Order Granting Debtor's Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 11087 and Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 8, *In re* Exide Techs., Inc., No. 13-11482 (Bankr. D. Del. Jul. 10, 2013). These are the only two cases examined in this study that included such a provision. See discussion *supra* Part III.D ("Debtor Breach Provisions").

¹³² Seventeen of the trade agreements examined pursuant to this survey contained a similar provision. However, these provisions differed in regards to how frequently the debtor must provide updated copies of its critical vendor payment list—on a biweekly, monthly, or bimonthly basis. See generally discussion *supra* Part III.G. This Sample Trade Agreement employs a provision stipulating that the debtor must provide an updated list of its critical vendor payments on a biweekly basis for the sole reason that over 50% of the trade agreements studied pursuant to this survey, which contained such a provision, required that the debtor provide biweekly reports. In contrast, only one agreement required disclosure of this list on a monthly basis, and only one required such disclosure on a bimonthly basis. See *supra* notes 98–99.

¹³³ Many of the trade agreements containing a similar provision did not require that the debtor provide a list of critical vendor payment to its lenders. Rather, these provisions only required that the debtor disclose such list to the Office of the United States Trustee and to counsel for the Official Committee of Unsecured Creditors. One possible explanation for the exclusion of lenders from these provisions is that the lenders are otherwise receiving this information, for they receive regular reports on the debtor's cash payments. As such, their inclusion in this provision is thereby rendered unnecessary. To note, the content of this provision was derived in substantial part from the provision used in *In re* Conexant Systems, Inc. See, e.g., Final Order

The Debtors may, in their sole discretion, reinstate a terminated Trade Agreement if (i) such determination is subsequently reversed by the Bankruptcy Court after notice and a hearing following a motion by the Critical Vendor, for good cause shown, that the determination was materially incorrect; (ii) the underlying default under the Trade Agreement was fully cured by the Critical vendor not later than five (5) business days following the Debtors' notification to the Critical Vendor that a default had occurred; or (iii) the Debtors, in their sole discretion, reach a favorable alternative agreement with the Critical Vendor.¹³⁴

The Debtors and you also hereby agree that any dispute with respect to this Agreement, the Order, or your participation in the Trade Payment Program, shall be determined by the Bankruptcy Court.¹³⁵

Please indicate your agreement to the terms hereof by returning a signed copy of this letter to [Name] at (____)_____.

Sincerely,
DEBTOR

Agreed and Accepted by:

[Name of Critical Vendor/Service Provider]

By:

Its:

Dated:

Authorizing The Debtors To Pay Prepetition Claims Of Certain Foreign Vendors And Lien Claimants, Ex. 1: Procurement Policy ¶ (e), *In re Conexant Sys., Inc.*, No. 13-10367 (Bankr. D. Del. Feb. 28, 2013).

¹³⁴ A total of 8 of the trade agreements in this sample included a provision providing for the debtor's reinstatement of a trade agreement in the event that the debtor terminated the agreement at an earlier point in time due to a vendor's alleged noncompliance with its terms. Six of these 8 trade agreements were identical in form and substance to the provision included in this Sample Trade Agreement. Specifically, the language used in this provision derives from *In re Synagro Technologies, Inc.* See Final Order Granting Debtors' Mot. For Order Pursuant To Bankruptcy Code Section 105(a), 363(b), 1107(a), And 1108 And Bankruptcy Rules 6003 And 6004 Authorizing Payment Of Critical Vendors ¶ 5, *In re Synagro Techs., Inc.*, No. 11041 (Bankr. D. Del. May 23, 2013). See also discussion *supra* Part III.E ("Reinstatement of Trade Agreement").

¹³⁵ All critical vendor orders and trade agreements examined pursuant to this study contained a provision such as this providing for the continuing jurisdiction of the bankruptcy court over any and all disputes that arise between the debtor and vendor in connection with the critical vendor order or trade agreement.

EXHIBIT B

SUMMARY OF 2013 CHAPTER 11 CASES

This sample includes 63 chapter 11 cases filed in the year 2013.

This table presents a summary of the sample findings.

NOTE: "CV" refers to Critical Vendors; "Amount Requested" refers to the dollar amount requested in the chapter 11 debtor's critical vendor motion; "Amount Granted" refers to the dollar amount granted by the bankruptcy court in its critical vendor order.

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
Allens, Inc. and All Veg, LLC 13-73597	WD Arkansas	8th	Manufacturing <i>Producer of Canned Vegetables</i>	✓	✓	✓	Shipping Claims = \$7M
Anchor Bancorp Wisconsin Inc. 13-14003	WD Wisconsin	7th	Banking & Finance	No	N/A	N/A	N/A
AppleILLINOIS, LLC 13-20723	ED Kentucky	6th	Food Services <i>Restaurant Franchise</i>	✓	✓	No	CVs = \$594,121.50 <i>Debtor identified 4 CVs by name & specified amount to be paid to each; this figure reflects the total</i>
Atari, Inc. 13-10176	SDNY	2nd	Electronics <i>Entertainment & Licensing (video games)</i>	✓	✓	No	Critical Vendor Claims = \$568,233
ATLS Acquisition, LLC 13-10262	DE	3rd	Healthcare <i>Provider of Diabetes Testing Supplies</i>	✓	✓	YES <i>Final Order only re: "Shipping Claims"</i>	CV Claims = \$4M Shipping & Warehouse Claims = \$300,000
Cengage Learning, Inc. 13-44106	EDNY	2nd	Education <i>Textbook Publishing</i>	✓	✓	✓	<i>Aggregate = \$3.025M</i> Shipping & Warehousing Claims = \$1M Lienholders = \$2,025,000 Authors & Content Sources = \$83.4M <i>requested final & interim relief</i>

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<u>FINAL:</u> Shipping Claims = \$7M <u>INTERIM:</u> Shipping Claims = \$7M	Shipping & Warehousing Claims	None	Total Unsecured Debt = \$108,657,676.99 Trade Debt = \$101.9M CV = \$7M $6.442\% = \text{CV/Total Unsecured Debt}$ $6.869\% = \text{CV/Trade Debt}$	<i>Epiq</i>	Customer Programs EXCLUDED
N/A	N/A	N/A	N/A	<i>KCC</i>	
\$294,729.64	Critical Trade Vendors	None	Total Unsecured Debt = \$1,360,799.54 CV = \$294,729.64 $20.659\% = \text{CV/Unsecured Debt}$	<i>GCG</i>	
<i>no monetary cap</i>	Critical Vendors	✓	9.5% of Trade Debt = CV Claims	<i>BMC Group</i> <i>(on Bloomberg)</i>	
<u>FINAL</u> Aggregate = \$4.33M CV Claims = \$4M Shipping & Warehouse = \$330,000 <u>INTERIM</u>	<u>2 Motions:</u> Mechanics' Liens & Shipping Charges (Shipping & Warehouse Charges) & CV Claims	✓	Trade Debt = \$168,044,015 CV = \$4,330,000 $2.577\% = \text{CV/Trade Debt}$	<i>Epiq</i> <i>(on Bloomberg)</i>	2 Interim Orders + 1 Final Order
<u>FINAL</u> Aggregate = \$86.425M Authors Sources = \$80.4M Content Sources = \$3M Shipping = ? Lien Claims = ? <u>INTERIM</u> Authors & Content	<u>2 Final Orders</u> (1) Shipping & Warehousing Claims, and Lien Claims (2) Authors & Content Sources	None	Total Unsecured Debt = \$4,261,265,643.89 Trade Debt = \$1,857,232,770.25 CV = \$86.425M $2.028\% = \text{CV/Unsecured Debt}$ $21.490\% = \text{CV/Trade Debt}$	<i>Donlin Recano & Co.</i> <i>(on Bloomberg)</i>	Declaration says - \$2,845,000 in shipping, warehousemen, mechanics, contractors & suppliers Authors & Content Sources - use same legal justification as typical CV motion Customer Programs EXCLUDED

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
Central European Distribution Corporation 13-10738	DE	3rd	Manufacturing <i>Alcoholic Beverage Producer</i>	No	N/A	N/A	N/A
Conexant Systems, Inc. 13-10367	DE	3rd	Computers & Software <i>Microchip Industry</i>	✓	✓	✓	<u>FINAL Aggregate</u> = \$5.655M Foreign Vendors = \$5.6M Lien Claims = \$55,000 <u>INTERIM Aggregate</u> = \$4.555M Foreign Vendors = \$4.5M Lien Claims = \$55,000
Education Holdings 1, Inc. 13-10101	DE	3rd	Education <i>Test-Preparation</i>	No	N/A	N/A	N/A
Electric Transportation Engineering Corporation 13-16126	AZ	9th	Telecomm. <i>Electronic Transportation & Storage Technologies</i>	✓	✓	No	Warranty Programs = in the ordinary course
EWGS Intermediary, LLC 13-12876	DE	3rd	Retail	✓	✓	✓	<u>FINAL</u> = \$210,000 <u>INTERIM</u> = \$190,000
Excel Maritime Carriers, Ltd. 13-23060	SDNY	2nd	Transportation <i>Provider of Seaborne Transportation</i>	✓	✓	✓	Vendor Claims = \$10M

Amount Granted (\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	GCG	
<u>FINAL Aggregate</u> = \$5.655M Foreign Vendors = \$5.6M Lien Claims = \$55,000 <u>INTERIM Aggregate</u> = \$4.555M Foreign Vendors = \$4.5M Lien Claims = \$55,000	Foreign Vendors & Lien Claims	None	Total Unsecured Debt = \$233,736,050.59 Trade Debt = \$49,200,000 CV = \$5,655,000 $2.419\% = \text{CV} / \text{Total Unsecured Debt}$ $11.494\% = \text{CV} / \text{Trade Debt}$	BMC Group (on Bloomberg)	
N/A	N/A	N/A	N/A	GCG	
Warranty Programs = in the ordinary course	Warranty Programs	None	N/A	KCC (on Bloomberg)	NOTE: Legal justification in debtor's motion for prepetition payment of warranty program claims matches that found in typical CV motions
<u>FINAL</u> = \$210,000 <u>INTERIM</u> = \$190,000	Lien Claimants	None	Total Unsecured Debt = \$28,146,647.05 CV = \$210,000 $0.746\% = \text{CV} / \text{Total Unsecured Debt}$	Epiq	Customer Programs EXCLUDED
<u>FINAL</u> Vendor Claims = \$10M <u>INTERIM</u> Vendor Claims = \$10M	Trade Vendor Claims (includes foreign vendors, those who may be able to assert maritime liens on debtors' vessels)	None	Total Unsecured Debt = \$233,765,187 CV = \$10M $4.278\% = \text{CV} / \text{Total Unsecured Debt}$	GCG	By the time the final order was approved (as per hearing transcript) - just over \$3M was spent on trade invoices

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested(\$)
Exide Technologies, Inc. 13-11482	DE	3rd	Manufacturing <i>Lead Acid Batteries</i>	✓	✓	✓	<u>FINAL Aggregate</u> = \$31.6M Critical Vendors = \$10M Foreign Vendors = \$2M Shipping Liens = \$9.2M Mechanics Liens = \$10.4M <u>INTERIM Aggregate</u> = \$13.2M CV = \$7M Foreign = \$1M Mechanics Liens = \$5.2M
F&H Acquisition Corp. 13-13220	DE	3rd	Food Services <i>Sports Bars & Restaurants</i>	✓	✓	No	<i>Aggregate</i> = \$1.9M Lien Claims = \$300,000 503(b)(9) = \$1.6M
FAH Liquidating Corp. 13-13087	DE	3rd	Manufacturing <i>Hybrid Cars</i>	No	N/A	N/A	N/A
Fairmont General Hospital, Inc. 13-01054	ND West Va.	4th	Healthcare	✓	No	No	503(b)(9) Claims = \$541,593.38
Flat Out Crazy, LLC 13-22094	SDNY	2nd	Food Services <i>Restaurants</i>	No	N/A	N/A	N/A
Furniture Brands International, Inc. 13-12329	DE	3rd	Retail <i>Furniture</i>	✓	✓	interim & final CV orders, only final order for shipping, import/export & mechanic s' liens	CV Claims = \$11.7M Shipping & Warehousing Claims = \$5.7M Import/Export Charges = \$300,000

Amount Granted (\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<p><u>FINAL Aggregate</u> = \$31.6M Critical Vendors = \$10M Foreign Vendors = \$2M Shipping Liens = \$9.2M Mechanics Liens = \$10.4M</p> <p><u>INTERIM Aggregate</u> = \$13.2M CV = \$7M Foreign = \$1M Mechanics Liens = \$5.2M</p>	Critical Vendors, Foreign Vendors, Shipping & Delivery Claims, Mechanics Liens	None	<p>Total Unsecured Debt = \$130,284,496.25 Trade Debt = \$103.5M CVs = \$31.6M</p> <p>$24.255\% = \text{CV} / \text{Total Unsecured Debt}$ $30.531\% = \text{CV} / \text{Trade Debt}$</p>	GCG	CV separate from foreign, liens, etc. <u>Observation:</u> desire for it to look like a smaller number, but they all have the same justification
<p><u>Aggregate</u> = \$1.9M Lien Claims = \$300,000 503(b)(9) = \$1.6M</p>	Section 503(b)(9) Claims; Lien Claims	None	<p>Total Unsecured Debt = \$11.2M Trade Debt = \$6.1M CV = \$1.9M</p> <p>$16.964\% = \text{CV} / \text{Total Unsecured Debt}$ $31.148\% = \text{CV} / \text{Trade Debt}$</p>	Epiq	PACA Claims & Customer Programs EXCLUDED
N/A	N/A	N/A	N/A	Rust/Omni	
N/A	on 503(b)(9) Claims	None	N/A	Epiq	
N/A	Customer Obligations	N/A	N/A	KCC	PACA Claims & Customer Programs EXCLUDED
<p><u>FINAL Aggregate</u> = \$19.1M CV Claims = \$13M (first must apply to goods rec'd within 20 days of Petition Date) Shipping Claims = \$5.7M Import/Export Claims = \$300,000 Mechanics' Liens = \$100,000 (whether relating to the period prior to or after the Petition Date)</p> <p><u>INTERIM Aggregate</u> = \$11.7M CV Claims = \$11.7M</p>	<p>(1) Critical Vendor Claims (Domestic & Foreign CVs, Administrative Claims); (2) Shipping & Warehousing Claims; (3) Import/Export Charges; (4) Mechanics' Lien Charges</p>	None	<p>Trade Debt = \$100M CV Aggregate = \$19.1M $19.1\% = \text{CV} / \text{Trade Debt}$</p>	Epiq	

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
Gatehouse Media, Inc. 13-12503	DE	3rd	Telecomm.	✓	✓	No	Trade Claims <i>Aggregate</i> = \$8.6M
Geokinetics, Inc. 13-10472	DE	3rd	Oil & Gas	✓	✓	interim & final orders for CV motion only (not for shippers or foreign claims)	<i>CV Aggregate</i> = \$10.95M CV Claims = \$8.7M Critical Landowner Claims = \$500,000 Foreign Vendor Claims = \$1M Shippers & Warehousemen = \$750,000
Global Access Corp. 13-51562	Nevada	9th	Banking & Finance <i>Provider of ATM Mgmt. & Support Services</i>	✓	✓	✓	CV Claims = \$2M

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
Trade Claims = \$8.6M	Trade Claims (3 Types) = Vendors, 503(b)(9) Claimants, & Lien Claimants	None	Total Unsecured Debt = \$15M CV = \$8.6M $57.333\% = \text{CV/Total Unsecured Debt}$	<i>Epiq</i>	
<u>FINAL Aggregate</u> = \$10.95M CVs = \$8.7M (<i>applied first to claims for goods rec'd by debtor within 20 days of Petition Date</i>) Critical Landowner Claims = \$500,000 Foreign Claims = \$1M (<i>applied first to claims for goods rec'd by debtor w/in 20 days of Petition Date</i>) Shippers & Warehousement = \$750,000 <u>INTERIM Aggregate</u> = \$9.2M CVs = \$8.7M Critical Landowner Claims = \$500,000	<u>3 Motions:</u> CVs, Critical Landowners, Foreign Vendors, and Shippers & Warehousemen	None	Total Unsecured Debt = \$154M Trade Debt = \$13M CV Claims = \$10.95M $7.110\% = \text{CV/Total Unsecured Debt}$ $84.231\% = \text{CV/Trade Debt}$	<i>GCG</i>	applied first to CV claims for goods rec'd by the debtors within 20 days of the Petition Datev (applies to both CVs and Foreign Vendors)
<u>FINAL CV Claims</u> = \$2M <u>INTERIM CV Claims</u> = \$910,000	Merchant Obligations (<i>earned but unpaid Customer Obligations</i>)	None	Total Unsecured Debt = \$700,000 CV Claims = \$2M	<i>KCC</i>	<u>OBSERVATION:</u> Strange that total unsecured debt is less than CV amount. Possible explanation is that these CV claims are not really trade claims (debtor provides ATMs for banks, and the CV-like claims are the sharing of fees that accrue on those ATMs, such as when Chase charges you extra to use their ATM if you are not a Chase customer). As such, this is, in reality, likely to be secured debt.

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested(\$)
Global Aviation Holdings, LLC 13-12945	DE	3rd	Transportation	✓	✓	✓	<u>FINAL Aggregate</u> = \$17,933,553 Foreign Claims = \$4.5M Fuel Suppliers <i>Total</i> = \$11.857M (DLA = \$8.392M; AMC = \$1.265M; other = \$2.2M) Industry Agreement Obligations = \$150,000 503(b)(9) = \$1,197,826 Lien Claims = \$199,727 PACA Claims = \$29,000 <u>INTERIM Aggregate</u> = \$4.65M Foreign Claims = \$4.5M Industry Agreement Obligations = \$150,000
GMX Resources, Inc. 13-11456	WD Oklahoma	10th	Oil & Gas <i>Natural Gas Production Company</i>	✓	✓	✓	Aggregate = \$19,470,956 CV = \$1,470,956 Lien Claims = \$18M
Goldking Holdings, LLC 13-37200	SD Texas	5th	Oil & Gas	✓	✓	✓	CV Claims = \$1.5M
Green Field Energy Services, Inc. 13-12783	DE	3rd	Oil & Gas	✓	✓	✓	CV Claims = \$1,000,000
Groeb Farms, Inc. 13-58200	ED Michigan	6th	Manufacturing	✓	✓	No	\$225,236.62
Highway Technologies, Inc. 13-11326	DE	3rd	Construction <i>Roadway Traffic Mgmt. & Safety Services</i>	No	N/A	N/A	N/A

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<u>FINAL Aggregate</u> = \$18,876,553 Foreign Claims = \$4.5M Fuel Suppliers <i>Total</i> = \$12.8M (DLA = \$11.2M; AMC = \$1.6M) Lien Claims = \$199,727 503(b)(9) = \$1,197,826 PACA Claims = \$29,000 Industry Agreement Obligations = \$150,000 <u>INTERIM Aggregate</u> = \$17.45M Foreign Claims = \$4.5M Fuel Suppliers <i>Total</i> = \$12.8M (DLA = \$11.2M; AMC = \$1.6M) Industry Agreement Obligations = \$150,000	4 CV Motions: (1)"503(b)(9) Motion" = 503(b)(9) Claimants, Lien Claimants, & PACA Vendors; (2)"Industry Agreements Motion"; (3)"Foreign Creditors Motion"; (4)"Fuel Supply Motion"	None	CV = \$18,876,553	KCC	
<u>FINAL Aggregate</u> = \$16,469,001 Lien Claims = \$14,998,045 CV Claims = \$1,470,956 <u>INTERIM Aggregate</u> = \$8,365,998 Lien Claims = \$6,895,042 CV Claims = \$1,470,956	2 CVs relating to oil & gas operations (installment plan for a seismic data study & a payment for software license) & Lien Claimants	None	Total Unsecured Debt = \$81,214,878.33 CV = \$1,470,956 1.811% = CV/Total Unsecured Debt	Epiq	NOTE: for purposes of calculating claims pool percentages - CV figure used, not lien claims figure
no final order INTERIM CV Claims = \$1M	Critical Trade Vendors	✓	CV = \$1,000,000	Epiq	NOTE: case transferred from DE to Texas
<u>FINAL: Aggregate</u> \$1M	Critical Vendor Claims	None	Trade Debt = \$98.6M CV = \$1,000,000 1.014% = CV/Trade Debt	Prime Clerk	
\$235,000	"Shipper and Warehouse Claims"	None	Total Unsecured Debt = \$19,758,600.39 Trade = \$15,036,775 CV = \$235,000 1.189% = CV/Total Unsecured Debt 1.563% = CV/Trade Debt	KCC	
N/A	N/A	N/A	N/A	KCC	

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
HSS Holding, LLC 13-12740	DE	3rd	Accommodation <i>Hospitality Staffing Services</i>	No	N/A	N/A	N/A
iBAHN Corporation 13-12285	DE	3rd	Telecomm.	✓	✓	No	Shipping =\$35,000
IPC International Corporation 13-12050	DE	3rd	Administrative & Support Services <i>Security Services & Programs</i>	No	N/A	N/A	N/A
Landauer Healthcare Holdings, Inc. 13-12098	DE	3rd	Healthcare <i>Medical Equipment & Services</i>	No	N/A	N/A	N/A
Loehmann's Holdings Inc. 13-14050	SDNY	2nd	Retail <i>Department Stores</i>	✓	✓	✓	Aggregate = \$1,218,063 Shippers = \$1,051,323 Warehouse Claims = \$166,740 <i>requested interim & final relief</i>
Longview Power, LLC 13-12211	DE	3rd	Oil & Gas / Energy	✓	✓	✓	FINAL Aggregate = \$5,400,000 Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants = \$2,400,000 INTERIM: Critical Vendors = \$500,000
LUHC Wind Down Corp. (Life Uniform Holding Corp.) 13-11391	DE	3rd	Healthcare	✓	✓	✓	FINAL: Lien Claims = \$200,000 INTERIM: Lien Claims = \$155,000

Amount Granted(\$)	Types of Vendors	Objecti ons Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	<i>Epiq</i>	Trade Debt = \$2M
Shipping = \$35,000	Shipping Obligations	None	Trade Debt = \$8M Shipping Claims = \$35,000 0.438% = Shipping Claims/Trade Debt	<i>Epiq</i>	
N/A	N/A	N/A	N/A	<i>KCC</i>	Total Unsecured Debt = \$7,196,577.36
N/A	N/A	N/A	N/A	<i>Epiq</i>	Trade Debt = \$15M
<u>FINAL</u> = no cap <u>INTERIM</u> = no monetary cap, "as the debtors determine, in the exercise of their business judgment, are necessary or appropriate"	"certain prepetition Customs, Shipper, Warehousemen and common carrier obligations"	None	Trade Debt = \$16.7M CV = \$1,218,063 7.294% = CV/Trade Debt	<i>Epiq</i>	Customer Obligations EXCLUDED <u>NOTE</u> : used aggregate CV amount requested in debtor's motion for purposes of calculating claims pool figures
<u>FINAL</u> : Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants =	2 Categories of "Critical Vendor Claims": (1) "Health & Safety Suppliers & Servicers"; (2) "Equipment & Raw Materials Suppliers & Servicers"	None	Total Unsecured Debt = \$256,624,145 CV = \$1,600,000 0.623% = CV/Total Unsecured Debt	<i>Donlin Recano & Co.</i>	<u>FINAL</u> : Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants = \$2,400,000
<u>FINAL</u> : Lien Claims = \$200,000 <u>INTERIM</u> : Lien Claims = \$155,000	"Lien Claimants"	None	Total Unsecured Debt = \$4,323,509 CV = \$200,000 4.626% = CV/Total Unsecured Debt	<i>Epiq</i>	Customer Programs EXCLUDED

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
HSS Holding, LLC 13-12740	DE	3rd	Accommodation <i>Hospitality Staffing Services</i>	No	N/A	N/A	N/A
iBAHN Corporation 13-12285	DE	3rd	Telecomm.	✓	✓	No	Shipping = \$35,000
IPC International Corporation 13-12050	DE	3rd	Administrative & Support Services <i>Security Services & Programs</i>	No	N/A	N/A	N/A
Landauer Healthcare Holdings, Inc. 13-12098	DE	3rd	Healthcare <i>Medical Equipment & Services</i>	No	N/A	N/A	N/A
Loehmann's Holdings Inc. 13-14050	SDNY	2nd	Retail <i>Department Stores</i>	✓	✓	✓	Aggregate = \$1,218,063 Shippers = \$1,051,323 Warehouse Claims = \$166,740 <i>requested interim & final relief</i>
Longview Power, LLC 13-12211	DE	3rd	Oil & Gas / Energy	✓	✓	✓	<u>FINAL</u> Aggregate = \$5,400,000 Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants = \$2,400,000
LUHC Wind Down Corp. (Life Uniform Holding Corp.) 13-11391	DE	3rd	Healthcare	✓	✓	✓	<u>FINAL</u> : Lien Claims = \$200,000 <u>INTERIM</u> : Lien Claims = \$155,000

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	<i>Epiq</i>	Trade Debt = \$2M
Shipping = \$35,000	Shipping Obligations	None	Trade Debt = \$8M Shipping Claims = \$35,000 0.438% = Shipping Claims/Trade Debt	<i>Epiq</i>	
N/A	N/A	N/A	N/A	<i>KCC</i>	Total Unsecured Debt = \$7,196,577.36
N/A	N/A	N/A	N/A	<i>Epiq</i>	Trade Debt = \$15M
<u>FINAL</u> = nocap <u>INTERIM</u> = no monetary cap, "as the debtors determine, in the exercise of their business judgment, are necessary or appropriate"	"certain prepetition Customs, Shipper, Warehousemen and common carrier obligations"	None	Trade Debt = \$16.7M CV = \$1,218,063 7.294% = CV/Trade Debt	<i>Epiq</i>	Customer Obligations EXCLUDED <u>NOTE</u> : used aggregate CV amount requested in debtor's motion for purposes of calculating claims pool figures
<u>FINAL</u> : Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants = \$2,400,000 <u>INTERIM</u> : Critical Vendors = \$500,000	<u>2 Categories of "Critical Vendor Claims"</u> : (1) "Health & Safety Suppliers & Servicers"; (2) "Equipment & Raw Materials Suppliers & Servicers"	None	Total Unsecured Debt = \$256,624,145 CV = \$1,600,000 0.623% = CV/Total Unsecured Debt	<i>Donlin Recano & Co.</i>	<u>FINAL</u> : Critical Vendors = \$1,600,000 Shippers = \$1,500,000 Lien Claimants = \$2,300,000 503(b)(9) Claimants = \$2,400,000 <u>INTERIM</u> : Critical Vendors = \$500,000
<u>FINAL</u> : Lien Claims = \$200,000 <u>INTERIM</u> : Lien Claims = \$155,000	"Lien Claimants"	None	Total Unsecured Debt = \$4,323,509 CV = \$200,000 4.626% = CV/Total Unsecured Debt	<i>Epiq</i>	Customer Programs EXCLUDED

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
Lyon Workspace Products, L.L.C. 13-02100	ND Illinois	7th	Manufacturing <i>Steel Products</i>	No	N/A	N/A	N/A
Maxcom Telecommunications 13-11839	DE	3rd	Telecomm.	✓	✓	No	\$15M in first 30 days, \$32M total
Metro Affiliates, Inc. 13-13591	SDNY	2nd	Transportation <i>Student Transportation Services</i>	✓	✓	✓	Fuel Suppliers = \$105,293.27
Namco, LLC 13-10610	DE	3rd	Retail <i>Pools, Pool Accessories & Recreational Equipment</i>	✓	✓	No	Freight Claims = \$159,879 (Atlantic Customs Charges = \$57,549; Damco Charges = \$102,330)
NE OPCO, Inc. 13-11483	DE	3rd	Manufacturing <i>Envelopes</i>	✓	✓	✓	Distribution Claims = \$2.75M Import & Export Claims = any and all necessary and appropriate Import/Export Claims incurred on account of prepetition transactions

Amount Granted (\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	KCC	Total Unsecured Debt = \$17,070,069
\$32M	"Trade Claims"	None	Total Unsecured Debt = \$40,833,771 CV = \$32M 78.367% = CV / Total Unsecured Debt	GCG	
<u>FINAL</u> : Fuel Suppliers = no cap <u>INTERIM</u> : Fuel Suppliers = \$3M	"Fuel Suppliers"	None	Total Unsecured Debt = \$219,735,637.80 CV = \$3,000,000 1.366% = CV / Total Unsecured Debt	KCC	subject to safe harbor provisions
no monetary cap - debtor is authorized to pay any and all valid prepetition Damco Charges & Atlantic Customs Charges in the ordinary course of the Debtor's business	"Freight Forwarders" (Atlantic Customs Charges & Damco Charges) <i>prepetition claims of freight forwarders relating to overseas shipment & transport of goods to the Debtor</i>	None	Total Unsecured Debt = \$32.7M Trade Debt = \$29M CV requested = \$159,879 0.489% = CV requested / Total Unsecured Debt 0.551% = CV requested / Trade Debt	Epiq	<u>NOTE</u> : for purposes of calculating claims pool percentages - used amount of CV relief requested (court gave no monetary cap) <u>OBSERVATION</u> : perhaps the court did not see the need to give monetary cap given that the requested CV relief was so small in comparison to total unsecured debt & trade debt
<u>FINAL Aggregate</u> = \$2.75M Distribution Claims = \$2.75M Import & Export Claims = as necessary & appropriate to secure the importor export of goods <u>INTERIM Aggregate</u> = \$2.75M Distribution Claims = \$2.75M Import & Export Claims = as necessary & appropriate to secure the importor export of goods	Shipping, Warehousing (Distribution Claims) & Import and Export Claims	None	Total Unsecured Debt = \$41,301,344.28 Trade Debt = \$20.3M CV = \$2.75M 6.658% = CV / Total Unsecured Debt 13.547% = CV / Trade Debt	Epiq	

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested(\$)
Nirvanix, Inc. 13-12595	DE	3rd	Computers & Software <i>Cloud Storage Services</i>	No	N/A	N/A	N/A
OCZ Technology Group, Inc. 13-13126	DE	3rd	Computers & Software	✓	✓	✓	Interim & Final Orders debtors seek to pay \$4.02M in CV Claims
OnCure Holdings, Inc. 13-11540	DE	3rd	Healthcare	✓	✓	✓	<u>FINAL Aggregate</u> = \$10.35M CV Claims = \$850,000 Foreign Vendors = \$9.5M <u>INTERIM Aggregate</u> = \$8.35M CV Claims = \$850,000 Foreign Vendors = \$7.5M
Ormet Corporation 13-10334	DE	3rd	Manufacturing <i>Aluminum</i>	✓	✓	✓	<u>FINAL Aggregate</u> = \$15,010,000 Critical Vendors = \$2.5M Foreign Suppliers = \$9.5M Shipping/Warehouse = \$3M Custom Duties = \$10,000 <u>INTERIM Aggregate</u> = \$8.5M Critical Vendors = \$1M Foreign Suppliers = \$7.5M
Penson Worldwide, Inc. 13-10061	DE	3rd	Computers & Software	No	N/A	N/A	N/A
Personal Communications Devices, LLC 13-74303	EDNY	2nd	Telecomm.	✓	✓	Interim & Final Orders re: Customer Programs BUT not as to Lien Claimants	<u>Shippers & Warehousemen</u> = \$912,000 (Customs Brokers = \$25,000; Transporters = \$306,000; Warehouseman = \$581,000) <u>Customer Programs</u> = \$1M (Repair Service Vendors = \$975,000)

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	<i>Epiq</i>	Total Unsecured Debt = \$1,743,200 (found in declaration)
FINAL = \$4.02M INTERIM = \$4.02M	"Critical Vendor Claims"	None	Trade Debt = \$31.4M CV = \$4.02M 1.280 % = CV/Trade Debt	<i>GCG</i>	found "general unsecured trade obligations of \$31.4M" in FN 2 of declaration
FINAL Aggregate = \$10.35M CV Claims = \$850,000 Foreign Vendors = \$9.5M INTERIM Aggregate = \$8.35M CV Claims = \$850,000 Foreign Vendors = \$7.5M	"certain critical vendors and service providers" & Foreign Vendors	None	Total Unsecured Debt = \$49,131,340 CV = \$10.35M 21.066% = CV/Total Unsecured Debt	<i>KCC</i>	NOTE: Total Unsecured Debt = sum of all affiliated debtors (see schedules)
FINAL Aggregate = \$15,010,000 Critical Vendors = \$2.5M Foreign Vendors = \$9.5M Shipping/Warehouse = \$3M Custom Duties = \$10,000 INTERIM Aggregate = \$8.5M Critical Vendors = \$1M Foreign Vendors = \$7.5M	Critical Vendors; Foreign Vendor; Shippers & Warehousemen; Custom Duties	None	Total Unsecured Debt = \$363,369,542 CV = \$15,010,000 4.1308% = CV/Total Unsecured Debt	<i>KCC</i>	NOTE: Total Unsecured Debt = sum of all affiliated debtors (see schedules)
N/A	N/A	N/A	N/A	<i>KCC</i>	Total Unsecured Debt = \$63,461,677
FINAL Aggregate = \$2.35M Shippers & Warehousemen = \$1.35M Customer Obligations = \$1M <i>no monetary amount (pay when due & payable consistent with past practice)</i> INTERIM Customer Programs = \$1M	2 Motions: (1) Shippers, Warehousemen, Customs Brokers, and other transportation lien claimants; and (2) Customer Programs	None	Total Unsecured Debt = \$177,935,135.97 CV = \$2.35M 1.321% = CV/Total Unsecured Debt	<i>Epiq</i>	debtors moved to amend shippers & warehousemen order - order granted - amount increased from \$912,000 to \$1.35M

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested(\$)
Physiotherapy Holdings, Inc. 13-12965	DE	3rd	Healthcare <i>Rehabilitation Services</i>	✓	✓	✓	pay amounts as they come due
PMGI Holdings, Inc. 13-12404	DE	3rd	Publishing <i>Internet Technology & Entertainment</i>	✓	✓	No	Shipping & Warehousing = \$13,983.51
RDA Holding Co. 13-22233	SDNY	2nd	Telecomm.	✓	✓	✓	Aggregate = \$27,064,000 Shipping & Warehousing Charges = \$1.3M Foreign Vendors = \$400,000 Other CVs = \$1.5M
Revel AC, Inc. 13-16253	NJ	3rd	Accommodation & Food Services <i>Resort Casino</i>	✓	✓	✓	FINAL Trade Claims = \$45M INTERIM Trade Claims = \$15M

Amount Granted (\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<u>FINAL</u> : Trade Claims = \$4.5M <u>INTERIM</u> : Trade Claims = debtor cannot pay more than \$2.5M within first 20 days of the case	"General Unsecured Trade Creditors" (various creditors providing goods & services)	None	CV = \$4.5M	KCC	
Shipping & Warehousing = \$13,983.51	Shipping & Warehouse Claims	None	Total Unsecured Debt = \$12,615,800 CV Claims = \$13,983.51 0.111% = CV / Total Unsecured Debt	BMC Group (on Bloomberg)	<u>NOTE</u> : arrived at Total Unsecured Debt figure by adding up all affiliated debtors (see schedules)
<u>FINAL Aggregate</u> = \$4.1M Foreign Vendors = \$600,000 Other CVs = \$1.5M Shipping & Warehousing Charges = \$2M <u>INTERIM Aggregate</u> = \$1.9M Foreign Vendors = \$400,000 Other CVs = \$1.5M Shipping = as is necessary & appropriate	"Trade Claims" (Foreign Claims & other Critical Vendors); Shipping & Warehousing Charges	None	Total Unsecured Debt = \$32,368,443 CV Claims = \$4.1M 12.666% = CV / Total Unsecured Debt	Epiq (on Bloomberg)	Customer Programs EXCLUDED <u>NOTE</u> : Total Unsecured Debt figure is an approximation, arrived at by totalling the amount listed in each affiliated debtor's Schedule F
<u>FINAL</u> : no monetary # (debtors are authorized to pay Trade Claims in their sole discretion & in the ordinary course of business) <u>INTERIM</u> : (same)	General Unsecured Trade Creditors	None	Total Unsecured Debt = \$32,368,540 CV = \$45M N/A = CV / Total Unsecured Debt	Epiq	Customer Programs EXCLUDED <u>NOTE</u> : Total Unsecured Debt figure is an approximation, arrived at by totalling the amount listed in each affiliated debtor's Schedule F

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
RIH ACQUISITIO NSNJ, LLC 13-34483	NJ	3rd	Accommodation & Food Services <i>Hotel & Gambling</i>	✓	✓	✓	<u>FINAL CV</u> = additional \$1M <u>INTERIM CV</u> = \$1.2M
Rodeo Creek Gold Inc. 13-50301	Nevada	9th	Mining	✓	✓	✓	<u>FINAL Aggregate</u> = \$5M Shipper & Lien Claims = \$3.5M Essential Vendors = \$1.5M <u>INTERIM Aggregate</u> = \$3.2M Shipper & Lien Claims = \$2.2M Essential Vendors = \$1M
Rotech Healthcare, Inc. 13-10741	DE	3rd	Healthcare <i>Home Medical Equipment Products & Services</i>	✓	✓	Yes	<u>CV Aggregate</u> = \$29M CV = \$16.9M 503(b)(9) = \$12.1M
Rural/Metro Corporation 13-11952	DE	3rd	Healthcare <i>Ambulance Services</i>	✓	✓	✓	<u>FINAL</u> : CV Claims = \$6M <u>INTERIM</u> : CV Claims = \$3M
Savient Pharmaceuticals, Inc. 13-12680	DE	3rd	Healthcare <i>Biopharmaceutical Co.</i>	No	N/A	N/A	N/A

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<u>FINAL</u> CV = <i>additional</i> \$1M <u>INTERIM</u> CV = \$1.2M	"Certain Critical Vendors" (vendors per motion = gaming, food & beverage, material & marketing)	None	Total Unsecured Debt = \$8,652,216.13 Critical Vendor = \$2.2M 25.427% = CV/Total Unsecured Debt	KCC	
<u>FINAL</u> Aggregate = \$5M upon 3 days prior notice to the Committee Shipper & Lien Claims = \$3.5M Essential Vendors = \$1.5M <u>INTERIM</u> Aggregate = \$3.2M Shipper & Lien Claims = \$2.2M Essential Vendors = \$1M	Shipper & Lien Claimants, Essential Vendors	None	Total Unsecured Debt = \$139,260,759.01 Trade Debt = \$13.5M CV = \$5M 3.590% = CV/Total Unsecured Debt 37.037% = CV/Trade Debt	GCG	Payment to Essential Vendors and to Shippers & Lien Claimants is authorized, but only upon 3 days prior notice to the Committee
<u>FINAL</u> (supplement order) Aggregate = \$33M CV = \$19M Administrative Cap = \$14M <u>FINAL</u> Aggregate = \$29M CV = \$16.9M Administrative Cap = \$12.1M <u>INTERIM</u> Aggregate = \$29M CV = \$16.9M Administrative Cap = \$12.1M	CVs & Administrative Claimholders - 503(b)(9)	None	CV = \$33,000,000 unable to locate total unsecured debt figure - research suggests that this figure is greater than \$1 billion	Epiq	NOTE: final order was amended to increase CV caps
<u>FINAL</u> : CV Claims = \$6M <u>INTERIM</u> : CV Claims = \$3M	<u>CV Categories</u> : Medical Supplies CVs, Equipment Supplies CVs, Fleet CVs, ITCVs	None	Total Unsecured Debt = \$313,323,593 CV = \$6M 1.915% = CV/Total Unsecured Debt	GCG	
N/A	N/A	N/A	N/A	GCG	Total Unsecured Debt = \$138,727,130.14

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
School Specialty, Inc. 13-10125	DE	3rd	Education	✓	✓	✓	<u>FINAL Aggregate</u> = \$14.5M 503(b)(9) Claims = \$5.2M Foreign Supplier Claims = \$4M Freight Claims = \$3M Key Product Claims = \$2.3M <u>INTERIM Aggregate</u> = \$8M
Simply Wheelz, LLC (Advantage Rent-A-Car) 13-03332	SD Mississippi	5th	Retail <i>Car Rental Co.</i>	✓	✓	✓	No total number - though Exh. 1 of motion contains list of top 20 largest unsecured claims
Sound Shore Medical Center of Westchester 13-22840	SDNY	2nd	Healthcare	No	N/A	N/A	N/A
SuperMedia Inc. & Dex One Corp. 13-10545, 13-10533(Dex)	DE	3rd	Telecomm.	✓	✓	✓	<u>Aggregate</u> = \$21,360,581 Lien Claims = \$157,669 (0.7% of the Claims) 503(b)(9) Claims = \$398,310 (1.9% of Claims) General Unsecured Creditors = \$20,804,602
Synagro Technologies, Inc. 13-11041	DE	3rd	Oil & Gas <i>Waste Recycling</i>	✓	✓	✓	<u>FINAL Aggregate</u> = \$4.25M CV = \$750,000 Subcontract Hauler & Landfill Claims = \$3.5M <u>INTERIM Aggregate</u> = \$1.25M Critical Vendor = \$250,000 Subcontract Hauler & Landfill Claims = \$1M

Amount Granted(\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
<u>FINAL Aggregate</u> = \$14.5 503(b)(9) Claims = \$5.2M Foreign Supplier Claims = \$3.7 Freight Claims = \$3.2M Key Product Claims = \$2.4M <u>INTERIM Aggregate</u> = \$8M Foreign Supplier Claims = \$4M Freight Claims = \$3M Key Product Claims = \$1M	Section 503(b)(9) Claimants; Foreign Suppliers; Freight Carriers; Key Product Suppliers	✓	Total Unsecured Debt = \$230.75M Trade Debt = \$60M CV = \$14.5M 0.063% = CV / Total Unsecured Debt 24.167% = CV / Trade Debt	KCC	Objection by Acco Brands Corp. & Mead Products, LLC Customer Programs EXCLUDED
<u>FINAL</u> - no monetary cap <u>INTERIM</u> - no monetary cap	Critical Vendors	None	N/A	Epiq	<u>OBSERVATION:</u> Exhibit 1 of debtor's CV motion is a list of its CVs - interesting that debtor identifies its CVs from the start Total Unsecured Debt = \$322,221,297.63
N/A	N/A	N/A	N/A	GCG	Total Unsecured Debt = \$54,181,938.43
<u>FINAL</u> - no monetary cap (as they come due in the ordinary course) <u>INTERIM</u> - no monetary cap	General Unsecured Creditors & Lien Creditors	None	CV = \$20,804,602 <i>unable to locate total unsecured debt figure - research suggests that this figure is greater than \$1 billion</i>	Epiq	Customer Programs EXCLUDED
<u>FINAL Aggregate</u> = \$4.25M CV = \$750,000 Subcontract Hauler & Landfill Claims = \$3.5M <u>INTERIM Aggregate</u> = \$1.25M Critical Vendor = \$250,000 Subcontract Hauler & Landfill Claims = \$1M	Critical Vendors, Subcontract Hauler & Landfill Claims	None	Total Unsecured Debt = \$100,528,486 Trade Debt = \$96,598 Critical Vendor = \$4.25M 4.23% = CV / Total Unsecured Debt 4.40% = CV / Trade Debt	KCC	

Case	Court	Circuit	Industry	CV Motion Filed	CV Motion Approved	Interim & Final Order	Amount Requested (\$)
The Scooter Store Holdings, Inc. 13-10904	DE	3rd	Manufacturing <i>Powered Wheelchairs & Scooters</i>	No	N/A	N/A	N/A
TPO Hess Holdings, Inc. (Printer Wind-Down Corporation I, Inc.) 13-11327	DE	3rd	Publishing	✓	✓	✓	Aggregate = \$1.37M CV Claims = \$695,000 Lien Claims = \$675,000
Trinity Coal Corporation 13-50364	ED Kentucky	6th	Mining	✓	✓	✓	<u>FINAL</u> : CV = \$851,514.49 <u>INTERIM</u> : CV = \$651,514.49
Velti, Inc. 13-12878	DE	3rd	Telecomm.	No	N/A	N/A	N/A

Amount Granted (\$)	Types of Vendors	Objections Filed	Claims Pool	Data Source (Claims Agent)	Notes
N/A	N/A	N/A	N/A	<i>Epiq</i>	
<u>FINAL Aggregate</u> = \$1.37M CV Claims = \$695,000 Lien Claims = \$675,000 <u>INTERIM Aggregate</u> = \$1.272M CV Claims = \$652,000 Lien Claims = \$620,000	CV Claims; Lien Claims	None	Total Unsecured Debt = \$18,713,070 Trade Debt = \$14.2M CV = \$1.37M 7.321% = CV/Total Unsecured Debt 9.648% = CV/Trade Debt	<i>Epiq</i>	Customer Programs EXCLUDED <u>NOTE:</u> total unsecured debt = sum of affiliated debtors (<i>see each debtor's schedule F</i>)
<u>FINAL</u> = \$754,641.82 <i>debtors may pay an additional \$200,000 to the identified CVs only if the Committee gives prior consent or by Court order</i> <u>INTERIM</u> = \$754,641.82	Critical Vendors	None	Total Unsecured Debt = \$134,394,075.60 Trade Debt = \$30M CV = \$954,641.82 0.710% = CV/Total Unsecured Debt 3.183% = CV/Trade Debt	<i>Epiq</i>	Debtors filed supplemental request after interim order was entered, seeking to increase CV cap by \$200,000
N/A	N/A	N/A	N/A	<i>BMC Group</i>	

EXHIBIT C

TERMS FEATURES OF TRADE AGREEMENTS

This chart details the content and term features of the critical vendor orders and trade agreements studied pursuant to this survey.

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Allens, Inc. and All Veg, LLC 13-73597 WD Arkansas	None	Services	No	pay in the ordinary course of business	No	No	No	No	No
AppleILLINOIS, LLC 13-20723 ED Kentucky	None	Both	<i>no mention of a Trade Agreement</i>	None	No	No	No	No	No
Atari, Inc. 13-10176SDNY	"prior to Petition Date"	Both	<i>no mention of an agreement</i>	"Customary Trade Terms" - normal trade terms that were most favorable to debtors in effect prior to Petition Date or on other such favorable terms as are acceptable to debtors (Order ¶ 2)	YES (Final Order ¶ 3)	No	YES (Final Order ¶ 3)	YES (Final Order ¶ 3)	No
ATLS Acquisition, LLC 13-10262 DE	"prior to Petition Date"	Goods	No (Final Order ¶ 7)	"Governing Trade Terms" = normal & customary trade terms that were most favorable to the debtors & in effect b/w such CV & the Debtors prior to the Petition Date, or such other trade terms that are agreed to by the Debtors & such CV (Final Order ¶ 3)	YES (Final Order ¶ 8)	No	YES Debtor may declare CV payment a voidable post-petition transfer pursuant to § 549 so as to restore the debtors & CV to their original positions as if the Vendor Agreement had never been entered into (Final Order ¶ 8)	(Final Order ¶ 8) Exhibit A ¶ 9 broadly refers to the termination of the Critical Vendor Payment Program	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	No	No	No	No	No	Customer Obligations & Programs EXCLUDED
Yes	N/A	No	No	No	No	No	Debtor specifically identified in motion 4 CVs and amounts to be paid to each <i>no mention of a Trade Agreement</i>
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	"During the pendency of the Bankruptcy Cases, you will continue to extend to the Company all Governing Trade Terms" (Exhibit A ¶ 4)	No	No	NO - BUT debtor must advise US Trustee, professionals retained by the Committee of Unsecured Creditors & "professionals retained by Alere Parent" (senior secured creditor who filed an objection to CV order) of the identity of the CV, the goods & services provided by such vendor & the amount paid to the CV, within 3 business days of making the CV payment (Final Order ¶ 5)	YES Final Order references Exhibit A as sample CV Agreement	No	Final Order specifies what factors debtor should take into account in determining who is a CV (Final Order ¶ 4)

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Cengage Learning, Inc. 13-44106 EDNY <i>Shippers, Warehousemen & Lienholders; Authors & Content Sources</i>	"before Petition Date"	Both	No - but debtors can condition payment to Shippers & Warehousemen on written verification that they will continue to provide services during pendency of ch 11 cases on most favorable terms that existed prior to Petition date	most favorable terms that existed before the Petition Date (Final Shipping Order ¶ 6)	YES (Final Shipping Order ¶ 7) (Final Author Order ¶ 12)	No	YES (Final Shipping Order ¶ 7) (Final Author Order ¶ 12)	YES (Final Shipping Order ¶ 7)	No
Conexant Systems, Inc. 13-10367 DE	"before Petition Date"	Both	No	"shall be no less favorable than those trade terms provided by such Foreign Vendor or Lien Claimant to the Debtors before the Petition Date" (Procurement Policy ¶ (a))	YES (Procurement Policy, ¶ (d))	No	YES (Procurement Policy, ¶ (d))	YES (Procurement Policy, ¶ (d))	must notify committ ee 2 days before any payment
Electric Transportation Engineering Corporation 13-16126 AZ	"in the same manner and on the same basis as the Debtors honored such obligations prior to commencement of these chapter 11 cases" (Order ¶ 3)	Both	No	None	No	No	No	No	No
EWGS Intermediary, LLC 13-12876 DE	None	Services	No	None	No	No	No	No	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	during the pendency of these chapter 11 cases	No	No	YES bi-weekly written reports of all payments must be provided to counsel to committee (Final Shipping Order ¶ 8) (Final Author Order ¶ 5)	No	No	
Yes	"for at least 18 months following the effective date of a plan of reorganization " (Vendor Agreement ¶ 4)	NOTICE debtor must notify Committee at least 2 business days prior to making any payments pursuant to this order (Final Order ¶ 5)	No	YES must provide updated list of payments, on a monthly basis, to US Trustee, counsel to the agent for debtor's proposed postpetition secured lenders, counsel to agents for the debtors' prepetition lenders, and counsel to any statutory committee appointed (Procurement Policy ¶ (e))	YES Procurement Policy (Exh. 1) & Vendor Agreement (Exh. 2)	No	very detailed Vendor Agreements/Order NOTE: unique duration - 18 months after plan debtor has right, in event of breach, to seek injunctive relief to compel performance pursuant to the existing Vendor Agreement
Yes	"Debtors are authorized... to honor all prepetition and postpetition obligations relating to the Warranty Programs" (Order ¶ 3)	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	No	No	No	

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Excel Maritime Carriers, Ltd. 13-23060 SDNY	120 Days (Final Order ¶ 2(b))	Both	No	"Customary Terms" = unless the parties agree to different terms & conditions ... on terms that are as good or better than those 120 days prior to commencement (Final Order ¶ 2(b))	YES (Final Order ¶ 2(d))	No	YES (Final Order ¶ 2(d))	YES (Final Order ¶ 2(d))	No
Exide Technologies, Inc. 13-11482 DE	180 Days	Both	No	"Customary Trade Terms" = terms most favorable to debtor for the period of 180 days of the Petition Date, or such other trade terms as mutually agreed upon (Exhibit A) credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix, & availability	YES (Final Order ¶ 6)	YES (Exhibit A ¶ 7)	YES (Order ¶ 6)	If Trade Agreement is terminated or a CV refuses to supply goods or services following receipt of payment "(regardless of whether such CV has entered into a Trade Agreement), it is the explicit intention of this Court to return the parties to their position immediately prior to the entry of this order" (Order p.4)	consultation with committee if agreement is made - committee retains right to object to waiver otherwise
F & H Corporation 13-13220 DE	"Historical Trade Terms" - no definition (Order ¶ 6)	Both	<i>no mention of an agreement</i>	None	YES (Order ¶ 6)	No	No	YES (Order ¶ 6)	No
Flat Out Crazy, LLC 13-22094 SDNY <i>Customer Obligations</i>	"in the ordinary course of business"	Customer Gift Cards	<i>no mention of an agreement</i>	"in the ordinary course of business"	No	No	No	No	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"during the pendency of these chapter 11 cases" (Final Order ¶ 2(b))	No	No	YES bi-weekly reports of CV payments must be provided (in the first 45 days after the Petition date) to US Trustee & to counsel for any statutory committee appointed (Final Order ¶ 3)	No	No	NOTE: provision providing for alternative in the event the relationship between the CV and debtor does not extend to 120 days before Petition Date
Yes	Debtor agrees to pay CV on net 30 days terms (Exhibit A ¶ 6)	YES (Order ¶ 3)	Debtor must provide committee & DIP with 3 business days advance notice of "waiver of entry of any trade agreement" - no waiver shall take place until resolution of objection or further order of the Court (if 3 days' notice is not feasible - committee and DIP retain right to object to waiver & request disgorgement of CV payment)	YES (Final Order ¶ 14) debtor must provide Creditors' Committee, DIP Agent, and Unofficial Noteholders' Committee bi-weekly written reports of all payments	YES (Exhibit A)	YES (Final Order ¶ 7)	Contract parties can be critical vendors (¶ 9-12) - why only for these parties does Order say debtor must maintain list of payments? CV separate from foreign, liens, etc. Observation: want it to look like a smaller number, but they all have the small justification
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	No	No	No	legal justification parallels typical CV motion authority for debtors to make modifications & adjustments

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Furniture Brands International, Inc. 13-12329 DE	<u>CVs</u> : 1 Year <u>Shipping</u> : 180 Days	Goods	No (Final Order ¶ 4)	"Customary Trade Terms" = most favorable terms in effect b/w such CV and debtors within months before the Petition Date, or on such other favorable terms as the Debtors and the CV may otherwise agree" (Final Order ¶ 3)	YES (Final Order ¶ 5)	No	YES (Final Order ¶ 5)	YES (Final Order ¶ 5)	
Gatehouse Media, Inc. 13-12503 DE	None	Both	No	Order uses the "Customary Terms" but does not define it or reference the motion Motion defines Customary Trade terms as those "that are at least as favorable as those terms existing as of the Petition Date" (¶9)	YES (Order ¶ 4)	No	YES "recover such payment in cash from the Trade Creditor as an unauthorized postpetition transfer" (Order ¶ 4)	YES (Order ¶ 4)	No
Geokinetics Inc. 13-10472 DE	<u>CV final order</u> : prior to Petition Date	Both	No	<i>not defined in final order - but order does reference Exhibit C as sample Vendor Agreement</i> "Customary Trade Terms are defined as the normal & customary trade terms, practice, & programs that were most favorable to the Company and in effect.. prior to the Petition Date, or such other trade terms as you and the Company agree" (Exhibit C)	YES (Final Order ¶ 10)	No	YES (Final Order ¶ 10)	YES (Final Order ¶ 10)	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"throughout these chapter 11 cases" (Final Order ¶ 3)	No	No	No	YES see Exhibit C to the motion (CV Final Order)	No	provision: [add individualized set of customary trade terms] - CV final order debtor can settle all or part of these claims & can elect to only pay part of a prepetition claim, leaving the remainder to be addressed pursuant a chapter 11 plan (Shipping & Warehousing Order ¶ 3(e))
Yes	"during the pendency of these chapter 11 cases"	No	No	No	No	No	
Yes	"for a period following the date of the agreement and on other such terms and conditions as are acceptable to the Debtors" (Final Order ¶ 2) "during the pendency of the Bankr. Cases" (Exhibit C ¶ 5)	No	No	YES "debtors shall maintain a summary list of all payments made to CVs" & provide updated copies of such lists to the US Trustee & counsel to the Consenting Noteholders on a bi-monthly basis (Final Order ¶ 13)	YES Exhibit C ("Vendor Agreement")	YES (Final Order ¶ 9)	Exhibit C leaves space - "the terms of such open trade balance or credit line are as follows" (¶ 4) "All Vendor Agreements shall be deemed to have terminated, together with the other benefits to CVs as contained in this Order, upon entry of an order converting the Debtors' chapter 11 cases to cases under chapter 7" (Final Order ¶ 12)

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Geokinetics Inc. 13-10472 DE (continue)	<u>Shipper/Warehousemen/ Lien Claimant:</u> 180 Days	Services	No	"trade terms that, at a minimum, were provided to the Debtors during the 6 months prior to the Petition Date, or such other trade practices & programs that are at least as favorable to the Debtors as those in effect prior to the Petition Date"	No	No	No	No	No
	<u>Foreign Vendor Order</u> None	Goods	no mention of an agreement	None	No	No	No	No	No
Global Aviation Holdings Inc. 13-12945 DE <i>Foreign Claims</i>	1 Year	Both	No - debtor need not obtain written verification, but vendor is required, unless otherwise waived by Debtor, to continue to provide goods & services to debtor on the most favorable terms in effect 12 months prior to Petition Date (or other terms agreed upon)	12 month period prior to Petition Date or other terms agreed upon	YES (Final Order ¶ 6)	No	YES (Final Order ¶ 6)	§ 549 avoidable postpetition transfer (Final Order ¶ 6)	No
Global Axxess Corp. 13-51562 Nevada	None	Services	no mention of an agreement	N/A	N/A	N/A	N/A	N/A	N/A

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	YES "debtors shall maintain a summary list of all payments made to Foreign Vendors" & provide updated copies of such lists to the US Trustee & counsel to the Consenting Noteholders on a bi-monthly basis (Order ¶ 6)	No	No	Order applies first to claims for goods rec'd by debtor within 20 days of Petition Date
Yes	customary trade terms apply for remaining term of vendor's agreement with debtor, but only if debtor pays for goods & services in accordance with payment terms provided in the agreement	No	No	No	No	No	NOTE: 4 orders total - these notes are based on foreign vendor order
Yes	N/A	N/A	N/A	No	No	No	NOTE: no mention of a Trade Agreement very little info in CV order - legal basis for paying these Merchant Obligations matches CV bases

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
GMX Resources Inc. 13-11456 W.D. Oklahoma	None	Both	No	None - pay undisputed claims in ordinary course (<i>i.e.</i> , committee does not object)	No	No	No	No	Yes
Goldking Holdings, LLC 13-37200 SD Texas	None	Services	YES (Interim Order ¶ 4(e) - CV agrees to be bound by terms & provisions of order	"Customary Trade Terms, or such other trade terms as are agreed to by the Debtors and the Critical Vendor" (Interim Order ¶ 4(c))	YES (Interim Order ¶ 4(g))	No	Does not mention § 549 by name - but does in substance (Interim Order ¶ 4(g))	YES (Interim Order ¶ 4(g))	No
Green Field Energy Services 13-12783 DE	180 Days	Both	No	"Customary Trade Terms or Minimum Credit Terms" "trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date or, if more favorable, that existed within the 180 day period prior to the Petition Date" (Exhibit A - Trade Agreement)	YES (Final Order ¶ 5)	No	No	YES (Final Order ¶ 5(d))	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	prior to making a payment - debtor must provide Committee's counsel with name of vendor, amount & business judgment for making payment	YES committee can serve written objection on debtor within 3 business days - if dispute, debtor must get ct approval to make payment (Final Order ¶ 2)	No - but must service notice on committee prior to making any payment	No	No	
Yes	<i>not specified</i>	No	No	YES "debtors shall provide a confidential report of payments & the recipients thereof under this Order every three (3) days" to Trustee (Interim Order ¶ 6)	No	No	
Yes	"at least during the pendency of the Bankruptcy Cases" <i>Exh. A - Trade Agreement ¶ 5(b)</i>	YES if debtors have determined, in consultation with the Committee, that one or more of 8 factors apply to CV, CV payment allowed (Final Order ¶ 2)	No	No	YES (Exhibit A - Trade Agreement)	YES (Final Order ¶ 5-6)	CONSULTATION RIGHTS Final Order ¶ 2 - if debtors have determined, in consultation with the Committee, that one or more of 8 specifically identified factors apply to a CV, then CV payment allowed "DEBTOR does not waive right to cancel or purchase order, decline acceptance of goods/services, return defective, nonconforming or unacceptable goods, contest the amount of any invoice or claims on any grounds" (Final Order ¶ 12)

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Groeb Farms, Inc. 13-58200 ED Mich.	"trade terms at least as favorable to debtor in place at the time of sale"	Goods	YES	"Trade Terms" - "continue to extend normalized trade credit & provide other business terms on a post-petition basis (consistent with past practices ... on terms at least as favorable as those extended prepetition or on other terms that are acceptable to the Debtor"	YES	YES <i>debtor also has 30 days to cure default</i> (Trade Agreement ¶ 8)	Yes	(a) may be deemed an unauthorized post-petition transfer under § 549 that the Debtor may either (i) recover from the Lienholder in cash or goods or (ii) at the Debtor's option, apply against any outstanding administrative claim held by such Lienholder, etc.	No
iBAHN Corporation 13-12285 DE	None	Services	No	None	No	No	No	No	No
Loehmann's Holdings, Inc. 13-14050 SDNY <i>Customs Duties, Broker's Fees, and Shipping & Warehousing Charges</i>	None	Goods	<i>no mention of an agreement</i>	"whether relating to the period before or after the Petition Date, consistent with their customary practices in the ordinary course of business" (Final Order ¶ 2)	No	No	No	None	counsel for Committee gets notice

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"until the Debtor emerges from chapter 11"	No	No	No	YES plan contains a "Trade Agreement" for suppliers	No	includes provision stating that supplier shall sell goods/services in volumes reasonably consistent with current market conditions and supplier's capacity parties can modify customary trade terms by written agreement (doesn't require court) supplier has right to cure default within 30 days from receipt of written notice "Compliance Audit" - ¶ 12 of trade agreement (debtor can request an audit of supplier to confirm supplier's compliance with customary trade
Yes	<i>not specified</i>	None	No	No	No	No	
Yes	<i>not specified</i>	"Debtors shall provide info AND notice of any payments made in connection with this Order to counsel to any official committee of unsecured creditors" (Final Order ¶ 6)	N/A	"Debtors shall provide info AND notice of any payments made in connection with this Order to counsel to any official committee of unsecured creditors" (Final Order ¶ 6)	No	No	debtor can settle all or part of these prepetition claims for less than their face amount without further notice or hearing (Final Order ¶ 3)

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Longview Power, LLC 13-12211	120 Days	Both	No	"trade terms at least as favorable to the Debtors as those practices and programs . . . In place in the 120 days immediately prior to the Petition Date (collectively, the "Customary Trade Terms")" (Final Order ¶ 5)	YES (Final Order ¶ 5) (Trade Agreement ¶ 5 - "Supplier Breach")	No	YES (Final Order ¶ 5)	YES (Final Order ¶ 5)	YES "Steering Committee" (Final Order ¶ 4)
LUHC Wind Down Corp. (Life Uniform Holding Corp.) 13-11391 DE	None	Services	No	None	No	No	No	No	No
Maxcom Telecommunications 13-11839 DE <i>Trade Claims</i>	"in accordance with prepetition practice" (Order ¶ 2)	Goods & Services	YES "Debtors are authorized, but not directed, to pay Trade Claims in their sole discretion and in accordance with prepetition practice up to \$32 million; <i>provided</i> , that the Debtors reserve the right to condition payments on receiving trade terms from the holders of Trade Claims, which terms must be acceptable to the Debtors" (Order ¶ 2)	"in accordance with prepetition practice" & "Debtors reserve the right to condition payments on receiving trade terms" (Order ¶ 2)	No	No	No	No	No
Metro Affiliates, Inc. 13-13591 SDNY <i>Fuel Suppliers</i>	"prior to Petition Date" (Final Order ¶ 3)	Both	YES debtors shall require Fuel Suppliers to acknowledge in writing that payment of such prepetition claims is conditioned upon them continuing to supply fuel and related services on trade terms (Final Order ¶ 3)	"terms that, at a minimum, such Fuel Suppliers provided to the Debtors prior to the Petition Date" (Final Order ¶ 3)	No	No	No	No	No
Namco, LLC 13-10610 DE <i>Freight Forwarders</i>	ordinary course	Services	No	debtor is authorized to pay any or all valid pre-petition charges in the ordinary course of the Debtor's business	No	No	No	No	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	Yes	YES (Final Order ¶5)	YES matrix summarizing the name of each CV, the amount paid, and a brief description of the goods or services provided by the CV shall be provided every 14 days to the "Steering Committee" (Final Order ¶ 10)	YES "Trade Agreement" (Exhibit C of Debtor's CV Motion)	No	
Yes	<i>not specified</i>	No	No	No	No	No	Customer Programs EXCLUDED
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	No	No	No	subject to safe harbor provisions
Yes	<i>not specified</i>	No	No	No	No	No	

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
NE OPCO, Inc. 13-11483 DE	120 Days (order says terms & conditions as good or better than those that existed on Feb. 9, 2013 - & debtors filed on June 10, 2013 = 120 days)	Both	No	"on terms & conditions (including credit terms) as good or better than those that existed on Feb. 9, 2013" (Final Order ¶ 4(b)(ii))	YES	No	YES (Order ¶ 4(c))	YES (Order ¶ 4(c), 5)	No
OCZ Technology Group, Inc. 13-13126 DE	180 Days	Both	No	nothing in order - but order says debtors can enter into Trade Agreements "substantially in the form of the letter annexed as Exhibit C to the Motion as a condition to payment of its CV Claims"	YES (Final Order ¶ 6)	not in order but Exhibit C ¶ (g) says that if debtor breaches - CV has no obligation to supply goods/services until breach is cured & CV can terminate the agreement upon written notice to debtor & if debtor doesn't cure default w/in 5 days, CV may retain all sums paid to it	No (but see Final Order ¶ 6, 10)	YES debtors reserve right to take any & all action necessary to return the parties to the positions they held immediately prior to entry of this order with respect to all prepetition claims (Final Order ¶ 6)	Yes
OnCure Holdings, Inc. 13-11540 DE	60 Days	Both	No	"add individualized set of customary trade/service terms or attach/cross-reference term from existing agreement" (Exhibit C of motion)	YES (Final Order ¶ 5)	No	not specifically - but see Final Order ¶ 5	YES (Final Order ¶ 5)	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"during the pendency of these Chapter 11 Cases" (Final Order ¶ 4(b))	No	No	No	No	No	debtor can settle all or part of these claims &/or elect to only pay part of the prepetition claim, leaving the remainder to be addressed by their plan or reorganization (Final Order ¶ 4(e))
Yes	<i>not specified</i>	YES as to future CV payments, at least 2 days prior to making such payments & as to the terms of any Trade Agreements (Final Order ¶ 5)	No	YES bi-weekly written reports of all CV payments must be provided to counsel to any statutorily appointed committee, US Trustee, and CV ("postpetition lender") (Final Order ¶ 9)	YES refers to Exhibit C of motion for sample Trade Agreement	YES Reinstatement of terminated Trade Agreement provision (Final Order ¶ 7)	<u>NOTE</u> : good sample debtor breach provision in Exhibit C ¶ (g)
Yes	"for at least during the pendency of the Bankruptcy Cases" (Exhibit C of motion)	No	No	No	Yes	YES Provision re: reinstatement of Trade Agreement (Final Order ¶ 6)	

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Ormet Corporation 13-10034 DE	180 Days	Both	No	None	YES (Final Order ¶ 4(h))	No	not specifically - execution of trade agreement is not a waiver, by debtor, of any other cause of action including avoidance actions (Final Order ¶ 12)	YES (Final Order ¶ 10)	No
Personal Communications Devices, LLC 13-74303 EDNY	"consistent with past practice"	Both	<i>no mention of a Trade Agreement</i>	N/A	N/A	N/A	N/A	N/A	N/A
Physiotherapy Holdings, Inc. 13-12965 DE	None	Services	No	None	No	No	No	No	No
PMGI Holdings, Inc. 13-12404 DE	None	Services	No	in the ordinary course of business	No	No	No	No	No
RDA Holding Co. 13-22233 SDNY	120 Days	Both	No	Those terms most favorable to Company & in effect between the Vendor & Company at any time during the 120 days before Commencement Date, or other such trade terms as agreed by the Company & Vendor (Exhibit A)	YES	No	Yes	debtors may declare that payment is a voidable postpetition transfer & recover in cash or in goods from CV, or creditor shall immediately return the payment & the Trade Claim shall be reinstated so as to restore parties to their original positions	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"Trade Agreement ... shall not automatically terminate upon confirmation of a plan"	No - but if debtor terminates a trade agreement - must provide notice to committee & US Trustee	No	YES "Debtors shall maintain a summary list of all payments to CVs, foreign vendors" on a bi-weekly basis (Final Order ¶ 15)	No	No	
Yes	N/A	N/A	N/A	No	No	No	<i>no mention of a Trade Agreement</i>
Yes	<i>not specified</i>	No	No	No	No	No	PRE-PACK
Yes	<i>not specified</i>	No	No	No	No	No	Customer & Marketing Programs EXCLUDED
Yes	Exh. A ¶ 6 "You will hereafter extend to the Company all Customary Trade Terms (as defined in the Order) for at least 24 months after execution of this letter agreement."	No	No	YES upon request to US Trustee & professionals retained by committee Debtors must maintain a matrix summarizing (i) name of each Foreign Vendor or Other CV paid, (ii) amount paid to each, and (iii) type of goods or services provided by each (Final Order)	YES <i>attached to final order as Exhibit A</i>	YES Vendor Agreement may be reinstated if (a) termination of Vendor Agreement is subsequent reversed by the Court for good cause shown that Debtors' determination was materially incorrect after notice & a hearing following a motion from the CV, (b) default cured no later than 5 business days after initial default, (c) debtors reach an agreement with the CV	DURATION Interesting - debtors can pay other claims as CVs payments based upon consideration of 3 specific factors: (a) goods/services could be replaced without interruption to Debtors' operations; (b) failure to pay the claim would result in the Debtors paying substantially more for the same goods or services; (c) failure to pay claim would interrupt operations or cause a loss of sales, market share, or future revenue

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Revel AC, Inc. 13-16253 NJ	None	Both	No - but debtor has the right to condition payment on receiving trade terms from the holders of Trade Claims	None	No	No	No	No	No
RIH Acquisitions NJ, LLC 13-34483 NJ	"trade terms that are at least as favorable to the debtors as those in effect prior to the Filing Date"	Both	No	Customary Trade Terms or other terms as the parties may agree	YES (Final Order ¶ 9, 10; <i>see also</i> motion p. 11, "Breach of Vendor Agreement")	No	No	YES (Final Order ¶ 10)	debtor is authorized, but not required, to consult with DIP lender re: Vendor Agreements (Order ¶ 7) if no Vendor Agreement - must consult with DIP lender if wants to make CV payments (Order ¶ 8)
Rodeo Creek Gold Inc. 13-50301 Nevada <i>Essential Vendors & Shippers and Lien Claimants</i>	180 Days	Both	No	trade terms that, at a minimum, were provided to the Debtors during the 6 months prior to the Petition Date, or such other trade practices & programs that are at least as favorable to the Debtors as those in effect prior to the Petition Date	No	No	No	No	Yes

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	YES summary list must be provided on a bi-weekly basis to US Trustee & Committee of unsecured creditors (Final Order ¶ 11)	YES "Critical Vendor Procurement Policy" as defined in detail in the Verified Application CVs - as defined in Verified Application debtors shall send a letter to the CVs substantially in the form attached as Exh A to the Motion	No	to the extent a CV fails to cure a default or reach a more favorable alternative agreement with debtor - debtor can go to court & seek injunctive relief to compel performance pursuant to vendor agreement (Final Order ¶ 9)
Yes	<i>not specified</i>	YES Payment to "Essential Vendors" & to "Shippers & Lien Claimants" is authorized only upon 3 days prior notice to the Committee	No	No	No	No	Order - (applied first to claims for goods rec'd by debtor within 20 days of Petition Date)

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Rotech Healthcare, Inc. 13-10741 DE	1 Year	Both	no written verification is required BUT CVs must agree to continue to provide goods/services on either (i) the most favorable terms in effect in the 12 months prior to commencement, or (ii) terms the parties otherwise agree to	(i) the most favorable terms in effect in the 12 months prior to commencement, or (ii) terms more favorable to the debtors to which the parties otherwise agree Final Order refers to "Schedule 1" attachment as a sample of a CV agreement - which contains a section where debtor is to "add individualized set of customary trade terms"	YES	No	YES Final Order specifies that acceptance of a vendor payment = waiver of "any and all defenses it might otherwise have against the Debtors with respect to any action commenced by the Debtors under section 549"	§ 549	No
Rural/Metro Corporation 13-11952 DE	None <i>Exhibit A contemplates "add individualized set of customary trade terms"</i>	Both	No (Final Order ¶ 3)	"normal and customary trade terms, practices and programs" including credit limits, pricing, cash discounts, timing of payments, allowances, rebates, and other applicable terms & programs (Exhibit A of motion)	YES (Final Order ¶ 5)	No	NO "nothing herein shall constitute a waiver of the Debtors rights to seek damages or other appropriate remedies against any breaching CV" [Final Order ¶ 5, see also Final Order ¶ 8, 15]	YES (Final Order ¶ 5)	Yes
School Specialty, Inc. 13-10125 DE	120 Days	Both	NO but CV must agree to supply goods/services to debtors postpetition "(i) on Customary Trade Terms, (ii) pursuant to a postpetition trade agreement, manufacturing agreement, or other business continuation agreement entered into by the Debtors, or (iii) on such other favorable terms as are acceptable to the Debtors" (Final Order ¶ 4)	terms favorable to debtors in effect for the period within 120 days of Petition Date, or such other trade terms as mutually agreed upon credit limits, coupon reconciliation, normal product mix, timing of payments, allowances, rebates, availability and other applicable terms and programs	YES (Final Order ¶ 6(g), 9, 10)	No	execution of a trade agreement is not a waiver, by the debtor, of any other CoA including avoidance actions [Final Order ¶ 11)	YES (Final Order ¶ 10)	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"The Customary Trade Terms shall apply throughout the Debtors' chapter 11 cases & for the 12-month period commencing on the date the debtor's plan of reorg is consummated, as long as the debtors agree to pay for such goods in accordance with such terms"	No	No	No	YES Final Order included attachment ("Schedule 1") as a sample agreement	No	Final Order says acceptance of CV payment = waiver of § 549 defenses. Duration = throughout chapter 11 case AND for the 12 month period after plan is consummated NOTE: Final Order was amended to increase CV caps
Yes	<i>not specified</i>	NOTICE also must consult with secured prepetition & postpetition lenders & consenting senior unsecured noteholders (Final Order ¶ 7)	No	YES bi-weekly reports of all CV payments must be provided to official committee of unsecured creditors	YES order references "Exhibit A" of debtors' motion	YES Provision re: reinstatement of Trade Agreement (Final Order ¶ 6)	
Yes	"at least the pendency of the Bankruptcy Cases" [Trade Agreement ¶ 5(b)]	YES debtors must consult with committee as to all future CV payments & terms of any Trade Agreement (Final Order ¶ 8)	No	YES bi-weekly reports of all CV payments must be provided to official committee of unsecured creditors	No - but "Trade Agreement" terms are included in Final Order ¶ 6	No	

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
Simply Wheelz LLC (Advantage Rent-A-Car) 13-03332 SD Mississippi	"terms most favorable to the Company prior to the Petition Date" <i>See Exhibit 2</i>	Both	No - though CV Agreement need not be entered into, Debtor can only make CV payments if CV agrees to continue to supply goods or services on "CV's Governing Trade Terms"	"Governing Trade Terms"	YES	No	Yes	(a) debtor may declare the CV payment a voidable postpetition transfer (§ 549) that the debtor may recover in cash or in goods from the CV, (b) creditor must return amount of payment that exceeds <u>postpetition obligations</u> , and (c) CV claim shall be reinstated so as to restore Debtore & CV to <u>original positions</u>	No
SuperMedia Inc. & Dex One Corporation 13-10545, 13-10533 (Dex)DE	None	Both	No	debtors are authorized to condition payment of Claims on "Customary Terms" - but no definition of these terms	YES (Final Order ¶ 4)	No	not by name (Final Order ¶ 4)	YES (Final Order ¶ 4)	No
Synagro Technologies, Inc. 13-11041 DE	180 Days	Both	NO "debtors shall undertake appropriate efforts to cause the CVs to enter into Trade Agreements"	"normal and customary trade terms, practices and programs" including credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability (Exhibit A of motion)	YES (Final Order ¶ 5)	No	No (but see Final Order ¶ 13)	YES (Final Order ¶ 5)	No

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	"during pendency of the Bankruptcy Cases" (Exhibit 2 (¶ 4))	No	No	No	YES Final Order references Exhibit 2 ("Critical Vendor Agreement")	No	NOTE: Exhibit 1 of motion is a list of CVs - interesting that it identifies its CVs from the start
Yes	<i>not specified</i>	No	No	No	No	No	
Yes	<i>not specified</i>	No	No	No	YES order references "Exhibit A" of debtors' motion	YES (Final Order ¶ 5)	

Case	Historical Basis	Goods &/or Services	Vendor Signature Required	Customary Trade Terms	Vendor Breach Provision	Debtor Breach Provision	Specify § 549 Voidable Post-petition Transfer	Return of Payment	Consent Rights
TPO Holdings, Inc. (Printer Wind-Down Corporation I, Inc.) 13-11327 DE	120 Days	Both	CVs: no - but CV must agree to Customary Trade Terms <u>Lien Claimants</u> : debtor may seek to <i>require</i> any Lien Claimant to enter into a Trade Agreement (Final Order ¶ 5)	Terms most favorable to the debtors & in effect between CV & debtors for the period of 120 days prior to Petition Date <i>or different terms negotiated b/w debtor & CV</i>	YES (Final Order ¶ 6, 3(f))	No	No	YES (Final Order ¶ 6, 7)	No
Trinity Coal Corporation 13-50364 ED Kentucky	"customary trade terms"	Both	Order ¶ 5 says debtor can request that each CV enter into a Vendor Agreement substantially in the form as to the Motion as Exhibit B	"customary trade terms or on such terms and conditions as are acceptable to the Debtors" (Final Order ¶ 4)	YES (Final Order ¶ 7)	No	Yes	YES (Final Order ¶ 7)	(1) no consent needed to pay \$353,546.29; (2) Committee must consent to CV payment of \$297,968.21; (3) US Trustee must consent to CV payment of \$103,127.33

Continuing Jurisdiction with Bankruptcy Court	For how long is CV bound by trade agreement?	Consultation with Creditors' Committee	Objection Rights if no Trade Agreement	Must debtor maintain summary list of CV payments?	Does CV order refer to an attached sample agreement?	Provision Providing for Reinstatement of Vendor Agreement	Notes & Observations
Yes	<i>not specified</i>	No	No	No	No, but customary trade terms are included in the order itself	No	Lien Claimants & CVs
Yes	"during these Chapter 11 Cases" (Final Order ¶ 4)	YES as to 3 identified CVs (CV payments in the amount of \$297,968.21) & consent of Committee needed prior to making an additional CV payment of \$200,000	No	No	YES <i>Exhibit B of motion</i>	YES Debtor may reinstate a terminated Vendor Agreement (Final Order ¶ 6)	NOTE: provision allowing debtor to pay identified CVs an additional \$200,000 if Committee gives prior consent or by court order Vendor Chart (10 CVs) provided to court, US Trustee & Committee