

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 PURSUANT TO SECTIONS 105(a) AND 363(b) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 6003: (I) AUTHORIZING DEBTORS TO (A) CONTINUE INSURANCE POLICIES AND AGREEMENTS RELATING THERETO, AND (B) HONOR CERTAIN PREPETITION OBLIGATIONS IN RESPECT THEREOF; AND (II) GRANTING RELATED RELIEF**

The debtors and debtors in possession in the above-captioned cases (collectively, the "**Debtors**")<sup>1</sup> hereby move (the "**Motion**") for entry of an order, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the "**Bankruptcy Code**") and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"): (i) authorizing the Debtors to (a) continue insurance policies and agreements relating thereto, and (b) honor certain prepetition obligations in respect thereof; and (ii) granting related relief. 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. In further support of the Motion, the Debtors, by and through their undersigned proposed co-counsel, respectfully represent:

<sup>1</sup> 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.

## JURISDICTION

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

## BACKGROUND

2. On January 24, 2010 (the "**Petition Date**"), Telogy, LLC 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.

3. 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.

## THE DEBTORS' INSURANCE POLICIES

4. In connection with the operation of their respective businesses, the Debtors maintain various workers' compensation and insurance policies (each, an "**Insurance Policy**" and, collectively, the "**Insurance Policies**") through third-party insurance carriers (the "**Insurance Carriers**"). Annexed hereto as Exhibit A is a list of the Debtors' current Insurance

Policies and corresponding Insurance Carriers.<sup>2</sup> As set forth below, the Insurance Policies insure against claims and losses relating to, among other things, workers' compensation programs, property damage, and directors' and officers' liability.

A. Workers' Compensation Insurance

5. The Debtors are required under the laws of the various states in which they operate to maintain workers' compensation insurance that provides their employees with coverage for injuries arising from or related to their employment with the Debtors. For employees in the state of California, the Debtors maintain a workers' compensation policy with Republic Indemnity (the "**Republic Policy**"). The coverage limit under the Republic Policy is \$1,000,000 per claim. The premium under the Republic Policy is estimated at the beginning of each policy period, and then adjusted (either higher or lower) at the end of the policy period based upon the Debtors' loss experience during that policy period (the "**Premium Adjustment**"). The Debtors' estimated annual premium under the Republic Policy is \$53,851, which is paid through an initial payment of \$7,330 and nine subsequent installments of approximately \$5,169. The Republic Policy is scheduled to expire on April 2, 2010, at which point the Debtors' premium under the Republic Policy will be subject to the Premium Adjustment.

6. For Telogy's two employees located outside the state of California, the Debtors maintain a workers' compensation policy with Great American Insurance Group (the "**Great American Policy**") and, together with the Republic Policy, the "**Workers'**

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<sup>2</sup> In spite of the Debtors' diligence, the Debtors currently may have certain Insurance Policies that are not reflected on Exhibit A. The Debtors' failure to include a particular Insurance Policy on Exhibit A shall not operate to exclude that policy from the coverage of this Motion or any order of the Court entered in connection with this Motion.

**Compensation Policies**”). The coverage limit under the Great American Policy is \$1,000,000 per claim. The premium under the Great American Policy is subject to a Premium Adjustment. The Debtors’ estimated annual premium under the Great American Policy is \$3,733, which is paid in its entirety at the commencement of the policy term. The Great American Policy is scheduled to expire on April 21, 2010, at which point the Debtors’ premium under the Great American Policy will be subject to the Premium Adjustment.

7. The Debtors are current on all estimated premiums and surcharges in respect of the Workers’ Compensation Policies. For the past two policy periods under the Workers’ Compensation Policies, the Debtors received a premium refund as a result of the Premium Adjustment, however, further amounts may be owing once such Insurance Policies are subject to the Premium Adjustment at the end of the policy period. The Debtors are not required to make any additional payments in connection with the Workers’ Compensation Policies for the remainder of such Insurance Policies’ current terms.

B. **Business Package Insurance**

8. The Debtors maintain a general business package insurance policy (the “**Business Policy**”) with One Beacon Insurance. The Business Policy provides coverage for claims and losses relating to, among other things: (i) business personal property; (ii) property in domestic transit; (iii) electronic data processing; (iv) commercial general liability; (v) crime; and (vi) automobile liability. The deductibles under the Business Policy vary based on the type of coverage for which claims are filed; however, for most types of losses, the deductible is \$10,000 per occurrence. Coverage limits under the Business Policy include, among others:

- (i) \$30,000,000 in the aggregate for losses relating to business personal property,
- (ii) \$10,000,000 in the aggregate for lost business income; (iii) \$2,000,000 per occurrence for

losses relating to contingent interest leased property; (iv) \$2,000,000 in the aggregate for commercial general liability; (v) an annual aggregate limit of \$2,000,000 for employee benefit program liability; (vi) \$1,000,000 for automobile liability; and (vii) \$10,000,000 in the aggregate for umbrella liability. The current term of the Business Policy ends on March 13, 2010.

9. The Debtors' annual premium in respect of the Business Policy is \$60,267, which the Debtors pay through an initial payment of \$20,069 and eight subsequent installments of \$5,024.75. The Debtors are current on all premiums and surcharges in respect of the Business Policy. Furthermore, the Debtors are not required to make any additional payments in connection with the Business Policy for the remainder of the current term.

C. Directors and Officers Liability Insurance

10. The Debtors maintain directors and officers liability insurance coverage (the "**D&O Policy**") with National Union Fire Insurance Company ("**National Union**"). The D&O Policy covers claims and losses relating to the actions of the Debtors' directors and officers, including employment practices claims and securities claims. The D&O Policy has an aggregate coverage limit of \$5,000,000. The D&O Policy is scheduled to expire on June 2, 2010. The Debtors' annual premium under the D&O Policy is \$85,213, and is paid in full at the commencement of the coverage term.

D. Ocean Cargo Insurance

11. The Debtors maintain an ocean cargo insurance policy (the "**Ocean Cargo Policy**") with Underwriters at Lloyd's of London (Falvey Cargo). The Ocean Cargo Policy covers claims and losses relating to overseas shipments, which are excluded from coverage under the Business Policy. Coverage limits under the Ocean Cargo Policy are: (i) \$500,000 per conveyance for air, land and vessel conveyances, (ii) \$50,000 per conveyance for

exhibition/trade fairs and non-containerized on-deck conveyances, and (iii) \$10,000 per conveyance for sales samples, messengers, and individual packages shipped though registered mail. The deductible under the Ocean Cargo Policy is \$5,000 per claim. The Ocean Cargo Policy is scheduled to expire on January 10, 2011.

12. The Debtors' annual premium for the Ocean Cargo Policy is \$10,000.00, which is paid in full in advance of the coverage period. The Debtors are current on all premiums and surcharges under the Ocean Cargo Policy.

### **BROKERAGE SERVICES**

13. Hub International (the "**Broker**") serves as the Debtors' insurance broker. Among other things, the Broker represents the Debtors in negotiations with the Debtors' insurers. Employment of the Broker has allowed the Debtors to obtain the insurance coverage necessary to operate their businesses in a reasonable and prudent manner and to realize savings in the procurement of such policies. The Debtors believe that it is in the best interests of their creditors and estates to continue their business relationship with the Broker.

14. The Debtors pay fees to the Broker (the "**Brokerage Fees**") upon the signing or renewal of certain policies, and the Broker's fees are bundled into the premium costs for each insurance policy the Debtors maintain. As the Debtors believe they have paid all premiums and surcharges owing under the Insurance Policies of the Petition Date, the Debtors do not believe they have any outstanding prepetition obligations in respect of Brokerage Fees. However, out of an abundance of caution, the Debtors request authority to pay, in their discretion, any Brokerage Fees or other amounts owing to the Broker that may subsequently be determined to be owed for periods prior to the Petition Date, as the Debtors' failure to pay such

amounts could result in a loss of the Broker's assistance in maintaining the Debtors' beneficial business relationships with their Insurance Carriers.

**RELIEF REQUESTED**

15. By this Motion, the Debtors seek authority, but not direction, pursuant to sections 363(b) and 105(a) of the Bankruptcy Code and Bankruptcy Rule 6003, to: (i) maintain and continue to make all payments with respect to Insurance Policies on an uninterrupted basis, in accordance with the Debtors' prepetition practices; and (ii) pay any prepetition premiums, Brokerage Fees, or other amounts due and owing under the Insurance Policies.

**BASIS FOR RELIEF**

16. 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 provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process.

11 U.S.C. § 105(a). Section 105(a) of the Bankruptcy Code grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory fiat or under equitable common law principles.

17. A bankruptcy court may use its equitable powers to authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor. See In re Just For Feet, Inc., 242 B.R. 821, 824 (D. Del. 1999) (acknowledging that "[c]ertain pre-

petition claims . . . may need to be paid to facilitate a successful reorganization” and that “[s]ection 105(a) of the [Bankruptcy] Code provides a statutory basis for the payment of pre-petition claims”); see also In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (“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 debtor is not a novel concept.”). 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, 1 S.Ct. 140, 27 L.Ed. 117 (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.

18. In a long line of well-established cases, federal courts consistently have permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. See, e.g., In re Just For Feet, Inc., 242 B.R. at 824 (granting approval to pay prepetition claims of certain trade vendors which were “critical to the Debtors’ reorganization”); In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (noting that debtors may pay prepetition claims that are essential to continued operation of business); In re Columbia Gas System, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing In re Lehigh & New England Rwy Co., 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that “if payment of a prepetition claim ‘is essential to the continued operation of [debtor], payment may be authorized.”)); Disability Compensation and Michigan Self-Insurers’ Security Fund v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 285–86 (S.D.N.Y. 1987), appeal dismissed, 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses and benefits); Miltenberger v. Logansport Ry.,

106 U.S. 286, 312 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent “stoppage of [crucial] business relations”).

19. The Debtors submit that it is essential that they be permitted to maintain the Insurance Policies and continue making payments thereunder, including the payment of any amounts that accrued prior to the Petition Date. The Debtors believe that all premiums due under the Insurance Policies have been paid in full prior to the Petition Date and no amounts are owing with respect thereto. However, because of the importance of the protection afforded by the Insurance Policies, the Debtors seek, out of an abundance of caution, authority, but not direction, to pay any such amounts that might be owing on account of prepetition liabilities with respect to the Insurance Policies. If the Insurance Policies were allowed to lapse, the Debtors would be exposed to substantial liability for any damages or loss resulting to persons and/or property of the Debtors and others.

20. In addition, absent certain types of coverage (e.g., workers’ compensation), the Debtors would not be able to continue to conduct business. It is essential to the continued operation of the Debtors’ businesses and the maximization of the value of these estates that all undisputed workers’ compensation claims are paid (up to the applicable reimbursement amount) on a timely basis. The risk that eligible claimants will not receive payments with respect to job-related injuries may have a devastating effect on the financial well-being and morale of the Debtors’ employees. Departures by employees at this critical time may result in a severe disruption of the Debtors’ businesses to the detriment of all parties in interest. Further, the Debtors are required to maintain adequate insurance coverage pursuant to the U.S. Department of Justice, Office of the United States Trustee, District of Delaware, Operating Guidelines for Chapter 11 Cases.

21. As described in the Phillips Affidavit, on the Petition Date, Telogy filed a motion seeking this Court's approval of a stalking horse purchase agreement for the sale of substantially all of its assets (the "**APA**"), and the establishment of procedures for the submission of competing bids for such assets. Under the APA, Telogy is obligated to continue operating its business in the ordinary course and consistent with past practice during the period prior to closing of the sale. The Debtors' maintenance of the Insurance Policies is therefore necessary to ensure that Telogy can satisfy its obligations under the APA.

22. Finally, maintenance of the Insurance Policies is necessary to provide adequate protection of the Debtors' prepetition secured lenders' (the "**Lenders**") collateral. Contemporaneously herewith, the Debtors have filed with the Court a stipulation between the Debtors and the Lenders governing the terms of the Debtors' use of cash collateral during the pendency of these cases (the "**Cash Collateral Stipulation**"). Indeed, the Cash Collateral Stipulation expressly provides that maintenance of the Insurance Policies constitutes part of the Lenders' adequate protection package.

23. As stated above, the Debtors believe that there are no prepetition premiums outstanding relating to the Insurance Policies. The Debtors intend to pay all obligations arising under or related to the Insurance Policies, including Brokerage Fees, subsequent to the Petition Date in the ordinary course of business, in accordance with the terms of the Insurance Policies and the Debtors' arrangement with the Broker.

24. To the extent that any Insurance Policy or other agreement described herein is deemed an executory contract within the meaning of section 365 of the Bankruptcy Code, the Debtors are not at this time seeking to assume such agreements. The Debtors submit that court authorization of payments to be made with respect to the Insurance Policies or

Brokerage Fees should not be deemed to constitute postpetition assumption or adoption, pursuant to section 365 of the Bankruptcy Code, of any such Insurance Policy or agreement with the Broker. The Debtors will continue to review the Insurance Policies and services provided by the Broker during the course of these cases, and hereby reserve all of their rights under the Bankruptcy Code with respect thereto.

25. Numerous courts in this jurisdiction have granted relief similar to that requested herein in other chapter 11 cases. See, e.g., In re AbitibiBowater Inc., 09-11296 (KJC) (Bankr. D. Del. Apr. 17, 2009); In re BT Tires Group Holding, LLC, No. 09-11173 (CSS) (Bankr. D. Del. Apr. 3, 2009); In re G.I. Joe's Holding Corp., No. 09-10713 (KG) (Bankr. D. Del. Mar. 6, 2009); In re Foamex International, Inc., 09-10560 (KJC) (Bankr. D. Del. Feb. 20, 2009); In re GWLS Holdings, Inc., No. 08-12430 (PJW) (Bankr. D. Del. Oct. 22, 2008); In re Shaper Image Corporation, No. 08-10322 (KG) (Bankr. D. Del. Feb. 19, 2008), In re Am. LaFrance, LLC, No. 08-10178 (BLS) (Bankr. D. Del. Jan. 29, 2008); In re World Health Alternatives, Inc., et al., No. 06-10166 (PJW) (Bankr. D. Del. March 14, 2006).

26. 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, the requirements of Bankruptcy Rule 6003 have been satisfied.

27. 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).

### **NOTICE**

28. 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; (c) the

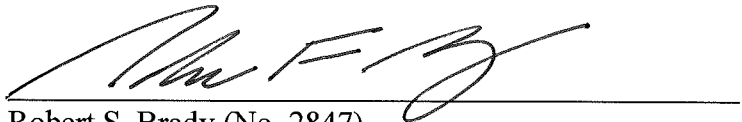
Debtors' twenty (20) largest unsecured creditors on a consolidated basis; (d) the Broker; and (e) the Insurance Carriers. The Debtors will serve copies of the Motion pursuant to Local Rule 9013-1(m). The Debtors submit that, under the circumstances, no other or further notice is required.

**CONCLUSION**

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

Dated: Wilmington, Delaware  
January 24, 2010

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**EXHIBIT A**

**Insurance Policies**

<b><u>Type</u></b>	<b><u>Insurer</u></b>	<b><u>Expiration</u></b>	<b><u>Policy Number(s)</u></b>	<b><u>Total Approximate Annual Premium</u></b>
Workers' Compensation	Republic Indemnity	4/2/2010	WC168961-05	\$53,851.00
	Great American Insurance Group	4/21/2010	WC6175542-04	\$3,733.00
Business Package Insurance	One Beacon Insurance	3/13/2010	711-00-95-26-0002	\$60,267.00
Directors and Officers Liability	National Union Fire Insurance Company	6/2/2010	534-40-34	\$85,213.00
Marine Ocean Cargo Policy	Underwriters at Lloyd's of London (Falvey Cargo).	1/10/2011	MC-2262 WC-2262	\$10,000.00

**EXHIBIT B**

**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 PURSUANT TO SECTIONS 105(a) AND 363(b)  
OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 6003: (I) AUTHORIZING  
DEBTORS TO (A) CONTINUE INSURANCE POLICIES AND AGREEMENTS  
RELATING THERETO, AND (B) HONOR CERTAIN PREPETITION  
OBLIGATIONS IN RESPECT THEREOF; AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”) of the debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”) for entry of an order, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”): (i) authorizing the Debtors to (a) continue insurance policies (the “**Insurance Policies**”) and agreements relating thereto and (b) honor certain prepetition obligations in respect thereof; 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; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice is required; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED AND DECREED that:**

1. The Motion is granted.
2. Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Motion.

3. The Debtors are authorized, but not directed, to maintain and continue to make all payments with respect to the Insurance Policies and Brokerage Fees (including premiums and any other related payments due on account thereof) without interruption in the ordinary course of business and on the same basis and in accordance with the same practices and procedures as in effect prior to the Petition Date.

4. The Debtors are authorized, but not directed, to enter into new insurance obligations in the ordinary course of business through the renewal of the Insurance Policies or the purchase of new insurance policies to the extent that the Debtors determine that such action is necessary or appropriate.

5. This order shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to pay any of the obligations discussed herein or in the Motion, and none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay such obligations, and nothing in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect such obligations to the extent they are not paid.

6. All applicable banks and other financial institutions are 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.

7. To the extent that the Insurance Policies or any related contracts or agreements, including any agreements between the Debtors and the Broker, are deemed executory contracts under section 365 of the Bankruptcy Code, neither the relief granted hereby nor any actions or payments made by the Debtors pursuant to this order shall be deemed an assumption or rejection of any such contract pursuant to section 365 of the Bankruptcy Code.

8. Nothing in this order or the Motion is intended or shall be construed to constitute relief from the automatic stay pursuant to section 362 of the Bankruptcy Code.

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

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

11. The Court shall retain jurisdiction over any matters arising from or related to the implementation or interpretation of this Order.

Dated: Wilmington, Delaware  
January \_\_, 2010

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UNITED STATES BANKRUPTCY JUDGE