

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

REVA MEDICAL, INC.,

Debtor.¹

Chapter 11

Case No. 20-10072 (JTD)

**MOTION OF THE DEBTOR FOR INTERIM AND FINAL ORDERS
AUTHORIZING PAYMENT OF CERTAIN PREPETITION
TRADE CLAIMS IN THE ORDINARY COURSE OF BUSINESS**

REVA Medical, Inc. (the “Debtor”), by and through its proposed counsel, DLA Piper LLP (US), hereby submits this motion (the “Motion”) for entry of an order substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively authorizing the Debtor to pay certain prepetition trade claims in the ordinary course of business. In support of this Motion, the Debtor relies upon, and incorporates by reference, the *Declaration of Jeffrey Anderson in Support of Chapter 11 Filing and First Day Pleadings* (the “First Day Declaration”),² filed contemporaneously with this Motion. In further support of this Motion, the Debtor respectfully states as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (this “Court”) has jurisdiction to consider this chapter 11 case, the Debtor, property of the Debtor’s estate and this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the*

¹ The last four digits of the Debtor’s tax identification number are (0505). The Debtor’s mailing address is 5751 Copley Drive, Suite B, San Diego, CA 92111.

² Capitalized terms used but not otherwise defined in this Motion shall have the meanings ascribed to them in the First Day Declaration.

United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b).

2. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. Venue of this chapter 11 case in this district is proper under 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested in this Motion are sections 105(a), 363, and 503 of title 11 of the United States Code (as amended, the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 9013-1(m).

BACKGROUND

5. The Debtor is a leading medical device company based in San Diego, California, focused on the development and commercialization of bioresorbable polymer technologies for three vascular applications – coronary artery disease (“CAD”), peripheral artery disease (“PAD”) and embolization therapy. Generally, scaffolds are inserted into blood vessels in order to expand the vessel and prevent blockage. Similarly, bioresorbable scaffolds are used to restore the flow of blood, support the artery through the healing process and then disappear from the body after a period of time.

6. Given the costs associated with the development and commercialization of its products, which are early in the commercialization stage, the Debtor has incurred significant operating losses since inception and relied on its ability to fund operations primarily through equity

and debt financings. Amid headwinds that have affected developers of bioresorbable scaffolds, REVA began working with its key stakeholders to identify a solution that would deleverage the balance sheet and recapitalize the company in order to position REVA for long-term growth.

7. Over the course of the last few months, REVA entered into arm's-length negotiations with key stakeholders, which negotiations resulted in the entry into a restructuring support agreement among the Debtor, Goldman Sachs International and certain of its affiliates, Senrigan Master Fund and certain affiliates of Elliott Management Corporation, pursuant to which the Debtor would implement the transactions (the "Restructuring") set forth in the *Prepackaged Chapter 11 Plan of REVA Medical, Inc.* (the "Plan"), filed contemporaneously herewith. The Debtor commenced solicitation of the Plan on January 13, 2020. On the date hereof (the "Petition Date"), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code to seek confirmation of the Plan and consummation of the Restructuring.

8. The Debtor continues to be in possession of its assets and to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or official committee of unsecured creditors has been appointed in the Debtor's chapter 11 case. No date has been set for a meeting pursuant to section 341 of the Bankruptcy Code.

9. Additional factual background regarding the Debtor, including its business operations, capital and debt structures and the events leading to the filing of this chapter 11 case, is set forth in detail in the First Day Declaration, which is fully incorporated into this Motion by reference.

B. Debtor's Business and Trade Creditors

10. In the ordinary course, the Trade Creditors (defined herein) provide critical services for the Debtor's businesses, including but not limited to: (i) providing finished goods and materials

to use in the Debtor's manufacturing process; (ii) providing services and products related to research and development, and intellectual property protection, of products; (iii) transportation of the Debtor's products to customers; and (iv) providing services to assist in staffing, managing and processing various critical operational tasks, including accounting, operations, communications and other essential services.

11. Given the highly regulated industry in which the Debtor operates, it is critical that the Debtor maintains and develops relationships with its vendors, who supply them with essential resources and services. Authority to pay the Trade Claims (as defined below) in the ordinary course of business is necessary to minimize disruption to the Debtor's operations and to allow for a seamless transition through this chapter 11 case, for the benefit of all parties in interest.

C. Trade Claims

12. The Debtor estimates that, as of the Petition Date, they owe a total of approximately \$1.029 million on account of undisputed Trade Claims. The Debtor estimates that approximately \$765,196.65 of that amount will become due within the Interim Period. The following table summarizes the types of Trade Claims held by the Trade Creditors, and provides the Debtor's estimate of the total amount of each type of Trade Claims outstanding as of the Petition Date, including estimates for the portion of such total coming due within the Interim Period:

Category	Description of Claims	Estimated Total Amount Outstanding as of Petition Date	Estimated Amount Due Within Interim Period
Lien Claimants' Charges	Claims that may give rise to shippers, warehouseman, mechanics, or other liens against the Debtor's property if unpaid.	\$209,927.01	\$209,927.01
503(b)(9) Claims	Claims entitled to statutory priority under section 503(b)(9) of the Bankruptcy Code.	\$2,542.27	\$2,542.27
Critical Vendor Claims	Claims of certain Trade Creditors that are essential to maintaining the going concern value of the Debtor's enterprise.	\$73,443.64	\$73,443.64
Non-Priority Trade Claims	All other Trade Claims incurred in the ordinary course of business.	\$742,523.70	\$479,283.73
Total Trade Claims:		\$1.029 million	\$765,196.65

13. The Debtor is not seeking to pay these amounts immediately or in one lump sum; rather, the Debtor intends to pay these amounts as they become due and payable in the ordinary course of the Debtor's business. Concurrently with the filing of this Motion, the Debtor has filed the *Motion of Debtor for Approval of Interim and Final Agreed Orders (I) Authorizing the Use of Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay and (IV) Scheduling a Final Hearing* (the "Cash Collateral Motion"). The Debtor's prepetition lender's cash collateral, in addition to the cash generated by the Debtor's business, will provide the necessary additional liquidity for the Debtor to continue operations in the ordinary course of business. As set forth in the budget (the "Budget") annexed to the Cash Collateral Motion, the Debtor's proposed expenditures include payment of the Trade Claims. Accordingly, the Debtor believes it will have ample liquidity to pay the Trade Claims in the ordinary course during the administration of the chapter 11 case.

D. Conditions on Authority to Pay Trade Claims in Ordinary Course

14. The Debtor requests that the Orders authorize it to pay the Trade Claims on the condition that, by accepting payment, the Trade Creditor agrees to either: (i) maintain or reinstate trade terms during the pendency of the chapter 11 case that existed 180 days prior to the Petition Date; or (ii) maintain such other terms satisfactory to the Debtor in its business judgment. The Debtor also proposes that if a Trade Creditor, after receiving a payment on account of its Trade Claim, does not maintain or reinstate trade terms at least as favorable as those existing 180 days prior to the Petition Date during the pendency of the chapter 11 case or does not maintain such other terms agreed to by the Debtor in its business judgment, then any payments of Trade Claims made to such Trade Creditor after the Petition Date may be, in the Debtor's discretion, either (i) deemed applied to postpetition amounts payable to such Trade Creditor or (ii) treated as an

unauthorized postpetition transfer recoverable by the Debtor under section 549 of the Bankruptcy Code or other applicable law.

E. Treatment of Trade Claims under the Plan

15. The goal of the Debtor's prepackaged chapter 11 case is to de-lever the Debtor's balance sheet and recapitalize the business to position REVA for long-term growth while continuing normal business operations. Disruption to the Debtor's timely receipt of necessary goods and services would negatively impact the Debtor's operations, which would harm its business, damage its market reputation, and possibly result in a loss of customers. Accordingly, it is imperative that the Debtor maintains positive relationships with the providers of the goods and services essential to its business operations throughout this chapter 11 case. The Debtor negotiated the terms of the Plan with the goal of avoiding, among other things, disruption to the normal operations of the business by keeping the legal, equitable, and contractual rights of Trade Creditors unimpaired, and quickly returning to business outside of bankruptcy.

16. Furthermore, with the exception of any rejected executory contracts or unexpired leases (if any), all executory contracts and unexpired leases to which the Debtor is a party, and that have not expired by their own terms on or before the effective date of the order confirming the Plan, shall be assumed without further notice or order of the Court. Any outstanding amounts owed under any executory contract or unexpired lease to be assumed under the Plan shall be paid or otherwise "cured" pursuant to section 365(b)(1) of the Bankruptcy Code, on the terms set forth in the Plan.

17. In light of the foregoing, the relief sought here is simply intended to advance the timing within which Trade Claims would otherwise be paid and not change the remedies or amounts of such claims, thereby minimizing disruption to the Debtor's business and maximizing value for the benefit of all stakeholders, including the holders of Trade Claims moving forward.

RELIEF REQUESTED

18. By this Motion, pursuant to sections 105(a), 363, and 503 of title 11 of the Bankruptcy Code, and consistent with the unimpaired treatment of general unsecured trade claims under the Plan, filed contemporaneously herewith, the Debtor requests authority, but not direction, to pay in full in their discretion and in the ordinary course of business, allowed prepetition claims of creditors (such creditors, the “Trade Creditors”) that provide goods or services related to the Debtor’s operations giving rise to trade claims (such claims, the “Trade Claims”). The Debtor estimates that the total aggregate Trade Claims are approximately \$1.029 million. The Trade Claims fall into several categories:

- (i) \$2,542.27 are entitled to statutory priority under section 503(b)(9) of the Bankruptcy Code (“503(b)(9) Claims”);
- (ii) \$209,927.01 may give rise to shippers, warehouseman, mechanics, or other liens against the Debtor’s property if unpaid (the “Lien Claims” and, together with the 503(b)(9) Claims, the “Priority Trade Claims”);
- (iii) \$73,443.64 represent Critical Vendor Claims (as defined herein) that the Debtor believes must be paid to maintain the going concern value of the Debtor’s enterprise; and
- (iv) Excluding the Priority Trade Claims and the Critical Vendor Claims, the Debtor estimates that the total Trade Claims are \$742,523.70 (the “Non-Priority Trade Claims”).

19. The Debtor further requests that this Court confirm administrative priority status of all undisputed obligations of the Debtor owing to vendors and suppliers arising from the postpetition delivery of goods and provision of services ordered before the Petition Date under the Prepetition Purchase Orders (as defined herein) and authorize the Debtor to pay such obligations in the ordinary course of business.

20. The Debtor also requests that the Orders: (a) authorize all applicable banks and other financial institutions (collectively, the “Banks”), when requested by the Debtor, to receive, process, honor, and pay any and all checks, drafts, and other forms of payment, including fund

transfers (collectively, the “Payments”), on account of Trade Claims, whether such Payments were submitted before, on, or after the Petition Date, *provided that* sufficient funds are on deposit in the applicable accounts to cover such Payments; (b) authorize the Banks to rely on any directions and representations of the Debtor as to which Payments are subject to this Motion, *provided that* any such Bank shall not have any liability to any party for relying on such directions or representations by the Debtor; (c) provide that the Banks shall, at the direction of the Debtor, receive, process, honor, and pay all prepetition and postpetition Payments on account of the Trade Claims that have not been honored and paid as of the Petition Date, *provided that* sufficient funds are on deposit in the applicable accounts to cover such Payments and that any such Bank shall not have any liability to any party for relying on such direction by the Debtor; (d) authorize, but not direct, the Debtor to issue new postpetition checks or effect new postpetition fund transfers or other new postpetition Payments to replace any checks, drafts, and other forms of payment, including fund transfers, that may be inadvertently dishonored or rejected; and (e) authorize, but not direct, the Debtor to continue in their ordinary course to make payments on the Trade Claims during the Debtor’s chapter 11 case.

21. For the reasons set forth herein, the Debtor submits that the relief requested is in the best interest of the Debtor, its estate, creditors, and other parties in interest, and therefore should be granted.

BASIS FOR RELIEF

I. Payment of Trade Claims Due in the Ordinary Course is an Appropriate Exercise of Business Judgment.

22. Additionally, the Court may authorize the Debtor’s payment of the Trade Claims pursuant to section 363(b) of the Bankruptcy Code. Section 363(b)(1) authorizes courts, after notice and hearing, to permit a debtor to “use, sell, or lease, other than in the ordinary course of

business, property of the estate.” See 11 U.S.C. § 363(b)(1); see also *The Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to pay prepetition wages and stating, “[s]ection 363(b) gives the court broad flexibility in tailoring its orders to meet a wide variety of circumstances”); *Armstrong World Industries, Inc. v. James A Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying upon section 363 of the Bankruptcy Code as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants). For a court to apply section 363(b), the debtor must “articulate some business justification, other than mere appeasement of major creditors” *In re Ionosphere Clubs*, 98 B.R. at 175 (ruling that debtor’s payment of prepetition claims was necessary to protect its business and to ensure successful reorganization); *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”). Once a debtor has articulated a valid business justification, the business judgment rule is applied to the debtor’s decision. *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

23. As discussed above, the Debtor believes that the materials, products, and services provided by the Trade Creditors are vital to the Debtor’s continuing business operations, and that the failure to pay the Trade Claims would have a material adverse impact on the day-to-day operations of the business and would very likely disrupt the Debtor’s manufacturing, distribution, and sales processes by inhibiting the Debtor’s access to the goods and services they need most. Indeed, if certain Trade Creditors are unwilling to provide the goods or services postpetition, the

Debtor's operations will materially suffer, compromising the Debtor's ability to successfully restructure and value of the Debtor's estate to the detriment of all parties in interest.

24. Moreover, section 105(a) of the Bankruptcy Code authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." See 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*, 98 B.R. at 175. "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). For the reasons described above and in light of the Debtor's need to preserve the going concern value of their businesses, the relief requested in this Motion is proper and should be granted. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) (recognizing that courts approve orders allowing payment of prepetition claims because it is necessary for a successful reorganization).

25. The paramount goal of the parties in interest during this chapter 11 case is protecting the value of the Debtor's business by avoiding damaging operational disruptions. The maintenance of the Debtor's business during the chapter 11 case is crucial to the Debtor's ability to preserve the going concern, which provides enhanced value for the benefit of all of the Debtor's stakeholders. The Debtor is also not seeking authority to pay all Trade Claims immediately, but only to pay in the ordinary course of business undisputed amounts that come due on terms consistent with prepetition practice. Thus, the Debtor believes the relief requested is narrowly tailored to and consistent with the paramount goal of chapter 11 to preserve value by "facilitating

the continued operation and rehabilitation of the debtor” *In re Ionosphere Clubs*, 98 B.R. at 176.

26. In addition to using the Court’s equitable powers under section 105(a) of the Bankruptcy Code, the Court may also rely on the “doctrine of necessity.” The doctrine of necessity is a well-established doctrine that permits a court to authorize the payment of certain pre-plan prepetition claims when payment is necessary to the continued operations of a debtor’s business and restructuring efforts. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that court may authorize payment of prepetition claims if such payment is essential to continued operation of debtor); *In re Ionosphere Clubs*, 98 B.R. at 176 (recognizing that the doctrine of necessity is derived from “the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor”); *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where a debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment).

27. Here, the relief sought is vital for the Debtor’s continued operations during this chapter 11 case and successful reorganization. The Debtor’s ability to pay Trade Creditors in the ordinary course will allow it to maintain strong relationships with its vendors and avoid any delay or withdrawal of vendor services, which occurrence would impair a successful reorganization and hamper viability following the Debtor’s emergence from this chapter 11 case.

28. Particularly as to the Trade Creditors that agree to continue to provide goods or services on the trade terms existing 180 days prior to the Petition Date (or other accommodations deemed acceptable to the Debtor in its business judgment), the Debtor will avoid unnecessary expense during the chapter 11 case, thereby preserving liquidity, and ensuring that they are better-

positioned to sustain operations while reorganizing. Such terms also allow the Debtor to avoid the inherent operational inefficiencies of paying cash on demand and managing billing processes for numerous vendors that might require cash in advance or shorten their trade terms to far less favorable than they are currently. Accordingly, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the doctrine of necessity, the Court should grant the relief requested herein.

29. Given the prepackaged nature of this chapter 11 case, the requested relief is particularly appropriate as such relief will enable the Debtor to move towards expeditious confirmation of the widely-supported Plan with the least possible disruption or harm to its businesses. This is the deal agreed to by the parties in support of the Plan. The Debtor submits that no parties in interest will be prejudiced by the relief requested herein as the Trade Claims are limited to those that are treated as unimpaired under the Plan. The relief requested merely expedites the treatment and distribution that is afforded to Trade Claims under the Plan and protects the Debtor's business and preserves the value of the Debtor's estate before confirmation.

30. Indeed, the Debtor's proposal is similar to the relief granted in other chapter 11 cases commenced in this jurisdiction. *See, e.g., In re Checkout Holding Corp.*, No. 18-12794 (KG) (Bankr. D. Del. Jan. 10, 2019); *In re Mattress Firm, Inc.*, No. 18-12241 (CSS) (Bankr. D. Del. Oct. 26, 2018) (same); *In re New MACH Gen, LLC*, No. 18-11368 (MFW) (Bankr. D. Del. June 28, 2018); *In re Remington Outdoor Co., Inc.*, No. 18-10684 (BLS) (Bankr. D. Del. Apr. 13, 2018) (same); *In re Southeastern Grocers, LLC*, No. 18-10700 (MFW) (Bankr. D. Del. Apr. 23, 2018) (same); *In re Model Reorg Acquisition, LLC*, No. 17-11794 (CSS) (Bankr. D. Del. Oct. 6, 2017) (same); *In re Tidewater Inc.*, No. 17-11132 (BLS) (Bankr. D. Del. June 13, 2017) (same).³

³ The referenced orders are voluminous in nature and are not attached to this Motion. However, in light of the requirements of Local Rule 7007-2(a)(vii), undersigned counsel has retained copies of each order and will make them available to the Court, if requested, or to any party that requests them.

31. Based on the foregoing, the Debtor submits that the relief requested is necessary and appropriate, and in the best interests of its estate and creditors. Thus, this motion should be granted in all respects.

II. Additional Bases for Payment of Certain Trade Claims

A. Certain Trade Claims are Administrative Expenses

32. Trade Claims in an aggregate amount of approximately \$1.029 million, with \$765,196.65 coming due and payable during the Interim Period, are claims entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code for goods delivered to the Debtor in the ordinary course of business within 20 days before the Petition Date. Section 503(b)(9) of the Bankruptcy Code provides that claims for goods delivered to the Debtor in the ordinary course of business within 20 days before the Petition Date are entitled to administrative expense priority against the Debtor's estate. *See* 11 U.S.C. § 503(b)(9). The Debtor is therefore required to pay such claims in full on the effective date of a chapter 11 plan. *See id.*; 11 U.S.C. § 1129(a)(9)(A) (requiring payment in full of claims entitled to administrative expense priority).

33. Instead of paying such Trade Claims on the effective date of the Plan, the Debtor seeks authority to pay the Trade Claims during the pendency of the chapter 11 case as they become due. The Bankruptcy Code requires, and the Plan provides for, payment in full of administrative expense claims on the effective date of the Plan, or as soon as practicable thereafter. Thus, payment of Trade Claims entitled to priority under section 503(b)(9) of the Bankruptcy Code under the Orders will effect only a change in the timing of such payments, not the amounts or priority thereof. Finally, authorizing the Debtor to pay Trade Claims pursuant to the terms set forth herein should eliminate the burden on this Court and the Debtor, which would arise from numerous motions requesting payment on account of claims under section 503(b)(9) of the Bankruptcy Code.

34. Courts in this jurisdiction have authorized the payment of vendor claims entitled to administrative priority pursuant to section 503(b)(9) of the Bankruptcy Code. *See, e.g., In re Mattress Firm, Inc.*, No. 18-12241 (CSS) (Bankr. D. Del. Oct. 26, 2018) (authorizing debtors to pay 503(b)(9) claims); *In re Southeastern Grocers, LLC*, No. 18-10700 (MFW) (Bankr. D. Del. Apr. 23, 2018) (same); *In re Tidewater Inc.*, No. 17-11132 (BLS) (Bankr. D. Del. June 13, 2017) (same); *In re Basic Energy Servs., Inc.*, No. 16-12320 (KJC) (Bankr. D. Del. Nov. 17, 2016) (same).⁴

B. Certain Trade Claims May be Secured by Liens

35. In operating its business, the Debtor uses shippers, delivery servicers, and distributors (collectively, the “Supply Chain Vendors”) to ship, transport, track, manage, and otherwise facilitate the movement of finished product (collectively, the “Goods”) to the Debtor’s customers. In addition, the Debtor relies on industry shippers to deliver the Debtor’s finished Goods from its manufacturing facility to the international doctors and hospitals that use such Goods (the “Freight Providers,” and together with the Supply Chain Vendors, the “Lien Claimants”) to ensure the Debtor is able to meet the requisite standards of the industry for Goods.

36. The services provided by the Lien Claimants are critical to the Debtor’s uninterrupted operations for a number of reasons: (i) the Supply Chain Vendors provide unique, patent protected materials; (ii) the Supply Chain Vendors provide integral components of the Debtor’s products; (iii) the Supply Chain Vendors are convenient suppliers due to location or geography and provide Goods at a low cost; and (iv) the delivery of product provided by the

⁴ The referenced orders are voluminous in nature and are not attached to this Motion. However, in light of the requirements of Local Rule 7007-2(a)(vii), undersigned counsel has retained copies of each order and will make them available to the Court, if requested, or to any party that requests them.

Freight Providers is necessary to complete the sale of the Debtor's products. Interruption to any of these services could result in material harm to the Debtor's business and estate value.

37. Because of the commencement of the chapter 11 case, certain Lien Claimants that hold Goods for delivery to or from the Debtor may refuse to release the Goods pending receipt of payment for their prepetition services. Under certain state and foreign laws, these Lien Claimants may have a lien on the Goods in its possession to secure the charges or expenses incurred for the transportation of Goods. The refusal of any Lien Claimant to perform their services could negatively impact the Debtor's ability to maintain their day-to-day operations and harm the Debtor's reorganization efforts.

38. Accordingly, it is imperative that the Debtor be authorized in its discretion, to pay the Lien Claimants for their services (the "Lien Claimants' Charges"), whether they arose before or after the Petition Date. Of the Trade Claims, an amount of \$209,927.01 relates to the Lien Claimants' Charges, all of which will come due and payable during the Interim Period.

39. Furthermore, under section 363(e) of the Bankruptcy Code, Trade Creditors with liens may be entitled to adequate protection of their liens, which may impose additional costs on the Debtor's estate. In addition, under the Plan, Trade Claims supported by liens are "Lien Claims" that are unimpaired and will be paid in full on the Effective Date of the Plan.

40. Courts in this jurisdiction have authorized similar relief. *See, e.g., In re Mattress Firm, Inc.*, No. 18-12241 (CSS) (Bankr. D. Del. Oct. 26, 2018) (authorizing debtors to pay prepetition claims of potential lien claimants); *In re Southeastern Grocers, LLC*, No. 18-10700 (MFW) (Bankr. D. Del. Apr. 23, 2018) (same); *In re Tidewater Inc.*, No. 17-11132 (BLS) (Bankr. D. Del. June 13, 2017) (same); *In re American Gilsonite Co.*, No. 16-12316 (CSS) (Bankr. D. Del.

Nov. 18, 2016) (same); *In re Basic Energy Servs., Inc.*, No. 16-12320 (KJC) (Bankr. D. Del. Nov. 17, 2016) (same).⁵

C. Certain Trade Creditors are Critical Vendors Necessary to Ensure Continuation of Debtor's Operations

41. The Debtor has determined that certain of the Trade Creditors are essential to maintaining the going concern value of the Debtor's enterprise (the "Critical Vendors" and their prepetition Trade Claims, the "Critical Vendor Claims"). These Critical Vendors include a network of suppliers, domestic and international vendors, and shippers that are critical to meet the needs of the business. Many of the Critical Vendors provide services uniquely required in the Debtor's highly regulated industry. Of the Trade Claims, an amount of approximately \$73,443.64 relate to the Critical Vendor Claims, all of which will come due and payable during the Interim Period.

42. Payment of the Critical Vendors is necessary for the Debtor to maintain operations, preserve the value of the Debtor's business, and enable the Debtor to function in the ordinary course. Many of the Critical Vendors are providers of: (i) supplies for and materials required to produce finished Goods; (ii) specialized engineering, design, and quality control services with respect to the Debtor's manufacturing and production process; and (iii) critical technology, software and other services necessary for the Debtor's business and products.

43. The Debtor believes that failure to timely pay the Critical Vendor Claims would cause disproportionate harm and economic damage to the Debtor's business and its ability to serve its customers. This harm and disruption would far outweigh the cost of payment of the Critical

⁵ The referenced orders are voluminous in nature and are not attached to this Motion. However, in light of the requirements of Local Rule 7007-2(a)(vii), undersigned counsel has retained copies of each order and will make them available to the Court, if requested, or to any party that requests them.

Vendor Claims. The Debtor is ill-equipped to switch to other vendors or suppliers on short notice and therefore face significant risk if certain prepetition amounts cannot be paid. Accordingly, the Debtor has concluded that if it does not make Critical Vendor payments, its value will be reduced by amounts well in excess of the amounts that the Debtor seeks authorization to pay. In addition, the Debtor believes that maintaining favorable trade terms with the Critical Vendors is in the best interests of all parties in interest in this chapter 11 case and will greatly simplify operations upon emergence.

44. Courts in this district regularly grant relief to pay critical vendors consistent with that which the Debtor is seeking in this Motion. *See, e.g., In re LBIMedia, Inc.*, No. 18-12655 (CSS) (Bankr. D. Del. Dec. 12, 2018) (authorizing debtors to pay prepetition claims of critical vendors); *In re The NORDAM Grp., Inc.*, No. 18-11699 (MFW) (Bankr. D. Del. Aug. 29, 2018) (same); *In re Claire's Stores, Inc.*, No. 18-10584 (MFW) (Bankr. D. Del. Apr. 17, 2018) (same); *In re TKHoldings Inc.*, No. 17-11375 (BLS) (Bankr. D. Del. Aug. 9, 2017) (same).⁶

III. Confirmation of Administrative Expense Status of Prepetition Purchase Orders is Appropriate and Necessary to the Debtor's Reorganization

45. Furthermore, as of the Petition Date, the Debtor has certain prepetition purchase orders (the "Prepetition Purchase Orders") outstanding with various third party vendors and suppliers (the "Prepetition Purchase Order Vendors") for goods or services ordered by the Debtor that have not yet been delivered or provided. These Prepetition Purchase Order Vendors may be concerned that, because the Debtor's obligations under the Prepetition Purchase Orders arose before the Petition Date, such obligations will be treated as general unsecured claims in this chapter

⁶ The referenced orders are voluminous in nature and are not attached to this Motion. However, in light of the requirements of Local Rule 7007-2(a)(vii), undersigned counsel has retained copies of each order and will make them available to the Court, if requested, or to any party that requests them.

11 case, and that payment will be delayed or uncertain. Accordingly, certain Prepetition Purchase Order Vendors may refuse to provide goods or services to the Debtor purchased pursuant to the Prepetition Purchase Orders unless the Debtor issue substitute purchase orders postpetition or obtain an order of the Court (i) confirming that all undisputed obligations of the Debtor arising from the postpetition delivery of goods or services subject to Prepetition Purchase Orders are afforded administrative expense priority status under section 503(b) of the Bankruptcy Code and (ii) authorizing the Debtor to satisfy such obligations in the ordinary course of business pursuant to section 363(c) of the Bankruptcy Code.

46. It is necessary to the uninterrupted operation of the Debtor's business that obligations owed under the Prepetition Purchase Orders for goods or services delivered or provided postpetition be explicitly granted administrative expense status. Pursuant to section 503(b)(1)(A) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery of necessary goods and services are afforded administrative expense priority status. *See, e.g., Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 956 (2d Cir. 1993) (“[A] claim will be afforded priority ‘only to the extent that the consideration supporting the claimant’s right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.’”) (quoting *Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986) (quoting *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976))); *In re Tropicana Entm’t, LLC*, No. 08-10856 (KJC), 2015 Bankr. LEXIS 3499, at *17 (Bankr. D. Del. Oct. 14, 2015) (internal quotation omitted) (“[Pursuant to] Bankruptcy Code § 503(b)(1)(A), the Court may allow as administrative expenses, the actual, necessary costs and expenses of preserving the estate, including wages, salaries, commissions for services rendered after the commencement of the case.”); *In re Blockbuster Inc.*, No. 10-14997 (BRL), 2010 Bankr.

LEXIS 4977, at *8-9 (Bankr. S.D.N.Y. Oct. 27, 2010) (final order ruling that “Debtors’ undisputed obligations . . . that arise from the postpetition delivery of materials, goods, and services that were ordered in the prepetition period shall have administrative expense priority status pursuant to section 503(b) of the Bankruptcy Code.”). Thus, the granting of the relief requested herein will not provide the Prepetition Purchase Order Vendors with any greater priority than they otherwise would have if the relief were not granted and will not prejudice any other parties in interest.

47. The Debtor is also permitted to make these payments in the ordinary course. Section 363(c)(1) of the Bankruptcy Code authorizes a debtor in possession to “use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). The purpose of section 363(c)(1) is to provide a debtor in possession with the flexibility to engage in the ordinary transactions required to operate its business without undue oversight by creditors or the court. *See, e.g., In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). Payment of the Prepetition Purchase Order Vendors for goods and services received postpetition is appropriate in the ordinary course.

48. Similar relief to that requested herein has been granted in other chapter 11 cases in this district. *See, e.g., In re Tidewater Inc.*, No. 17-11132 (BLS) (Bankr. D. Del. June 13, 2017) (granting administrative expense status to undisputed obligations to vendors arising from postpetition delivery of goods and services ordered prepetition); *see also In re The NORDAM Grp., Inc.*, No. 18-11699 (MFW) (Bankr. D. Del. Aug. 29, 2018) (same); *In re The Bon-Ton Stores, Inc.*, No. 18-10248 (MFW) (Bankr. D. Del. Feb. 6, 2018) (same); *In re TKHoldings Inc.*, No. 17-11375 (BLS) (Bankr. D. Del. July 26, 2017) (same).⁷

⁷ The referenced orders are voluminous in nature and are not attached to this Motion. However, in light of the requirements of Local Rule 7007-2(a)(vii), undersigned counsel has retained copies of each order and will make them available to the Court, if requested, or to any party that requests them.

IV. Cause Exists To Authorize The Debtor's Financial Institutions To Honor Electronic Fund Transfers.

49. The Debtor also requests that all applicable banks and other financial institutions be authorized, when requested by the Debtor in its sole discretion, to receive, process, honor, and pay any and all Payments made by the Debtor related to the Trade Claims, so long as sufficient funds are available in the applicable accounts to make the Payments.

50. To stabilize the Debtor's operations, and to smoothly transition into chapter 11, it is imperative that the Debtor normalize its business. Failure to do so would result in extremely adverse business effects. Under the Debtor's existing cash management system, the Debtor represents that wire and other electronic bank transfer requests can be readily identified as relating to an authorized payment made on account of Trade Claims. Accordingly, the Debtor believes that unauthorized wire and electronic bank transfer requests will not be honored inadvertently and that all applicable financial institutions may rely on the representations of the Debtor as to which wire or electronic bank transfers are made and authorized to be paid in accordance with this Motion without any duty of further inquiry and without liability for following the Debtor's instructions.

RESERVATION OF RIGHTS

51. The Debtor reserves all rights. Without limiting the generality of the foregoing, nothing contained herein is or should be construed as: (i) an admission as to the validity, extent, perfection, priority, allowability, or enforceability of any claim or any security interest which purportedly secures such claim; (ii) a waiver of the Debtor's or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtor; (iii) a promise to pay any claim; (iv) a waiver of any claims or causes of action which may exist against any creditor or interest holder; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code, and nothing herein otherwise affects the

Debtor's rights under section 365 of the Bankruptcy Code to assume or reject any executory contract or unexpired lease with any party subject to this Motion; (vi) granting third-party beneficiary status or bestowing any additional rights on any third party; or (vii) being otherwise enforceable by any third party. Further, and without limiting the generality of the foregoing (i) the Debtor expressly reserves all of its rights to contest any obligations specific to the motion and claims related thereto, and (ii) if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not and should not be construed as an admission as to the validity of any obligations specific to the motion or claims related thereto or as a waiver of the Debtor's rights to dispute such obligations specific to the motion or claims related thereto.

**IMMEDIATE RELIEF IS NECESSARY TO AVOID IMMEDIATE AND
IRREPARABLE HARM**

52. For a debtor to obtain relief to make pre-plan payments within 21 days of the Petition Date, it must establish that such payments satisfy the requirements mandated by Bankruptcy Rule 6003—namely, that the relief requested is necessary to avoid “immediate and irreparable harm”. Immediate and irreparable harm exists when, absent the requested relief, a debtor's prospect of reorganizing is threatened or a swift diminution in the value of the debtor's estate is likely. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (finding that “immediate and irreparable harm” exists where loss of the business threatens ability to reorganize). The Third Circuit has interpreted language similar to the “immediate and irreparable harm” language in the context of preliminary injunctions and has instructed that irreparable harm is a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App'x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent,

not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cty.*, 40 F.3d 645, 653-55 (3d Cir. 1994).

53. Here, immediate and irreparable harm would result without the relief requested herein. To the extent that the Debtor owes any accrued but unpaid Trade Claims as of the Petition Date, failure to pay the Trade Claims in the ordinary course may cause the Trade Creditors to assert liens over the Debtor's property or impose other penalties, which would be detrimental to the value of the Debtor's estate and going concern value.

54. Moreover, payment of any Trade Claims is essential to ensure the smooth operation of the Debtor's business. Failure to do so in the ordinary course of business during the first 21 days of this chapter 11 case would result in needless disruption to the Debtor's business and may jeopardize the Debtor's operations at this critical time. For these reasons, the Debtor submits that the relief requested in the Orders is essential to prevent immediate and irreparable harm to the Debtor's operations and preserves the ongoing value of the Debtor's business, which inures to the benefit of all stakeholders.

WAIVER OF BANKRUPTCY RULE 6004(a) AND 6004(h)

55. To implement the foregoing successfully, and given the nature of the relief requested herein, the Debtor respectfully requests a finding that (x) the notice requirements under Bankruptcy Rule 6004(a) are met and (y) the 14-day stay under Bankruptcy Rule 6004(h) is waived. Such waiver is warranted here because the immediate payment of any accrued and unpaid Trade Claims is essential to prevent potentially irreparable harm to the Debtor's business, value, and ability to reorganize.

NOTICE

56. Notice of this Motion will be provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney for the District of Delaware; (iii) the

parties included on the Debtor's list of twenty (20) largest unsecured creditors; (iv) the Internal Revenue Service; (v) the Securities and Exchange Commission; (vi) counsel to Goldman Sachs International, Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Kevin Bostel, Esq.); (vii) counsel to Elliott Management Corporation and its affiliates, Debevoise & Plimpton LLP, 919 Third Avenue, New York, New York 10022 (Attn: Jasmine Ball, Esq.); (viii) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (iv) any other party in interest entitled to notice of this Motion. As this Motion is seeking "first day" relief, notice of this Motion and any order entered in connection with this Motion will be served on all parties required by Local Rule 9013-1(m). Due to the urgency of the circumstances surrounding this Motion and the nature of the relief in it, the Debtor respectfully submits that no further notice of this Motion is required.

NO PRIOR REQUEST

57. No previous request for the relief sought herein has been made by the Debtor to this or any other Court.

[Remainder of Page Intentionally Left Blank]

WHEREFORE, the Debtor respectfully requests that this Court (i) enter interim and final orders, substantially in the form attached hereto as **Exhibit A** and **Exhibit B**, respectively, granting the relief requested in this Motion, and (ii) grant such other and further relief as this Court may deem just and proper.

Dated: January 14, 2020
Wilmington, Delaware

Respectfully submitted,

DLA PIPER LLP (US)

/s/ Stuart M. Brown

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Proposed Counsel to the Debtor

EXHIBIT A

Proposed Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

REVA MEDICAL, INC.,

Debtor.¹

Chapter 11

Case No. 20-10072 (JTD)

**INTERIM ORDER AUTHORIZING PAYMENT OF CERTAIN
PREPETITION TRADE CLAIMS IN THE ORDINARY COURSE OF BUSINESS**

Upon the motion (the “Motion”)² of the Debtor for entry of an order (this “Order”), pursuant to sections 105(a), 363(b), and 503 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004 and Local Bankruptcy Rule 9013-1, authorizing, but not directing, the Debtor to pay the prepetition Trade Claims in the ordinary course of business, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference*, dated February 29, 2012; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due, sufficient, and proper notice of the Motion having been provided under the circumstances and in accordance with the Bankruptcy Rules and the Local Bankruptcy Rules, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the “Hearing”); and upon consideration of the First Day Declaration and the record of the Hearing and all of the proceedings

¹ The last four digits of the Debtor’s tax identification number are (0505). The Debtor’s mailing address is 5751 Copley Drive, Suite B, San Diego, CA 92111.

² Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

had before the Court; and the Court having found and determined that the relief sought in the Motion is necessary to avoid immediate and irreparable harm to the Debtor and its estate, as contemplated by Bankruptcy Rule 6003, and is in the best interests of the Debtor, its estate, its creditors, its stakeholders, and all other parties-in-interest, and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The Debtor is authorized, but not directed, pursuant to sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code, in the reasonable exercise of its business judgment, to pay, in the ordinary course of business, some or all of the prepetition Trade Claims of Trade Creditors in full; *provided that* the Debtor is authorized, but not directed, to pay only amounts due and payable as of the Petition Date and amounts that are or become due and payable between the Petition Date and the date that a final order on the Motion is entered, in an amount not to exceed \$770,000, unless otherwise ordered by this Court; *provided, further*, that as a condition to payment hereunder, such Trade Creditors shall agree to maintain or reinstate trade terms during the pendency of the chapter 11 case that are at least as favorable as those existing 180 days prior to the Petition Date or on such other terms satisfactory to the Debtor's in its business judgment.
3. In the event that a Trade Creditor does not maintain or reinstate trade terms at least as favorable as those existing 180 days prior to the Petition Date during the pendency of the chapter 11 case, or does not maintain such other terms agreed to by the Debtor, any payments made pursuant to this Order after the Petition Date shall be, in the Debtor's sole discretion, deemed applied to postpetition amounts payable to such Trade Creditor or treated as an unauthorized

postpetition transfer recoverable by the Debtor under section 549 of the Bankruptcy Code or other applicable law.

4. The undisputed obligations of the Debtor arising under the Prepetition Purchase Orders shall be afforded administrative expense priority status pursuant to section 503(b)(1)(A) of the Bankruptcy Code.

5. The Debtor is authorized, but not directed, in their sole discretion, pursuant to section 363(c)(1) of the Bankruptcy Code, to pay in the ordinary course of their businesses all undisputed obligations arising from the postpetition delivery or shipment of goods or provision of services under the Prepetition Purchase Orders consistent with its customary past practice.

6. All payments authorized by this Order may be made solely to the extent in compliance with the Budget (as defined in the interim or final order approving the Debtor's use of cash collateral (the "Cash Collateral Order") then in effect. To the extent there is any inconsistency between the terms of this Order and the Cash Collateral Order, the Cash Collateral Order shall control.

7. Nothing in the Motion or this Order shall be deemed to authorize the Debtor to accelerate any payments not otherwise due prior to the date of the hearing to consider entry of an order granting the relief requested in the Motion on a final basis (the "Final Hearing").

8. The Debtor is authorized and empowered to execute and deliver such documents and to take and perform all actions necessary to implement and effectuate the relief granted in this Order.

9. All applicable banks and financial institutions (collectively, the "Banks") are authorized, when requested by the Debtor in its sole discretion, to receive, process, honor, and pay any and all checks, drafts, and other forms of payment, including fund transfers (collectively, the

“Payments”), on account of the Trade Claims, whether such Payments were submitted before, on, or after the Petition Date, *provided that* sufficient funds are on deposit in the applicable accounts to cover such Payments and that any such Bank shall not have any liability to any party for relying on such direction by the Debtor.

10. Each of the Banks is authorized to rely on any directions and representations of the Debtor as to which Payments should be honored and paid in respect of the Trade Claims pursuant to the Motion and this Order, and any such Bank shall not have any liability to any party for relying on such directions or representations by the Debtor as provided in this Order.

11. The Debtor is authorized to issue new postpetition checks or effect new postpetition fund transfers or other new postpetition Payments to replace any checks, drafts, and other forms of payment, including fund transfers, which may have been inadvertently dishonored or rejected.

12. Nothing contained in the Motion or this Order, nor any payment made pursuant to the authority granted by this Order, is intended to be or shall be construed as (a) an admission as to the validity, extent, perfection, priority, allowability, or enforceability of any claim or any security interest which purportedly secures such claim, (b) a waiver of the Debtor’s or any appropriate party in interest’s rights to dispute the amount of, basis for, or validity of any claim against the Debtor, (c) a promise to pay any claim, (d) a waiver of any claims or causes of action which may exist against any creditor or interest holder, (e) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code, and nothing herein otherwise affects the Debtor’s rights under section 365 of the Bankruptcy Code to assume or reject any executory contract or unexpired lease with any party subject to this Order, (f) granting third-party beneficiary status or bestowing any additional rights on any third party; or (g) being otherwise enforceable by any third party. Without limiting the generality of the foregoing, nothing

in the Motion or this Order nor any payment of any Trade Claims pursuant to this Order shall be construed as impairing the Debtor's right to contest the validity, priority, or amount of any Trade Claims allegedly due or owing to any Trade Creditor, and all of the Debtor's rights with respect thereto are hereby reserved.

13. Notwithstanding the relief granted in this Order, any payment made by the Debtor pursuant to the authority granted herein shall be subject to and in compliance with any orders entered by the Court authorizing the Debtor's use of cash collateral and any budget in connection therewith.

14. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied.

15. The Court finds and determines that the requirements of Bankruptcy Rule 6003(b) are satisfied and that the relief is necessary to avoid immediate and irreparable harm.

16. The notice requirement set forth in Bankruptcy Rule 6004(a) is satisfied.

17. This Order is immediately effective and enforceable notwithstanding the provisions of Bankruptcy Rule 6004(h) or otherwise.

18. This Court retains jurisdiction with respect to all matters arising from or related to the enforcement of this Order.

19. The deadline by which objections to entry of a final order on the Motion must be filed is _____, 2020 at _____.m. (Eastern Time) (the "**Objection Deadline**"). The Final Hearing, if required, will be held on _____, 2020 at _____.m. (Eastern Time).

EXHIBIT B

Proposed Final Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

REVA MEDICAL, INC.,

Debtor.¹

Chapter 11

Case No. 20-10072 (JTD)

**FINAL ORDER AUTHORIZING PAYMENT OF CERTAIN
PREPETITION TRADE CLAIMS IN THE ORDINARY COURSE OF BUSINESS**

Upon the motion (the “Motion”)² of the Debtor for entry of an order (this “Order”), pursuant to sections 105(a), 363, and 503 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004 and Local Bankruptcy Rule 9013-1, authorizing the Debtor to pay the prepetition Trade Claims in the ordinary course of business, as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference*, dated February 29, 2012; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due, sufficient, and proper notice of the Motion having been provided under the circumstances and in accordance with the Bankruptcy Rules and the Local Bankruptcy Rules, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the “Hearing”); and upon consideration of the First Day Declaration and the record of the Hearing and all of the proceedings had before the Court;

¹ The last four digits of the Debtor’s tax identification number are (0505). The Debtor’s mailing address is 5751 Copley Drive, Suite B, San Diego, CA 92111.

² Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors, its stakeholders, and all other parties-in-interest, and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein. Any objections or reservations of rights filed in respect of the Motion are overruled, with prejudice.

2. The Debtor is authorized, but not directed, pursuant to sections 105(a), 363(b), and 503(b)(9) of the Bankruptcy Code, in the reasonable exercise of their business judgment, to pay, in the ordinary course of business, some or all of the prepetition Trade Claims of Trade Creditors in full, *provided, further*, that as a condition to payment hereunder, such Trade Creditors shall agree to maintain or reinstate trade terms during the pendency of the chapter 11 case that are at least as favorable as those existing 180 days prior to the Petition Date or on such other terms satisfactory to the Debtor's in its business judgment.

3. In the event that a Trade Creditor does not maintain or reinstate trade terms at least as favorable as those existing 180 days prior to the Petition Date during the pendency of the chapter 11 case, or does not maintain such other terms agreed to by the Debtor, any payments made pursuant to this Order after the Petition Date shall be, in the Debtor's sole discretion, deemed applied to postpetition amounts payable to such Trade Creditor or treated as an unauthorized postpetition transfer recoverable by the Debtor under section 549 of the Bankruptcy Code or other applicable law.

4. The undisputed obligations of the Debtor arising under the Prepetition Purchase Orders shall be afforded administrative expense priority status pursuant to section 503(b)(1)(A) of the Bankruptcy Code.

5. The Debtor is authorized, but not directed, in its sole discretion, pursuant to section 363(c)(1) of the Bankruptcy Code, to pay in the ordinary course of their businesses all undisputed obligations arising from the postpetition delivery or shipment of goods or provision of services under the Prepetition Purchase Orders consistent with their customary past practice.

6. All payments authorized by this Order may be made solely to the extent in compliance with the Budget (as defined in the interim or final order approving the Debtor's use of cash collateral (the "Cash Collateral Order") then in effect. To the extent there is any inconsistency between the terms of this Order and the Cash Collateral Order, the Cash Collateral Order shall control.

7. The Debtor is authorized and empowered to execute and deliver such documents and to take and perform all actions necessary to implement and effectuate the relief granted in this Final Order.

8. All applicable banks and financial institutions (collectively, the "Banks") are authorized, when requested by the Debtor in its sole discretion, to receive, process, honor, and pay any and all checks, drafts, and other forms of payment, including fund transfers (collectively, the "Payments"), on account of the Trade Claims, whether such Payments were submitted before, on, or after the Petition Date, *provided that* sufficient funds are on deposit in the applicable accounts to cover such Payments and that any such Bank shall not have any liability to any party for relying on such direction by the Debtor.

9. Each of the Banks is authorized to rely on any directions and representations of the Debtor as to which Payments should be honored and paid in respect of the Trade Claims pursuant to the Motion and this Order, and any such Bank shall not have any liability to any party for relying on such directions or representations by the Debtor as provided in this Order.

10. The Debtor is authorized to issue new postpetition checks or effect new postpetition fund transfers or other new postpetition Payments to replace any checks, drafts, and other forms of payment, including fund transfers, which may have been inadvertently dishonored or rejected.

11. Nothing contained in the Motion or this Order, nor any payment made pursuant to the authority granted by this Order, is intended to be or shall be construed as (a) an admission as to the validity, extent, perfection, priority, allowability, or enforceability of any claim or any security interest which purportedly secures such claim, (b) a waiver of the Debtor's or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtor, (c) a promise to pay any claim, (d) a waiver of any claims or causes of action which may exist against any creditor or interest holder, (e) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code, and nothing herein otherwise affects the Debtor's rights under section 365 of the Bankruptcy Code to assume or reject any executory contract or unexpired lease with any party subject to this Order, (f) granting third-party beneficiary status or bestowing any additional rights on any third party, or (g) being otherwise enforceable by any third party. Without limiting the generality of the foregoing, nothing in the Motion or this Order nor any payment of any Trade Claims pursuant to this Order shall be construed as impairing the Debtor's right to contest the validity, priority, or amount of any Trade Claims allegedly due or owing to any Trade Creditor, and all of the Debtor's rights with respect thereto are hereby reserved.

12. Notwithstanding the relief granted in this Order, any payment made by the Debtor pursuant to the authority granted herein shall be subject to and in compliance with any orders entered by the Court authorizing the Debtor's use of cash collateral and any budget in connection therewith.

13. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied.

14. The notice requirement set forth in Bankruptcy Rule 6004(a) is satisfied.

15. This Order is immediately effective and enforceable notwithstanding the provisions of Bankruptcy Rule 6004(h) or otherwise.

16. This Court retains jurisdiction with respect to all matters arising from or related to the enforcement of this Order.