

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11
: :
Telogy, LLC, et al., : Case No. 10-10206 ()
: :
Debtors. : Joint Administration Pending
: :
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DEBTORS' MOTION FOR ORDER: (I) AUTHORIZING DEBTORS TO (A) PAY PREPETITION EMPLOYEE WAGES, SALARIES AND OTHER COMPENSATION, PREPETITION EMPLOYEE BUSINESS EXPENSES, AND OTHER MISCELLANEOUS EMPLOYEE EXPENSES AND EMPLOYEE BENEFITS; AND (B) CONTINUE EMPLOYEE BENEFIT PROGRAMS; AND (II) GRANTING RELATED RELIEF

The debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**")¹ hereby move for entry of an order, pursuant to sections 105(a), 363(b), and 507(a) of title 11 of the United States Code (the "**Bankruptcy Code**"), as supplemented by Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"): (i) authorizing the Debtors to (a) pay prepetition employee wages, salaries and other compensation, prepetition employee business expenses, and other miscellaneous employee expenses and employee benefits; and (b) continue certain employee benefit plans, programs and policies in effect as of the Petition Date (as defined herein); and (ii) granting related relief (the "**Motion**"). In support of the Motion, the Debtors rely upon and incorporate by reference the Affidavit of Gary B. Phillips, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings (the "**Phillips Affidavit**"), which was filed with the Court concurrently herewith.

¹ The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors' executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

In further support of the Motion, the Debtors, by and through their proposed undersigned counsel, respectfully represent:

BACKGROUND

1. On January 24, 2010 (the "**Petition Date**"), Telogy, LLC ("**Telogy**") and e-Cycle, LLC filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Debtors have requested that these chapter 11 cases be consolidated for procedural purposes. As of the date hereof, no official committee of unsecured creditors has been appointed.

2. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the Phillips Affidavit.

JURISDICTION

3. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue before this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363(b), and 507(a) of title 11 of the Bankruptcy Code, as supplemented by Bankruptcy Rule 6003.

RELIEF REQUESTED

4. By this Motion, the Debtors seek entry of an order (the "**Order**"), in substantially the form annexed hereto as Exhibit A: (i) authorizing, but not directing, the Debtors to pay certain prepetition employee obligations including, but not limited to, accrued prepetition wages and salaries (collectively, the "**Employee Wage Claims**"), reimbursable

expenses (“**Reimbursable Business Expenses**”), as well as fees, premiums and other costs associated with maintenance of the Debtors’ employee benefit practices, programs and policies, as more fully described herein (the “**Employee Benefit Obligations**”); (ii) authorizing, but not directing, the Debtors to continue their various employee benefit plans, programs and policies in effect as of the Petition Date (the “**Employee Benefit Programs**”) and to continue honoring all Employee Benefit Obligations relating thereto; (iii) authorizing, but not directing, payment of all related prepetition withholdings (the “**Employee Deductions**”) and payroll taxes (the “**Employer Taxes**,” collectively, with the Employee Wage Claims, the Employee Benefit Obligations, the Employee Benefit Programs, and Employee Deductions, the “**Prepetition Employee Obligations**”) associated with payroll obligations and the Employee Benefit Obligations; (iv) directing the disbursement banks and all other banks and lending institutions maintaining payroll and employee benefits to honor and pay all prepetition and postpetition checks issued or to be issued, and fund transfers requested, in respect of the Prepetition Employee Obligations; and (v) authorizing, but not directing, the Debtors to issue new postpetition checks or effect postpetition fund transfers in respect of the Prepetition Employee Obligations, if necessary.²

5. Absent the relief requested herein, not only would the Debtors’ employees suffer enormous personal hardship, but the Debtors’ businesses would be immediately and irreparably harmed. Thus, entry of an order approving this Motion is critical to ensure the continuity of the Debtors’ operations and preserve the value of these estates.

² The Order provides that the relief granted therein shall not constitute or be deemed an assumption pursuant to section 365(a) of the Bankruptcy Code of any employment and service agreements to which the Debtors may be a party or any of the Debtors’ Employee Benefit Programs.

PREPETITION EMPLOYEE OBLIGATIONS

6. By this Motion, the Debtors request authority to pay certain prepetition obligations to the Debtors' employees, insurance companies, plan administrators and other third parties. The Prepetition Employee Obligations for which authorization to pay is sought by the Debtors are described below.

A. Wages, Salaries and Other Compensation

7. Prior to the Petition Date and in the ordinary course of the Debtors' business, the Debtors paid their employees' wages, salaries and other compensation and benefits. The Debtors seek authority to pay the accrued but unpaid prepetition wages, salaries, and other compensation owed to employees, in accordance with the Debtors' existing schedule for such payments.

8. On a consolidated basis, the Debtors currently employ approximately 41 full-time employees and one part-time employee, which employees provide a variety of services to support the Debtors' operations. All of the Debtors' employees are salaried.

9. The Debtors estimate that, as of the Petition Date, outstanding Employee Wage Claims total approximately \$105,000.³ As of the Petition Date, no employee of the Debtors has an Employee Wage Claim exceeding \$10,950.

(i) *Payroll Process*

10. The Debtors' payroll is administered through Ceridian Corporation ("Ceridian").⁴ Employees are paid semimonthly, on or about the 15th day and the last day of

³ The estimated amounts of Employee Wage Claims referenced herein include Employee Deductions and the employee portion of Employer Taxes. For the avoidance of doubt, Employee Wage Claims do not include the value of accrued but unpaid Vacation Time or Floating Holidays (each as defined below).

each month, current through the payment date. Two days before employees are scheduled to be paid, the Debtors wire the amount necessary to satisfy all payroll obligations for the applicable period from their central disbursement account to a payroll disbursement account (the “**Payroll Disbursement Account**”). The day prior to the payment date, Ceridian draws on the Payroll Disbursement Account in the amount necessary to satisfy the Debtors’ payroll obligations. On the payment date, Ceridian will deposit the appropriate amounts directly in employees’ bank accounts or, in certain cases, issue paychecks to employees.

11. The Debtors’ typical semimonthly payroll for all employees is, on average, approximately \$180,000 (the “**Semimonthly Payroll Amount**”). The Debtors’ last payroll was paid on January 15, 2010. The next payroll for the Debtors’ salaried Employees is scheduled to be paid on January 31, 2010.

(ii) *Commissions*

12. The Debtors’ sales employees are entitled to earn commission payments (“**Commissions**”) pursuant to four different sales incentive programs maintained by the Debtors. Commissions vary based on the satisfaction of certain individual and team revenue goals. Certain sales employees receive Commissions on a monthly basis; certain receive Commissions on a quarterly basis. The Debtors pay Commissions when due in connection with their normal payroll cycle. The Debtors estimate that their outstanding prepetition obligations in respect of Commissions total approximately \$15,000, representing the Debtors’ estimate of Commissions earned on account of January sales, leases and rentals prior to the Petition Date. By this Motion,

⁴ The Debtors pay Ceridian fees to administer their payroll. As of the Petition Date, the Debtors estimate that they owe Ceridian administrative fees of approximately \$1,000. By this Motion, the Debtors seek authority to pay such administrative fees to Ceridian.

the Debtors are seeking authority to pay all outstanding Commissions, and to continue to pay Commissions after the Petition Date in the ordinary course of business.

(iii) *Bonus Plans*

13. The Debtors have historically maintained bonus plans (the “**Bonus Plans**”) for the benefit of certain eligible employees. By this Motion, the Debtors are not seeking authority to pay any prepetition amounts under the Bonus Plans. However, the Debtors hereby reserve their rights to request authority to honor any outstanding obligations under the Bonus Plans at a later date.

B. Employer Taxes

14. In addition to the Employee Wage Claims, the Debtors are obligated to pay certain Employer Taxes on behalf of employees, including FICA (Social Security and Medicare), federal, state, and, in some instances, local income and other payroll taxes. A portion of such payments represents amounts withheld from employees’ paychecks, and the remainder of such payments represents required employer contributions. Typically, Employer Taxes total approximately \$57,000 per semimonthly pay period. The estimate of outstanding Employee Wage Claims set forth herein includes all Employer Taxes.

15. The Debtors withhold Employer Taxes at the time of the applicable pay period; however, amounts withheld are remitted weekly, monthly, or quarterly, depending on state and local laws. Consequently, as of the Petition Date, the Debtors may be in possession of Employer Taxes relating to the prepetition period. Many of the Employer Taxes constitute “trust fund” taxes and the remaining Employer Taxes likely will create priority claims pursuant to section 507(a)(8) of the Bankruptcy Code if not paid. Accordingly, the Debtors request authority

to pay any accrued but unpaid Employer Taxes that may relate to the prepetition period as and when they become due in the ordinary course of the Debtors' businesses.

16. The Debtors believe that all of their employees have priority claims with respect to their accrued but unpaid prepetition wages or salaries pursuant to section 507(a)(4) of the Bankruptcy Code. Due to the critical importance of the employees to the Debtors' business and the inability of the Debtors to replace such employees, the Debtors hereby request authority to pay the Employee Wage Claims described above as well as any Employer Taxes associated with those claims.

C. Reimbursable Business Expenses

17. Prior to the Petition Date and in the ordinary course of the Debtors' business, the Debtors reimbursed employees for a variety of expenses (the "**Reimbursable Business Expenses**"), including, approved business expenditures incurred in the normal course of their employment such as the actual costs of travel, meals, lodging, entertainment and other expenses. Because employees do not always submit claims for reimbursement promptly, it is difficult for the Debtors to determine the actual amount of incurred but not reported reimbursable expenses as of any particular time. The Debtors estimate, however, that Reimbursable Business Expenses of no more than \$2,000 in the aggregate are outstanding as of the Petition Date. The Debtors hereby seek authority to reimburse all outstanding prepetition Reimbursable Business Expenses in the ordinary course of business.

18. All of the Reimbursable Business Expenses were incurred in connection with each Employee's employment by the Debtors and in reliance upon the understanding that such expenses would be reimbursed. The Debtors' ability to pay such expenses reaffirms the employees' reliance on the Debtors and, thereby, has a significant effect on employee morale. It

would be patently inequitable to require employees to bear any expenses that they incurred in furtherance of their responsibilities to the Debtors. Accordingly, the Debtors request authority, in their discretion and in the exercise of their business judgment, to continue to honor their Reimbursable Business Expenses in the ordinary course of business regardless of when such obligations arose.

D. Employee Benefit Programs

19. In the ordinary course of business, as is customary with most large businesses, the Debtors have established certain Employee Benefit Programs, including medical insurance, dental insurance, vision insurance, life insurance, accidental death and dismemberment insurance, long-term disability coverage, and a 401(k) plan across all facilities and sales offices. The Debtors' primary Employee Benefit Programs are described below.

(i) *Medical and Prescription Drug Benefits*

20. The Debtors' employees and eligible dependents receive health insurance pursuant to plans administered by Blue Shield of California and Kaiser Permanente (the "**Health Plans**"). The Health Plans provide medical coverage and prescription drug benefits to covered employees and dependents.

21. Premiums for the Health Plans total approximately \$51,000 per month. Approximately 90% of such premiums are paid by the Debtors, and approximately 10% are funded by employee contributions. The Debtors pay such monthly premiums in advance on the first day of each month. Accordingly, the Debtors believe that, as of the Petition Date, they have no outstanding obligations with respect to accrued but unpaid Health Benefits costs. The Debtors hereby seek authority to maintain their Health Plans, including paying, in their

discretion, any outstanding obligations in respect of the Health Plans, regardless of when such obligations arose.

(ii) *Dental Insurance*

22. The Debtors provide dental benefits (“**Dental Benefits**”) to employees and eligible dependents through a dental plan administered by Principal Life Insurance Company (“**Principal**”). Premiums for the Dental Benefits total approximately \$5,400 per month. Approximately 90% of such premiums are paid by the Debtors, and approximately 10% are funded by employee contributions. The Debtors pay the monthly premiums for the Dental Benefits in advance, on the first day of each month. Accordingly, the Debtors estimate that, as of the Petition Date, they had no outstanding obligations with respect to accrued but unpaid Dental Benefits. The Debtors hereby seek authority to maintain the Dental Benefits, including paying, in their discretion, any outstanding obligations in respect of the Dental Benefits, regardless of when such obligations arose.

(iii) *Vision Insurance*

23. The Debtors’ employees and eligible dependents receive vision coverage pursuant to a plan administered by Vision Service Plan (the “**Vision Benefits**”). Premiums for the Vision Benefits total approximately \$410 per month. Approximately 87% of such premiums are paid by the Debtors, and approximately 13% are funded by employee contributions. The Debtors pay such monthly premiums in advance each month. Accordingly, the Debtors believe that, as of the Petition Date, they have no outstanding obligations with respect to accrued but unpaid Vision Benefits costs. The Debtors hereby seek authority to maintain Vision Benefits, including paying, in their discretion, any outstanding obligations in respect of the Vision Benefits, regardless of when such obligations arose.

(iv) *Life Insurance and Accidental Death and Dismemberment Insurance*

24. The Debtors offer life and accidental death and dismemberment insurance benefits (the “**Basic Life/AD&D Benefits**”) to all employees through a plan administered by Principal (the “**Life Insurance Plan**”). Pursuant to the Life Insurance Plan, employees receive Basic Life/AD&D Benefits in an amount equal to the applicable Employee’s salary. Premiums for the Basic Life/AD&D Benefits total approximately \$520 per month, and are paid entirely by the Debtors.

25. Certain employees voluntarily purchase supplemental life insurance benefits for themselves or their eligible dependents (the “**Supplemental Life Benefits**”) through the Life Insurance Plan. Premiums in respect of the Supplemental Life Benefits total approximately \$620 per month. Such premiums are funded entirely by employee contributions.

26. Premiums in respect of the Basic Life/AD&D Benefits and Supplemental Life Benefits are paid in advance, on the first day of each month. Accordingly, the Debtors believe that, as of the Petition Date, they have no outstanding obligations with respect to accrued but unpaid premiums in respect of the Basic Life/AD&D Benefits and the Supplemental Life Benefits. The Debtors hereby seek authority to maintain the Basic Life/AD&D Benefits and the Supplemental Life Benefits, including making any payments necessary with respect thereto in the ordinary course of the Debtors’ businesses, regardless of when such amounts accrued.

(v) *Disability Insurance*

27. Full-time employees and part-time employees working at least 30 hours per week are eligible for long-term disability insurance benefits (“**Long Term Disability Coverage**”) through a plan administered by Principal. After being disabled for a period of 180 days, eligible employees are entitled to receive, pursuant to the Long Term Disability Coverage

and any applicable state disability insurance program, aggregate benefits equal to approximately 67% of their regular compensation⁵ up to a maximum of \$2,769 per week. If an employee receiving benefits under the Long Term Disability Coverage is younger than 60 years old at the time of such employee's disability, the Long Term Disability Coverage will last until the employee turns 65.

28. Premiums in respect of the Long Term Disability Coverage total approximately \$850 per month, and are paid entirely by the Debtors. Premiums in respect of the Long Term Disability Coverage are paid in advance, on the first day of each month. Accordingly, the Debtors believe that, as of the Petition Date, they have no outstanding obligations with respect to accrued but unpaid premiums in respect of the Long Term Disability Coverage. The Debtors hereby seek authority to maintain the Long Term Disability Coverage, including making any payments necessary with respect thereto in the ordinary course of the Debtors' businesses, regardless of when such amounts accrued.

(vi) *Flexible Spending Account Benefits*

29. The Debtors provide flexible spending account benefits (the "**Flex Spending Benefits**") on a pre-tax basis to assist employees with dependent care (e.g., child care expenses) and health care (e.g., out-of-pocket medical expenses such as deductible, co-payments, etc.). The Flex Spending Benefits are administered by Flex Plan Services, Inc. The Flex Spending Benefits allow participating employees to elect to withhold a certain percentage of their gross wages (prior to deductions for income or Social Security taxes) to contribute towards payment of covered health and/or dependent care expenses.

⁵ For the purposes of Long-Term Disability coverage, "regular compensation" includes Commissions averaged over the previous 12 months but not bonuses, car allowances, or overtime pay.

(vii) *401(k) Plan*

30. The Debtors maintain, for the benefit of their employees, a defined contribution 401(k) plan (the “**401(k) Plan**”) administered by Diversified Investment Advisors (the “**401(k) Administrator**”). The 401(k) Plan is funded completely by employee-elected or automatic 401(k) plan contributions withheld from employee wages (“**401(k) Deductions**”). The Debtors estimate that 401(k) Deductions for employees total approximately \$12,000 per semimonthly pay period. Until 2009, the Debtors, as an additional benefit to employees, matched a percentage of employee contributions to the 401(k) Plan. However, in 2009, the Debtors suspended their matching program.

31. The 401(k) Administrator collects fees for its administrative services in respect of the 401(k) Plan. The 401(k) Administrator collects such fees directly from employee accounts; accordingly, the Debtors have no outstanding prepetition obligations to the 401(k) Administrator on account of administrative fees. By this motion, the Debtors seek authority to: maintain the 401(k) Plan, including paying to the 401(k) Administrator any 401(k) Deductions, regardless of when such obligations accrued. Although the Debtors respectfully submit that the 401(k) Deductions should not be deemed property of the Debtors’ estates, as they are held in trust for the benefit of employees participating in the 401(k) Plan and the 401(k) Administrator, the Debtors nevertheless seek confirmation of their authority to remit the 401(k) Deductions to the 401(k) Administrator for deposit in the 401(k) Plan.

(viii) *Other Benefits*

32. In addition to the Employee Benefit Programs described above, the Debtors offer other benefits to various employees, including, but not limited to, car allowances and fitness expense reimbursements. The Debtors estimate that to the extent the Debtors have

any outstanding prepetition obligations in respect of these programs, such obligations are *de minimis* and are reflected in the Debtors' estimate of their outstanding obligations in respect of Reimbursable Business Expenses. The Debtors believe that these programs are important to maintain Employee morale and assist in the retention of the Debtors' workforce while representing a relatively minimal cost to the Debtors' estates. Accordingly, the Debtors request authority to maintain these programs in the ordinary course of business, including payment of any amounts that may relate to the prepetition period.

E. Prepetition Employee Withholdings and Deductions

33. The Debtors deduct the Employee Deductions from employee wages under salary reduction or other arrangements. The Employee Deductions primarily include contributions to the Flex Spending Plans and the 401(k) Plan, as well as other Employee Benefit Programs as well as amounts deducted to pay insurance premiums in connection with the Employee Benefit Obligations. With respect to the Employee Benefit Programs described in Section D above, the full amount of the Employee Benefit Obligations, as well as the employee's share, is paid by the Debtors directly to the appropriate third parties.

34. To the extent Employee Deductions for prepetition payroll periods remain under the Debtors' control, the Debtors believe that such Employee Deductions comprise property of the employees or third parties — not property of the Debtors' estates. Employee Deductions withheld from employee paychecks and direct deposits total approximately \$15,000 per semimonthly payroll period.⁶

⁶ This amount does not include the employee portion of Employer Taxes.

35. By this Motion, the Debtors seek authority to allow the Debtors (directly or through Ceridian) to continue to withhold the Employee Deductions from employee wages and remit them to the appropriate third parties, regardless of whether they relate to prepetition or postpetition periods. As the Debtors believe that the Employee Deductions are not property of the Debtors' estates pursuant to section 541 of the Bankruptcy Code, payment of the Employee Deductions to the appropriate parties will not unfairly prejudice other unsecured creditors.

F. Vacation, Holidays, and Other Paid Time Off

(i) *Vacation*

36. All regular full-time employees and part-time employees are eligible to accrue paid vacation time ("**Vacation Time**"). Employees accrue ten days of Vacation Time per year during their first five years of service, fifteen days per year during the sixth through tenth years of service, and twenty days per year after ten years of service. An employee may carry forward unused Vacation Time to the next year; however, the amount of Vacation Time an employee can accrue is "capped" at one and a half times such employee's annual vacation accrual amount. For example, an employee who has worked for the Debtors for two years, and therefore is accruing Vacation Time at the rate of ten days per year, may have accrued no more than 15 days of Vacation Time at any given time. Once an employee reaches the accrual "cap," the employee does not accrue any additional Vacation Time until such employee uses Vacation Time, thereby bringing such employee's Vacation Time below the cap.⁷

⁷ The Debtors traditionally have reduced their work force during the last two weeks of each year due to decreased activity. Most of the Debtors' employees voluntarily take time off during this period; however, to the extent necessary, managers will require employees to take time off in order to ensure that the Debtors' staffing needs are satisfied, but not exceeded. Whether an employee volunteers or is required to take time off, the employee will need to use Vacation Time or "floating holidays" in order to be paid during his or her time off from work.

(ii) *Holidays*

37. It is the Debtors' policy to provide all of their employees with several scheduled paid holidays (each, a "**Holiday**") per calendar year, including, but not necessarily limited to: New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving (two days), Christmas Eve, Christmas Day, and New Year's Eve. Absent extenuating circumstances, employees must work their regular scheduled shift the day before and the day after a Holiday in order to receive pay for such Holiday.

(iii) *Miscellaneous Paid Time Off*

38. The Debtors also provide full-time employees with certain miscellaneous paid time off ("**Miscellaneous Paid Time Off**"), including sick leave, bereavement leave, pay for jury/witness duty, and "floating holidays" ("**Floating Holidays**"). Although employees may not "carry over" Floating Holidays year-to-year, the Debtors typically pay employees for accrued but unused Floating Holidays upon separation of employment.

39. The Debtors hereby seek authority to continue to permit employees to use, in the ordinary course of business, accrued Vacation Time, Holidays, and/or Miscellaneous Paid Time Off policies. For the avoidance of doubt, the Debtors are not seeking authority at this time to pay employees for accrued but unused Vacation Time or Floating Holidays upon separation of employment.

G. Banks and Payroll Accounts

40. By this Motion, the Debtors also are requesting entry of an order:

(a) authorizing Bank of America, N.A., the Bank at which the Debtors maintain the Payroll Disbursement Account, from which the Debtors make payments related to the Prepetition Employee Obligations (the "**Payroll Bank**") to receive, process, honor and pay all checks drawn

on payroll, benefit and general disbursement accounts and fund transfers on account of the Prepetition Employee Obligations, whether presented before or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments; and (b) authorizing, but not requiring, the Debtors to issue new postpetition checks or effect new postpetition fund transfers on account of the Prepetition Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected. Such relief is integral in order to implement the relief sought by this Motion.

BASIS FOR RELIEF

41. By this Motion, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the “necessity of payment” doctrine, the Debtors seeks authority to pay their outstanding Prepetition Employee Obligations. Section 363(b)(1) of the Bankruptcy Code provides: “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. . . .” 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code further provides in pertinent part: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Accordingly, this Court is authorized to grant the relief requested.

42. “The ability of a Bankruptcy Court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtors is not a novel concept.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); see also, In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (noting that “‘necessity of payment’ doctrine . . . permit[s] 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”) (citations and internal quotations omitted);

In re Chateaugay Corp., 80 B.R. 279 (S.D.N.Y. 1987); 2 COLLIER ON BANKRUPTCY ¶105.01 at 105-3 (L. King 15th ed. 1996) (purpose of section 105(a) is to “assure the Bankruptcy Court’s power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction.”) This equitable common law principle “was first articulated by the United States Supreme Court in Miltenberger v. Logansport C. & S.W. R. Co., 106 U.S. 286 (1882), and is commonly referred to as either the ‘doctrine of necessity’ or the ‘necessity of payment’ rule.” In re Ionosphere Clubs, Inc., 98 B.R. at 176. “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.” Id.; see In re Just For Feet, Inc., 242 B.R. 821, 825-826 (D. Del. 1999) (“[n]ecessity of payment doctrine recognizes that paying certain pre-petition claims may be necessary to realize the goal of chapter 11 – a successful reorganization”).

43. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay certain critical prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. See Ionosphere Clubs, Inc., 98 B.R. at 176 (“This rule recognizes the existence of 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 Columbia Gas Sys. Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing Lehigh & New England Ry. Co., 657 F.2d at 581 (recognizing that “[if] payment of a [prepetition] claim . . . is essential to the continued operation of [the debtor] . . . payment may be authorized.”)). The Debtors submit that, as illustrated below, application of the “necessity of payment” doctrine is wholly warranted in these cases.

44. The wage and benefit obligations for which the Debtors request authority to pay herein would constitute prepetition employee wage claims or prepetition claims for contributions to an employee benefits plan entitled to priority under sections 507(a)(4) and (5) of the Bankruptcy Code. Courts have recognized future priority status as a valid basis for allowing the payment of wage claims arising prepetition. See, e.g., In re Braniff, Inc., 218 B.R. 628, 633 (Bankr. M.D. Fla. 1998) (explaining that prepetition wage and wage-related claims are often allowed to be paid postpetition where such wages are subject to priority because “in all but the direst of circumstances, the debtor will ultimately pay the prepetition wages because of their very high priority . . . [and, therefore,] the court authorizes their payment early in the case rather than requiring that the employees wait for payment at the end of the case.”). Accordingly, the Debtors respectfully submit that granting the relief requested will not adversely affect the Debtors’ other unsecured creditors.

45. Similarly, the remittance of the Employee contributions towards Employer Taxes, the 401(k) Plan, or the Employee Deductions also will not prejudice the Debtors’ creditors because such withholdings are held or should be deemed to be held in trust for the benefit of the related payees and, thus, do not constitute property of the Debtors’ estates under section 541 of the Bankruptcy Code. See Begier v. IRS, 496 U.S. 53 (1990); DeChiaro v. New York State Tax Comm’n, 760 F.2d 432, 433 (2d Cir. 1985) (sales taxes are “trust fund” taxes); In re Al Copeland Enters., Inc., 133 B.R. 837, 842 (Bankr. W.D. Tex. 1991) (debtor obligated to pay sales taxes plus interest, because such taxes were “trust fund” taxes), aff’d, 991 F.2d 233 (5th Cir. 1993); In re Am. Int’l Airways, Inc., 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (funds held in trust for federal excise and withholding taxes are not property of debtor’s estate and, therefore, not available for distribution to creditors); Shipley Co., Inc. v. Darr (In re Tap, Inc.),

52 B.R. 271, 278 (Bankr. D. Mass. 1985) (funds paid by employer to debtor for payment of employer's federal taxes were returnable to employer and not part of debtor's estate).

46. The success of the Telogy's efforts to sell its assets and business (a "Sale") will depend in large part on Telogy's employees continuing to work with the same or greater degree of commitment and diligence as they did prior to the Petition Date. Telogy is obligated, under its agreement (the "APA") with the stalking horse purchaser for Telogy's assets, to continue operating its business in the ordinary course and consistent with past practice during the period between the commencement of these cases and the closing of the Sale. Additionally, the APA also requires Telogy to use its reasonable best efforts to preserve the goodwill of employees during such period. Thus, Telogy's failure to maintain positive working relationships with its employees would not only jeopardize Telogy's postpetition operations and going concern value, but would also be inconsistent with Telogy's obligations under the APA.

47. For these reasons, among others, it is essential that the Debtors continue the ordinary course personnel policies, programs, and procedures that were in effect prior to the Petition Date. If the checks issued and fund transfers requested in payment of the Prepetition Employee Obligations are dishonored, or if such accrued obligations are not timely paid postpetition, the Debtors' employees may suffer extreme personal hardship and certain of them may be unable to pay their daily living expenses. The Debtors' failure to pay the Employee Wage Claims and continue the Employee Benefit Programs also would create low morale among the Debtors' employees and, ultimately, be disruptive to the Debtors' postpetition operations.

48. Authorizing, but not directing, the Debtors to pay the Prepetition Employee Obligations in accordance with the Debtors' prepetition business practices is in the best interests of the Debtors, the creditors, and all parties in interest. A significant deterioration

in morale among employees at this critical time would have a devastating impact on the Debtors and their customers. The total amount to be paid if the relief sought herein is granted is modest compared to the size of the Debtors' estates and the importance of the Debtors' employees to a value-maximizing Sale process.

49. The requested authority to continue to pay the Employee Wage Claims and to maintain the current Employee Benefits Programs is necessary to ensure that the Debtors can retain personnel knowledgeable about the Debtors' businesses, and to provide an incentive for the Debtors' employees to continue to provide quality services while the Sale process is pending.

50. Pursuant to section 363 of the Bankruptcy Code, a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business. Payment of prepetition wage and salary claims in order to preserve and protect a debtor's business and to ultimately reorganize, retain their employees and maintain positive employee morale, even if such payment were deemed to be outside the ordinary course of business, is a sufficient business justification for such an authorization. See Ionosphere Clubs, 98 B.R. at 175.

51. Furthermore, with respect to obligations described herein, including, but not limited to, Employee Wage Claims and Employer Taxes, failure by the Debtors to fulfill such obligations could potentially result in claims being asserted directly against the Debtors' officers and directors. Such claims against the Debtors' officers and directors would distract such individuals at a time when it is critical that their full attention be focused on the Debtors' Sale efforts.

52. Numerous courts, including this Court, have permitted the postpetition payment of prepetition wage and salary obligations as well as sales and use tax obligations on the first day or in the early stages of other chapter 11 bankruptcy cases. See, e.g., In re Autobacs Strauss Inc., No. 09-10358 (CSS) (Bankr. D. Del. Feb. 5, 2009); In re Smurfit-Stone Container Corp., No. 09-10235 (BLS) (Bankr. D. Del. Jan. 27, 2009); In re Nortel Networks, Inc., No. 09-10138 (KG) (Bankr. D. Del. Jan. 15, 2009); In re Interlake Material Handling, Inc., No. 09-10019 (KJC) (Bankr. D. Del. Jan. 7, 2009); In re KB Toys, Inc., No. 08-13269 (KJC) (Bankr. D. Del. Dec. 12, 2008); In re GWLS Holdings, Inc., No. 08-12430 (PJW) (Bankr. D. Del. Oct. 22, 2008); In re JHT Holdings, Inc., et al., No. 08-11267 (BLS) (Bankr. D. Del. June 25, 2008); In re Holley Performance Prods., Inc., No. 08-10256 (PJW) (Bankr. D. Del. Feb. 12, 2008); In re Buffets Holdings, Inc., No. 08-10141 (MFW) (Bankr. D. Del. Jan. 23, 2008); and see, e.g., In re Journal Register Co., No. 09-10769 (ALG) (Bankr. S.D.N.Y. Feb. 24, 2009).

53. The Debtors further submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein, Rule 6003 of the Bankruptcy Rules has been satisfied.

54. To successfully implement the foregoing, the Debtors respectfully seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay under Bankruptcy Rule 6004(h).

55. Accordingly, for the foregoing reasons, the Debtors respectfully submit that cause exists for granting the relief requested herein.

NOTICE

56. Notice of this Motion will be given to: (a) the United States Trustee for the District of Delaware; (b) counsel to the agent for the Debtors' prepetition secured lenders; and

(c) the Debtors' twenty (20) largest unsecured creditors on a consolidated basis. The Debtors will serve copies of the Motion pursuant to Local Rule 9013-1(m). The Debtors submit that, under the circumstances, no other or further notice is required.

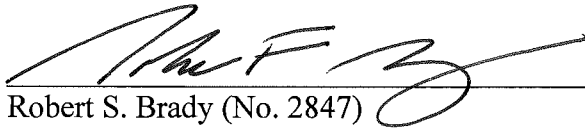
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CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form annexed hereto as Exhibit A, granting the relief requested herein and such other and further relief as may be just or proper.

Dated: Wilmington, Delaware
January 24, 2010

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*Proposed Co-Counsel for Debtors and
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EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

----- X
In re: : Chapter 11
: :
Telogy, LLC, et al., : Case No. 10-~~10206~~ ()
: :
Debtors. : Jointly Administered
: :
----- X Ref. Docket No. _____

**ORDER: (I) AUTHORIZING DEBTORS
TO (A) PAY PREPETITION EMPLOYEE WAGES, SALARIES AND
OTHER COMPENSATION, PREPETITION EMPLOYEE BUSINESS
EXPENSES, AND OTHER MISCELLANEOUS EMPLOYEE
EXPENSES AND EMPLOYEE BENEFITS; AND (B) CONTINUE
EMPLOYEE BENEFIT PROGRAMS; AND (II) GRANTING RELATED RELIEF**

Upon the motion (“**Motion**”) of the debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”)¹, for entry of an order, pursuant to sections 105(a), 363(b), and 507(a) of title 11 of the United States Code (the “**Bankruptcy Code**”), as supplemented by Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”): (i) authorizing the Debtors to (a) pay prepetition employee wages, salaries and other compensation, prepetition employee business expenses, and other miscellaneous employee expenses and employee benefits; and (b) continue certain employee benefit plans, programs and policies in effect as of the Petition Date (as defined herein); and (ii) granting related relief; and upon the Affidavit of Gary B. Phillips, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings (the “**Phillips Affidavit**”); and notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice need

¹ The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors’ executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

be provided; and it appearing that the relief requested by this Motion is necessary and is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED, that:

1. The Motion is granted as set forth herein.
2. Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Motion.
3. The Debtors shall be and hereby are authorized to pay, in their sole discretion, the Prepetition Employee Obligations, including, but not limited to, Employee Wage Claims, Reimbursable Business Expenses, Employee Benefit Obligations, and to remit all Employee Deductions and Employer Taxes to the appropriate third parties, as and when such obligations are due, upon entry of this Order; provided, however, that: (i) any such payments by the Debtors to employees in respect of prepetition Employee Wage Claims (including Commissions) shall not exceed \$125,000 in the aggregate (the “**Employee Wage Cap**”); (ii) any such payments by the Debtors to any individual employee on account of prepetition Employee Wage Claims shall be subject to the \$10,950 per employee cap on priority claims under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code (the “**\$10,950 Cap**”); (iii) any such payments by the Debtors to employees on account of prepetition Reimbursable Business Expenses shall not exceed \$2,500 in the aggregate; and (iv) any such payments by the Debtors to the appropriate third parties on account of prepetition Employer Taxes shall not exceed \$65,000 in the aggregate.
4. The Debtors shall be and hereby are authorized, in their sole discretion, to honor and continue their Employee Benefit Programs that were in effect as of the Petition Date.

5. The Debtors shall be and hereby are authorized, but not directed, to continue honoring and paying all Employee Benefit Obligations in respect of the Employee Benefit Programs in the ordinary course of business; provided, however, that nothing contained herein authorizes the Debtors to pay employees for accrued but unused Vacation Time or Floating Holidays upon separation of employment.

6. Subject to the \$10,950 Cap and Employee Wage Cap, the Debtors hereby are authorized to continue to pay, in their sole discretion, Commissions in the ordinary course of business, regardless of when the Debtors' obligation to pay any such Commission accrued.

7. The Debtors are authorized, but not directed, to pay costs and expenses incidental to the payment of the Prepetition Employee Obligations, including all administration and processing costs and payments to third parties (including Ceridian), in the ordinary course of business, in order to facilitate the administration and maintenance of the Debtors' programs and policies related to the Prepetition Employee Obligations.

8. The Payroll Bank is hereby authorized and required to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order.

9. Neither this Order nor any payment or performance by the Debtors authorized hereunder shall be deemed an assumption of any executory contract, including any Employee Benefit Programs, or otherwise affect the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with an Employee.

10. Authorizations given to the Debtors in this Order empower but do not direct the Debtors to effectuate the payments specified herein, and the Debtors shall retain the business judgment to make or not make such payments, in all instances subject to the condition that funds are available to effect any payment. In no event shall any person (director, creditor, officer, manager, member, Employee or otherwise of the Debtors) be personally liable for any amounts authorized for payment herein but not paid, and nothing in this Order shall be deemed to increase, reclassify, elevate to administrative expense status or otherwise effect such claims.

11. The relief requested in the Motion is necessary to avoid irreparable harm to the Debtors, and timely entry of this Order is not prohibited by Bankruptcy Rule 6003(b).

12. The notice requirements of Bankruptcy Rule 6004(a) are hereby deemed waived.

13. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

14. This Court shall retain jurisdiction over an any and all matters arising from or related to the implementation or interpretation of this Order.

Dated: Wilmington, Delaware
January ____, 2010

UNITED STATES BANKRUPTCY JUDGE