

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re:

Chapter 11

CARDINAL HOMES, INC.,

Case No. 19-36275-KRH

Debtor.<sup>1</sup>

**MOTION FOR ENTRY OF ORDER AUTHORIZING  
THE DEBTOR TO PAY CERTAIN PRE-PETITION CLAIMS OF CRITICAL VENDORS**

The above captioned debtor and debtor in possession (the “Debtor”), hereby moves the Court (the “Motion”) for entry of an order, the proposed form of which is attached hereto as **Exhibit A** (the “Order”), pursuant to sections 105(a), 363, 503, 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 6004-2 and 9013-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia (the “Local Rules”) authorizing, but not requiring, the Debtor to (i) pay, in the ordinary course of business, all undisputed, liquidated, prepetition amounts owing on account of claims held by Critical Vendors

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<sup>1</sup> The Debtor in this Chapter 11 Case and the last four digits of its taxpayer identification number are as follows: Cardinal Homes, Inc. (9112). The Debtor’s headquarters are located at 525 Barnesville Highway, Wylliesburg, VA 23976.

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*Proposed Counsel for the Debtor and  
Debtor in Possession*

(as defined herein) (the “Critical Vendor Claims”); (ii) authorizing and directing banks and other financial institutions (the “Banks”) to honor and process related checks and transfers; and (iii) granting related relief. In support of the Motion, the Debtor relies on the *Declaration of Bret A. Berneche, President and Chief Executive Officer of Cardinal Homes, Inc., In Support of Chapter 11 Petition and First Day Motions* (the “First Day Declaration”)<sup>2</sup> filed concurrently herewith. In further support of this Motion, the Debtor respectfully represents as follows:

### **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), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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

### **BACKGROUND**

3. On November 20, 2019, Alouette Holdings, Inc., the Debtor’s parent company, filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, commencing Case No. 19-36126-KRH.

4. On the date hereof (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

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

5. The Debtor is authorized to continue to operate its business and manage its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or statutory committee has been appointed in this Case by the Office of the United States Trustee (the “U.S. Trustee”).

**I. The Critical Vendors**

6. In the ordinary course of business, the Debtor engages a limited number of providers for many of the critical products and services the Debtor depends upon to operate its business and service its customers. Of particular importance are vendors that are irreplaceable due to geography or vendors that provide specialized goods or services with expertise specific to the Debtor’s business and infrastructure. The Debtor obtains such products and services from a limited number of highly specialized vendors, including certain suppliers and service providers (the “Critical Vendors”), that could only be replaced at substantially higher costs, or perhaps not at all during this critical juncture in these chapter 11 cases.

7. Moreover, the Debtor relies on timely and frequent delivery of these critical goods and services and any interruption in this supply—however brief—would disrupt the Debtor’s operations and could potentially cause irreparable harm to its business, goodwill, employees, and customer base. Such harm likely would far outweigh the cost of payment of the Critical Vendor Claims.

8. In the ordinary course of business, the Debtor pays the Critical Vendors for goods and services provided. If the Critical Vendors are not paid, they may be unwilling to: (i) continue providing goods and services that are critical to the Debtor’s business; or (ii) continue delivering goods and services on reasonable price or credit terms absent payment of some or all of their prepetition claims, thereby effectively refusing to do business with the Debtor. Such interruption

could have drastic consequences for the Debtor's operations due to the lack of alternative suppliers or service providers in many situations, or the amount of time needed to locate and convert to alternative sources at significantly higher costs.

9. The Debtor has reviewed its business relationships and identified vendors, the loss of whose particular goods or services would cause immediate and irreparable harm to the Debtor's business. In identifying Critical Vendors, the Debtor has and will continue to consider, among other things, the following criteria to determine which of the Debtor's vendors and service providers are Critical Vendors: (a) whether the vendor or service provider is a sole, limited, or high value source provider of goods or services critical to the Debtor's business operations; (b) whether no or few alternative vendors are available that can provide similar goods or services on a timely basis and on equal or better terms; (c) whether the Debtor could not continue to operate while transitioning business to an alternative vendor or source of supply; or (d) whether an agreement exists by which the Debtor could compel the vendor to perform.

10. A schedule of Critical Vendors has not been filed with this Motion and will not be made publicly available unless required by the Court. If requested, the Debtor will provide, on a confidential basis, a schedule of Critical Vendors to (i) the Court; (ii) the Office of the United States Trustee for the Eastern District of Virginia; and (iii) any official committee appointed in this case.

11. The continued availability of goods and services on terms consistent with those that the Debtor enjoyed prepetition is necessary for the Debtor to maintain liquidity for operations and preserve the customer base and vendor network that is essential to the Debtor's efforts to maximize the value of its estates. The Debtor believes that preserving working capital through the retention or reinstatement of Customary Trade Terms (as defined below) will enable the Debtor to maintain

its competitiveness and to maximize the value of its business. Conversely, a deterioration of trade credit and disruption or cancellation of deliveries of goods and services would hinder the Debtor's operations and undermine its ability to generate revenue and ultimately to maximize the value of its estates.

12. In sum, the Debtor believes that payment of the Critical Vendor Claims is vital to maximizing the value of the Debtor's estate for the benefit of all parties in interest. The failure to pay the Critical Vendor Claims owed to Critical Vendors could critically damage the Debtor, its estate, its creditors and other parties in interest and undermine the prospects for a successful chapter 11 process. Indeed, failure to pay Critical Vendor Claims may result in Critical Vendors ceasing to do business with the Debtor altogether. Accordingly, the Debtor believes that satisfying Critical Vendor Claims is necessary to preserve value.

13. The Debtor proposes to condition, in its sole discretion, the payment of the Critical Vendor Claims on the agreement of each Critical Vendor to continue supplying goods and services on the most beneficial terms, based on practices and programs in effect between the Critical Vendor and the Debtor in the one year prior to the Petition Date (the "Customary Trade Terms"), or such other trade terms as are agreed to by the Debtor and the Critical Vendor. The Debtor reserves the right to negotiate new trade terms with the Critical Vendors as a condition to payment of all or a portion of the Critical Vendor Claims. Payments made on Critical Vendor Claims pursuant to this Motion shall be applied first to any claim of such Critical Vendors allowable under 11 U.S.C. § 503(b)(9). Thereafter, the Debtor may, in its discretion, settle all or some of the Critical Vendor Claims for less than their face amount without further notice or hearing. Nothing in this Motion or any order of this Court approving this Motion should be construed as (i) a waiver by the Debtor of its rights to contest any invoice of the Critical Vendor under applicable non-bankruptcy law, or (ii)

a waiver or limitation of the Debtor's rights to assert at a later date that any contract(s) and/or lease(s) are not executory contracts or unexpired leases.

14. To ensure that the Critical Vendors deal with the Debtor in accordance with Customary Trade Terms, the Debtor may require execution by a Critical Vendor of a letter agreement (a "Trade Agreement")<sup>3</sup> substantially in the form attached to the Order as Exhibit 1.

15. In consideration for the payment paid to such Critical Vendors, the Critical Vendors are required to agree not to file or otherwise assert against the Debtor, its estate 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 section 503(b)(9) of the Bankruptcy Code (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 pre-petition amounts allegedly owed to such Critical Vendors by the Debtor arising from agreements or other arrangements entered into prior to the Petition Date. In addition, to the extent such Critical Vendors have already obtained or otherwise asserted such a Lien, Reclamation Claim, or 503(b)(9) Claim, they shall take (at their own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim unless the applicable Trade Agreement is terminated. In addition, such Critical Vendors will be required not to file a motion to compel the assumption or rejection of any executory contract to which the Debtor and the Critical Vendors are party.

16. The Debtor further proposes that if a Critical Vendor accepts the payment proposed herein on its Critical Vendor Claim and thereafter refuses to continue to supply goods and services

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3. Cardinal's entry into a Trade Agreement shall not change the nature or priority of the underlying Critical Vendor Claims and shall not constitute an assumption or rejection of any executory contract or prepetition or post-petition agreement between Cardinal and a Critical Vendor.

to the Debtor on the Customary Trade Terms for the applicable period, or on such terms as were individually agreed to between the Debtor and such Critical Vendor, then the Debtor may, in its sole discretion, and without further order of the Court: (i) declare that any Trade Agreement between the Debtor and such Critical Vendor is terminated (ii) declare that the payment of Critical Vendor Claim is a voidable post-petition transfer pursuant to 11 U.S.C. § 549(a) that the Debtor may recover from such Critical Vendor in cash, (iii) demand that the creditor immediately return and seek to recover such payments in respect of its 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 or other defenses of any type whatsoever, and (iv) upon recovery of such payment by the Debtor, such Critical Vendor Claim shall be reinstated in such an amount as to restore the Debtor and the applicable Critical Vendor to their original positions, as if the agreement had never been entered into and the payment of the creditor's Critical Vendor Claim had not been made.

17. The Debtor further proposes that any Trade Agreement terminated as a result of a Critical Vendor's refusal to comply with the terms thereof may be reinstated if the underlying default under the Trade Agreement is fully cured by the Critical Vendor no later than five (5) business days following the Debtor's notification to the Critical Vendor of such a default; or the Debtor, in its discretion, reaches a favorable alternative agreement with the Critical Vendor.

18. To the extent that an agreement relating to a Critical Vendor Claim is deemed an executory contract within the meaning of 11 U.S.C. § 365, the Debtor does not, at this time, seek to assume the same, all rights expressly reserved. Accordingly, if the Court authorizes the payments described above, such payments should not be deemed to constitute post-petition assumption, reaffirmation, or adoption of the programs, policies, or agreements as executory

contracts pursuant to 11 U.S.C. § 365. The Debtor reserves all rights under the Bankruptcy Code, and all rights of the Critical Vendors are also reserved.

### **RELIEF REQUESTED**

19. By this Motion, the Debtor requests, pursuant to sections 105(a), 363, 503, 1107(a), and 1108 of the Bankruptcy Code, entry of an Order authorizing, but not requiring, the Debtor (i) to pay the Critical Vendor Claims, in the aggregate amount of up to \$100,000 (the “Cap”); (ii) authorizing and directing the Banks to receive, process, honor, and pay all prepetition and post-petition checks issued or to be issued, and electronic fund transfers requested or to be requested, by the Debtor in connection with the Critical Vendor Claims; and (iii) granting related relief.

### **BASIS FOR RELIEF**

20. The relief requested in this Motion is supported by several provisions of the Bankruptcy Code that authorize a debtor to honor prepetition obligations in certain circumstances, including sections 105(a), 363(b), 1107(a), and 1108 of the Bankruptcy Code.

21. Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). A bankruptcy court’s use of its 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.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). “Under 11 U.S.C. § 105 the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing Ionosphere Clubs, 98 B.R. at 177).

22. Federal courts have consistently permitted post-petition payment of certain prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for



the benefit of all creditors. See, e.g., Mich. Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 285–86 (S.D.N.Y. 1987) (approving lower court order authorizing payment of prepetition wages, salaries, expenses and benefits). Indeed, “a per se rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” In re Structurlite Plastics Corp., 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988).

23. This “doctrine of necessity” functions in a Chapter 11 case as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. See In re United Am., Inc., 327 B.R. 776, 782 (Bankr. E.D. Va. 2005) (acknowledging the doctrine of necessity “because otherwise there will be no reorganization and no creditor will have an opportunity to recoup any part of its pre-petition claim”); In re Boston & Me. Corp., 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation).

24. Several courts apply the doctrine of necessity where payment of a prepetition claim: (1) is necessary for the successful reorganization of the debtor,” (2) falls within “the sound business judgment of the debtor,” and (3) will not “prejudice other unsecured creditors.” United Am., 327 B.R. at 782; see also In re Universal Fin., Inc., 493 B.R. 735, 739–40 (Bankr. M.D. N.C. 2013) (applying the United American three-part test); In re Corner Home Care, Inc., 438 B.R. 122, 126 (Bankr. W.D. Ky. 2010) (same).

25. The requirement for necessity has been further clarified in In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks a probability of harm, or,

alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

26. With these considerations in mind, the Debtor's decision to pay the Critical Vendor Claims is clearly supported by its sound business judgment as required to use property of the estate under 11 U.S.C. § 363(b)(1). See e.g., Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 985 (2017) (recognizing that courts routinely grant orders allowing payment to essential suppliers in order to preserve and maximize the debtors' estates). The business judgment rule is satisfied "when the following elements are present: (1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets." Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992), appeal dismissed, 3 F.3d 49 (2d Cir. 1993) (internal quotations omitted); see also In re W.A. Mallory Co., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997) (discussing similar requirements for an 11 U.S.C. § 363(b) sale under the business judgment rule). In fact, "[w]here 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." Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). Courts have consistently and appropriately been loath to interfere with corporate decisions "unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.,

756 F.2d 1043, 1047 (4th Cir. 1985) (applying the business judgment rule to a debtor's decision to reject an executory contract); see also In re Integrated Res. Inc., 147 B.R. at 656.

27. Additionally, the Debtor's calculation of the Cap is also reasonable and a sound exercise of the Debtor's business judgment. To determine the amount of the Cap, the Debtor considered, among other things, which vendors/service providers: (a) are needed to continue to operate without disruption; (b) would be prohibitively expensive or difficult to replace under the circumstances; and (c) would present an unacceptable risk to the Debtor's business should they threaten to discontinue providing services or supplies post-petition. Once the Debtor gathered and reviewed this information, it estimated the Cap as amounts that would be required to pay each Critical Vendor to ensure the continued supply of goods and services. Therefore, the Debtor respectfully submits that the Cap and the other relief sought herein is fully justified pursuant to section 363.

28. The critical need for the goods and services provided by the Critical Vendors amply justifies the grant of the relief sought herein. Unless the Debtor has the authority to pay for these essential services, its business will suffer irreparable harm.

29. The Court may also authorize the payment of the Critical Vendor Claims as a valid exercise of the Debtor's fiduciary duty. The Debtor, operating its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, is a fiduciary "holding the bankruptcy estate and operating the business for the benefit of . . . its creditors and (if the value justifies) equity owners." In re CoServ, 273 BR. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to protect and preserve the estate, including operating business's going-concern value." Id.

30. It has been noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only by the pre-plan satisfaction of a prepetition claim.” Id. The *CoServ* court specifically noted that pre-plan of reorganization satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate” and also when the payment was to “sole suppliers of a given product.” Id. at 497-98. The court provided a three-pronged test for determining whether a pre-plan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

31. Payment of the Critical Vendor Claims meets the test set forth in CoServ. As described above, the Debtor has determined that the services of the Critical Vendors and Independent Contractors are essential to maximizing the value of the Debtor’s estate. Any disruption in the services provided by the Critical Vendors could jeopardize the Debtor’s going concern viability. Accordingly, the harm that would stem from the failure to pay the Critical Vendor Claims is disproportionate to the amount of the prepetition claims that the Debtor is seeking to pay by this Motion.

32. Moreover, with respect to the Critical Vendors, the Debtor has examined other options short of payment of the Critical Vendor Claims and has determined that, to avoid significant negative financial impact on the Debtor’s estate and there exists no practical or legal alternative to payment of the Critical Vendor Claims. Therefore, the Debtor can only meet its fiduciary duties as debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code

by paying the Critical Vendor Claims. Accordingly, the Debtor submits that the relief requested herein is appropriate under the circumstances.

33. This Court and courts in other jurisdictions regularly authorize chapter 11 debtors to pay claims to critical vendors where the payments are essential to the debtor's continued operations. See, e.g., In re Patriot Coal Corp., No. 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) (requesting payments up to \$22 million on a final basis for critical vendors); In re James River Coal Co., No. 14-31838 (KRH) (Bankr. E.D. Va. Apr. 7, 2014) (requesting payments to fuel suppliers and material suppliers, up to \$7.5 million); In re Payless Holdings LLC, No. 1742267 (KAS) (Bankr. E.D. Mo. May 9, 2017) (authorizing payments up to \$113 million); In re Avaya, Inc., No. 17-10089 (SMB) (Bankr. S.D.N.Y. Feb. 10, 2017) (authorizing payments up to \$39.5 million); In re Quiksilver, Inc., No. 15-11880 (BLS) (Bankr. D. Del. Oct. 28, 2015) (authorizing payments up to \$52 million).

34. The Debtor also requests that all applicable banks and other financial institutions be authorized and directed to (i) receive, process, honor and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtor related to, the claims that the Debtor requests authority to pay in this Motion, regardless of whether the checks were presented or fund transfer requests were submitted before or after the Petition Date and (ii) rely on the Debtor's designation of any particular check as approved by the Order; *provided* that funds are available in the Debtor's accounts to cover the checks and fund transfers.

35. The Debtor submits that the requested relief represents a sound exercise of the Debtor's business judgment, is necessary to avoid immediate and irreparable harm, and is justified under 11 U.S.C. §§ 105(a) and 363(b). Based upon the foregoing, the relief requested herein is

essential, appropriate, and in the best interest of the Debtor and its creditors and estate and, therefore, should be granted.

**IMMEDIATE RELIEF IS NECESSARY**

36. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. As set forth throughout this Motion, the inability to pay all of or a portion of the claims of Critical Vendors would substantially diminish or impair the Debtor’s efforts in this Case to preserve and maximize the value of its estate.

37. For this reason and those set forth above, the Debtor respectfully submits that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtor and its estate.

**WAIVER OF ANY APPLICABLE STAY**

38. The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtor seeks in this Motion is necessary for the Debtors to operate its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

**RESERVATION OF RIGHTS**

39. Nothing in the Proposed Orders or this Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an

admission as to the validity of any claim against the Debtor and its estate; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority, or amount of any claim against the Debtor and its estate; or (iii) (iv) shall be construed as a promise to pay a claim.

**NOTICE**

40. Notice of this Motion will be given to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for DIP Lender; (v) the Debtor's twenty (20) largest unsecured creditors; (vi) the Debtor's pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor's assets; and (viii) any party that has filed a request for notice with the Court. The Debtor submits that, under the circumstances, no other or further notice of the Motion is required.

**NO PRIOR REQUEST**

41. No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, for the reasons set forth herein and in the First Day Declaration, the Debtor respectfully requests that this Court enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as is just and proper.

Dated: December 2, 2019

CARDINAL HOMES, INC.

/s/ Michael E. Hastings

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*Proposed Counsel for the Debtor and  
Debtor in Possession*



**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re:

Chapter 11

CARDINAL HOMES, INC.,

Case No. 19-36275-KRH

Debtor.<sup>1</sup>

**ORDER AUTHORIZING THE DEBTOR TO PAY  
CERTAIN PRE-PETITION CLAIMS OF CRITICAL VENDORS**

Upon the Motion (the “Motion”)<sup>2</sup> of the above-captioned debtor and debtor-in-possession (the “Debtor”) for, among other things, entry of an order pursuant to sections 105(a), 363, 503, 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 6004-2 and 9013-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia (the “Local Rules”) authorizing, but not requiring, the Debtor to (i) pay, in the ordinary course of business, all undisputed, liquidated, prepetition amounts owing on account of claims held by Critical Vendors (the “Critical Vendor Claims”);

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<sup>1</sup> The Debtor in this Chapter 11 Case and the last four digits of its taxpayer identification number are as follows: Cardinal Homes, Inc. (9112). The Debtor’s headquarters are located at 525 Barnesville Highway, Wylliesburg, VA 23976.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings set forth in the Motion.

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Debtor in Possession*

(ii) authorizing and directing banks and other financial institutions (the “Banks”) to honor and process related checks and transfers; and (iii) granting related relief; and notice of the Motion having been given to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for the DIP Lender; (v) the Debtor’s twenty (20) largest unsecured creditors; (vi) the Debtor’s pre-petition secured lenders and their counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor’s assets; and (viii) any party that has filed a request for notice with the Court; and the Court having conducted a hearing on December 3, 2019, to consider the relief requested in the Motion (the “First Day Hearing”); and it appearing that granting the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtor, and is otherwise fair and reasonable and in the best interest of the Debtor, its estate and its creditors, and is essential for the preservation of the value of the Debtor’s assets; and all objections, if any, to the entry of this Order having been withdrawn, resolved or overruled by the Court; and upon the entire record of this case, including any evidence presented or statements of counsel at the First Day Hearing; and after due deliberation thereon; and good and sufficient cause appearing therefor;

It is accordingly hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. The Motion is **GRANTED**, stated herein, on an interim basis pending a final hearing thereon, which is hereby scheduled for December \_\_, 2019 at \_:00 p.m. in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, 701 E. Broad Street, Courtroom 5000, Richmond, Virginia 23219 (the “Final Hearing”), with any objections to be filed and served so as to be received on or before December \_\_, 2019. If no objections are filed and served in accordance with this Order, no Final Hearing will be held and the Motion is

approved by this Order becoming final, and no further order approving the Motion will be required.

2. Pursuant to sections 105(a), 363, 503, 1107(a), and 1108 of the Bankruptcy Code, the Debtor is authorized, but not required, to pay the Critical Vendor Claims, in the aggregate amount of up to \$100,000, in accordance with the Debtor's business judgment and as provided in the Motion.

3. To ensure that the Critical Vendors deal with the Debtor in accordance with Customary Trade Terms, the Debtor is authorized, but not required, to require execution by a Critical Vendor of a letter agreement (a "Trade Agreement") substantially in the form attached to this Order as **Exhibit 1**.

4. In accordance with this Order and any other order of this Court, the banks and financial institutions at which the Debtor maintains its accounts are authorized and directed to honor all checks and fund transfer requests made by the Debtor related hereto, to the extent that sufficient funds are on deposit in such accounts.

5. Nothing in the Motion or this Order shall be construed as impairing the Debtor's right to contest the validity or amount of any Critical Vendor Claims.

6. Nothing in the Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtor and its estate; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority, or amount of any claim against the Debtor and its estate; or (iii) shall be construed as a promise to pay a claim.

7. Within two (2) business days following entry of this Order, the Debtor shall serve, by United States mail, first-class postage prepaid, a copy of this Order on: (i) the Office of

the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for the DIP Lender; (v) the Debtor's twenty (20) largest unsecured creditors; (vi) all parties that have filed a financing statement asserting a lien in any of the Debtor's assets; and (viii) any party that has filed a request for notice with the Court.

8. The requirement under Local Rule 9013-1(G) to file a memorandum of law in connection with the Motion is waived.

9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) are satisfied by such notice.

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

11. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

12. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: \_\_\_\_\_

\_\_\_\_\_

UNITED STATES BANKRUPTCY JUDGE

Entered on Docket \_\_\_\_\_

WE ASK FOR THIS:

/s/ Michael E. Hastings

Michael E. Hastings (Virginia Bar No. 36090)

Brandy M. Rapp (Virginia Bar No. 71385)

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*Proposed Counsel for the Debtor and Debtor in Possession*

Local Rule 9022-1(C) Certification

The foregoing Order was endorsed by and/or served upon all necessary parties pursuant to Local Rule 9022-1(C).

/s/ Michael E. Hastings

Michael E. Hastings

\_\_\_\_\_, 2019

TO: [Critical Vendor Name and Address]

**Trade Agreement**

As you may be aware, on December 2, 2019 (the “**Petition Date**”), Cardinal Homes, Inc. (the “**Debtor**”), filed a voluntary petition (the “**Bankruptcy Case**”) under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Virginia (the “**Bankruptcy Court**”). On the **Petition Date**, the Debtor requested the Bankruptcy Court’s authority to pay all or part of the pre-bankruptcy claims of certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers; provided, however, that such approval was conditioned upon the written agreement of such vendors and service providers to be bound by the terms contained herein. On December 3, 2019, the Bankruptcy Court entered an Order (the “**Order**”) authorizing the Debtor to enter into this “**Trade Agreement.**” A copy of the Order is enclosed for reference.

To receive payment on pre-bankruptcy claims, the Debtor requires you to agree to supply goods and/or services to the Debtor based on “Customary Trade Terms” by executing this Trade Agreement. Customary Trade Terms are trade terms that are the same or better than the trade terms that existed within one (1) year prior to the **Petition Date**.

For purposes of administration of this trade program as authorized by the Bankruptcy Court, by signing this Trade Agreement, you and the Debtor agree as follows:

- a. For purposes of this Trade Agreement, the estimated balance of your pre-petition claim (accounting for any setoffs, credits or discounts) is \$[\_\_\_\_\_]. You hereby agree to settle and compromise the foregoing amount for the sum of \$\_\_\_\_\_ (the “**Prepetition Claim**”). The Pre-petition Claim will be paid as follows:

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Notwithstanding the Debtor’s agreement to pay the Pre-petition Claim as described herein, it will be necessary for you to file a proof of claim in the Bankruptcy Case to officially evidence the Pre-petition Claim. **You will receive notice of the bar date for filing a proof of claim at a later date.** You hereby agree to accept payment as agreed upon herein between the Debtor and you, in full and complete satisfaction of the Pre-petition Claim, 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 Pre-petition Claim. In particular, you agree that your proof of claim will not be filed in an amount that exceeds the Pre-petition Claim.

- b. The open trade balance or credit line that you will extend to the Debtor for delivery of post-petition goods or performance of post-petition services is \$[\_\_\_\_\_](which shall not be less than the greater of the open trade balance outstanding (a) on \_\_\_\_\_ or (b) on normal and customary terms on an historical basis for the one (1) year period prior to the Petition Date).
  
- c. In consideration for the payment described herein, you agree not to file or otherwise assert against the Debtor, its estate 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 section 503(b)(9) of the Bankruptcy Code (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 pre-petition amounts allegedly owed to you by the Debtor arising from agreements or other arrangements entered into prior to the Petition Date. In addition, 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 this Trade Agreement is terminated.
  
- d. If your Pre-petition Claim arises under a contract with the Debtor, you also agree not to file a motion to compel assumption or rejection of the contract.
  
- e. You will hereafter extend to the Debtor all Customary Trade Terms, which are:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
- f. You agree that, to the extent it is determined that you do not honor the Customary Trade Terms set forth in this Trade Agreement after receiving payment of the Pre-petition Claim, the Debtor’s payment of your Pre-petition Claims shall constitute an unauthorized post-petition transfer that is subject to avoidance and recovery pursuant to section 549 of the Bankruptcy Code.

Payment of your Pre-petition 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 Debtor. Your execution of this letter agreement and the return of the same to the Debtor constitute an agreement by you and the Debtor:

- a. to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Pre-petition Claim set forth above;
  
- b. that, for at least during the pendency of the Bankruptcy Case, you will continue to supply the Debtor with goods and/or services under the

Customary Trade Terms and any terms set forth herein and that the Debtor 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; and
- d. that, to the extent it is determined that you do not honor the Customary Trade Terms set forth in this Trade Agreement after receiving payment of the Pre-petition Claim, the Debtor's payment of your Pre-petition Claims shall constitute an unauthorized post-petition transfer that is subject to avoidance and recovery pursuant to section 549 of the Bankruptcy Code, without the right of any setoffs, claims, provision for payment of reclamation or trust fund claims, or other defense.

The Debtor and you also hereby agree that any dispute with respect to this Trade Agreement, the Order, and/or disputes arising thereunder, shall be subject to the exclusive jurisdiction of, and determined by, the Bankruptcy Court.

Please indicate your agreement to the terms hereof by returning a signed copy of this letter to Mr. Bret A. Berneche, President and Chief Executive Officer of Cardinal Homes, Inc., 525 Barnesville Hwy, Wylliesburg, Virginia 23976.

Sincerely,

CARDINAL HOMES, INC.

By: Bret A. Berneche

Its: President and Chief Executive Officer

Agreed and Accepted by:

[Name of Critical Vendor/Service Provider]

By:

Its:

Dated: