

**BANKRUPTCY IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In re:	)	
	)	Chapter 11
AVAYA INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 23-90088 (DRJ)
	)	
Debtors.	)	(Joint Administration Requested)
	)	(Emergency Hearing Requested)

**DEBTORS' EMERGENCY MOTION FOR ENTRY  
OF AN ORDER (I) AUTHORIZING THE DEBTORS TO  
MAINTAIN AND ADMINISTER THEIR EXISTING CUSTOMER  
AND PARTNER PROGRAMS AND HONOR CERTAIN PREPETITION  
OBLIGATIONS RELATED THERETO, (II) AUTHORIZING ASSUMPTION OF  
CERTAIN CUSTOMER AGREEMENTS, AND (III) GRANTING RELATED RELIEF**

**Emergency relief has been requested. Relief is requested not later than 9:00 a.m. (prevailing Central Time) on February 15, 2023.**

**If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.**

**A hearing will be conducted on this matter on February 15, 2023, at 9:00 a.m. (prevailing Central Time) in Courtroom 400, 4th floor, 515 Rusk Street, Houston, Texas 77002. Participation at the hearing will only be permitted by an audio and video connection.**

**Audio communication will be by use of the Court's dial-in facility. You may access the facility at (832) 917-1510. Once connected, you will be asked to enter the conference room number. Judge Jones's conference room number is 205691. Video communication will be by use of the GoToMeeting platform. Connect via the free GoToMeeting application or click the link on Judge Jones's homepage. The meeting code is "Judge Jones". Click the settings icon in the upper right corner and enter your name under the personal information setting.**

**Hearing appearances must be made electronically in advance of both electronic and in-person hearings. To make your appearance, click the "Electronic Appearance" link on Judge Jones's homepage. Select the case name, complete the required fields**

<sup>1</sup> A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at <http://www.kcellc.net/avaya>. The location of Debtor Avaya Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 350 Mount Kemble Avenue, Morristown, New Jersey 07960.



**and click “Submit” to complete your appearance.**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) state the following in support of this motion (this “Motion”):<sup>2</sup>

### **Relief Requested**

1. The Debtors seek entry of an order, substantially in the attached form (the “Order”), (a) authorizing the Debtors to maintain and administer their Customer and Partner Programs (as defined below) and honor certain related prepetition obligations on a postpetition basis in the ordinary course; (b) authorizing the Debtors to assume certain agreements (collectively, the “Customer Agreements”) between the Debtors and their Customers (as defined below); and (c) granting related relief.

### **Jurisdiction and Venue**

2. The United States Bankruptcy Court for the Southern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The Debtors confirm their consent to the entry of a final order by the Court.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), 363, and 365(a) of title 11 of the United States Code (the “Bankruptcy Code”), rules 6003, 6004, and 6006 of the

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<sup>2</sup> The Debtors, together with their non-Debtor affiliates (collectively, “Avaya” or the “Company”), are a leading provider of mission-critical, real-time communication applications. The facts and circumstances supporting this Motion are set forth in the *Declaration of Eric Koza, Chief Restructuring Officer of Avaya Holdings Corp. and Certain of Its Affiliates and Subsidiaries, in Support of the Debtors’ Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), filed contemporaneously with the filing of this Motion and incorporated by reference herein. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration or the *Debtors’ Joint Prepackaged Plan of Reorganization of Avaya Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”), filed contemporaneously herewith, as applicable.

Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and rules 1075-1 and 9013-1 of the Bankruptcy Local Rules for the Southern District of Texas (the “Bankruptcy Local Rules”).

### **Background**

5. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

6. The Debtors have filed a motion requesting joint administration of these Chapter 11 Cases pursuant to Bankruptcy Rule 1015(b). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases and no official committees have been appointed or designated.

### **The Customer and Partner Programs**<sup>3</sup>

7. The Company offers products and services that address the needs of a diverse range of businesses, including large multinational enterprises, small and medium-sized businesses, and governmental organizations. The Debtors’ customers operate in a broad range of industries, including financial services, healthcare, hospitality, education, government, manufacturing, retail, transportation, energy, media, and communications. The Company serves approximately 90,000 customers worldwide, approximately 42,000 of which are in North America and approximately 48,000 of which are outside North America (collectively, the “Customers”).

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<sup>3</sup> Although this Motion is intended to be comprehensive, the Debtors may have inadvertently omitted some Customer and Partner Programs. The Debtors request relief with respect to all Customer and Partner Programs, regardless of whether every such Customer and Partner Program is specifically identified herein. Further, the Debtors do not believe that any relief requested herein overlaps with that requested within the *Debtors’ Emergency Motion for Entry of an Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimbursable Expenses, and (B) Continue Employee Benefits Programs and (II) Granting Related Relief* (the “Wages Motion”). However, for the avoidance of doubt, no relief requested herein should be construed as duplicative of that requested within the Wages Motion.

Among the Debtors' Customers are various Fortune 500 companies, major hospitals and universities, local, state, and federal governmental units, and foreign governmental units.

8. In delivering their communications solutions, the Debtors work with approximately 4,600 third-party partners located around the world (collectively, the "Partners") to provide Customers with alternative ways to access the Debtors' products and services. Partners are third-party entities generally selected based upon their local-market and vertical expertise to deliver flexible, integrated solutions customized for each individual Customer's business needs and serve as a point of contact for access to the Debtors' broader technical resources. The Debtors generate revenue through both direct sales by the Debtors to end-user Customers (collectively, the "End-Users") and through indirect sales by Partners.

9. With regards to indirect sales of products, in certain instances, the Debtors sell to certain reseller Partners (collectively, the "Channel Partners"), which then sell directly to the End-User. Typically a Channel Partner who sells directly to the End-User receives between one and four percent of the total contract amount as compensation, remitting the balance to the Debtors. In other instances, the Debtors partner with a distributor (collectively, the "Distributors"), which subsequently sell to Channel Partners, which then sell the Product to End-Users. Distributors typically receive between eight and thirteen percent of the total contract as compensation, remitting the balance to the Debtors. The Debtors currently generate approximately sixty-five percent of Product revenues through indirect sales of products.

10. The Debtors also sell certain services to their Customers, which include technical support and installation services for the products purchased by End-Users, as well as project-based deployment, design, and optimization services. The Debtors sell these services directly to Customers, using Avaya-employed salespersons and sales agents, as well as indirectly via

Distributors and Channel Partners in the same manner described above. Services may be delivered to Customers solely by Avaya or in conjunction with Channel Partners. The Debtors' revenue from indirect sales of services is approximately thirty-five percent of their total services revenue.

11. In the ordinary course, the Debtors provide Customers and Partners with various programs that are vital to the Debtors' ability to engender goodwill, maintain loyalty, increase sales opportunities, drive revenue generation, and position the Debtors to compete within their markets. The programs include: (a) the Partner Programs, (b) the Back-End Credits Programs, (c) the RingCentral Commission Programs, (d) the Warranties, and (e) the Prepayments and Credits (each as defined below and collectively, the "Customer and Partner Programs"). The Debtors believe their ability to continue the Customer and Partner Programs and honor their obligations thereunder in the ordinary course of business is necessary to retain their reputation for reliability, meet competitive market pressures, and ensure Customer satisfaction.

**I. Partner Programs.**

12. The Debtors offer their Partners a number of programs (collectively, the "Partner Programs") that are designed to generate revenue and develop Partners' relationships with Customers, as well as maintain the relationship between the Debtors and the Partners, who are not contractually obligated to partner exclusively with the Debtors. The Debtors believe that, given their revenue model and the importance of their Partners, maintaining the Partner Programs is essential to the continued health and sustainability of the Debtors' businesses.

**A. Edge Incentive Program.**

13. The Debtors' growth-based Partner Program (the "Edge Incentive Program"), which is made up of several components described in greater detail herein, provides incentives, rebates, and commissions to Channel Partners who achieve certain predefined sales performance targets. The targets are generally dependent on the total volume of sales, as well as the Debtors'

own specific goals. Because the Edge Incentive Program is largely based on incentive-based promotions that the Debtors adjust depending on their desired outcome for any particular component of the Edge Incentive Program, the amount paid by the Debtors on account of the Edge Incentive Program can vary significantly from quarter to quarter.

14. As of the Petition Date, the Debtors estimate they owe approximately \$30.1 million in outstanding prepetition obligations related to the Edge Incentive Program. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the Edge Incentive Program and to continue the Edge Incentive Program in the ordinary course of business on a postpetition basis consistent with past practice.

**i. Migration Incentive.**

15. Through the Edge Incentive Program, the Debtors incentivize their Partners to migrate existing Avaya Customers (the “Migration Incentive”) to various priority products, such as Avaya Call Center Elite, Avaya Aura Platform, Avaya IP Office, Avaya Enterprise Cloud, Avaya Enterprise Cloud Private Label, Avaya Government Cloud, Avaya Experience Platform, Avaya Cloud Office, Avaya Spaces, and Avaya Communication APIS (collectively, the “Avaya Cloud Products”). The Migration Incentive rewards Partners with a one-time payment equal to three times the monthly billing rate of the minimum commitment they divert to Avaya Cloud Products from existing Avaya Customers who were not previously enrolled in an Avaya Cloud Product. The Debtors rely on the Migration Incentive to grow the customer base of the Debtors’ priority cloud-based products.

16. As of the Petition Date, the Debtors estimate they owe approximately \$22.4 million in outstanding prepetition obligations related to the Migration Incentive. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the Migration

Incentive and to continue the Migration Incentive in the ordinary course of business on a postpetition basis consistent with past practice.

**ii. New Customer Incentive.**

17. The Debtors incentivize their Partners to grow the Debtors' overall customer base by developing relationships with, and selling Avaya products to, new Customers who do not currently leverage Avaya's products or capabilities (the "New Customer Incentive"). For the purposes of the New Customer Incentive, "new Customers" are businesses and organizations that have not been active Customers within the preceding thirty-six month period. The New Customer Incentive stimulates the growth of the Debtors' business by awarding Partners between four and eight percent of the total contract value.

18. As of the Petition Date, the Debtors estimate they owe approximately \$100,000 in outstanding prepetition obligations related to the New Customer Incentive. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the New Customer Incentive and to continue the New Customer Incentive in the ordinary course of business on a postpetition basis consistent with past practice.

**iii. Retail Support Services Commissions.**

19. To further incentivize their Partners, the Debtors provide commissions on account of support agreements that are sold through their Partners who act as sales agents (collectively, the "Retail Support Services Commissions"). The Debtors' point-of-sale and renewal agreements are eligible for the Retail Support Services Commissions.

20. While the determination of the Retail Support Services Commissions to be paid to any particular Partner is made on a case-by-case basis and varies from Partner to Partner, the Retail Support Services Commissions are generally determined based on the following four factors:

(a) base commission; (b) percent of retail point-of-sale revenues; (c) retail on-time renewal rate; and (d) the prior six-months' performance.

21. As of the Petition Date, the Debtors estimate they owe approximately \$3.6 million in outstanding prepetition obligations related to the Retail Support Services Commissions. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the Retail Support Services Commissions and to continue the Retail Support Services Commissions in the ordinary course of business on a postpetition basis consistent with past practice.

**iv. Market Development Programs.**

22. The Debtors maintain a variety of Partner Programs focused on developing the foundational relationship between their Partners and Customers through the co-funding of various market-development and Customer-engagement opportunities (collectively, the "Market Development Programs"). Typically, in connection with a given marketing campaign, the Debtors and the Partner each contribute half of the required marketing cost upfront, and the Debtors subsequently reimburse the Partner in an amount tied to actual expenses incurred for marketing activities based on a business case, including a return on investment analysis for each activity.

23. As of the Petition Date, the Debtors estimate they owe approximately \$3 million in outstanding prepetition obligations related to the Market Development Programs. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the Market Development Programs and to continue the Market Development Programs in the ordinary course of business on a postpetition basis consistent with past practice.

**v. Reseller Sales Representative Loyalty Program.**

24. In order to encourage Partners at the sales representative level, the Debtors maintain, among other things, an incentive program for a Partner's sales representative who



successfully sells certain of the Debtors' products to End-Users (the "Reseller Sales Representative Loyalty Program"). Both the Partner and the Partner's sales representative must register for the Reseller Sales Representative Loyalty Program, after which the Partner's sales representative is awarded commissions for successful sales of certain of the Debtors' products and services, including the Avaya Cloud Products and the Device-as-a-Service offering, among others. Once rewards are earned under the Reseller Sales Representative Loyalty Program, the earned funds are remitted to the Partners, who, in turn, are responsible for remitting them to their individual sales representatives.

25. As of the Petition Date, the Debtors estimate they owe approximately \$1 million in outstanding prepetition obligations related to the Reseller Sales Representative Loyalty Program. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the Reseller Sales Representative Loyalty Program and to continue the Reseller Sales Representative Loyalty Program in the ordinary course of business on a postpetition basis consistent with past practice.

**vi. Distributor Rebate Programs.**

26. The Debtors maintain a suite of several rebate programs designed to help Distributors improve their margins while selling Avaya products (the "Distributor Rebate Programs"). The Distributor Rebate Programs provide quarterly rebates that the most committed Distributors may earn for aligning with the Debtors' top strategic priorities and are based on meeting certain quarterly eligibility and performance requirements. Specifically, the Distributor Rebate Programs are composed of three discrete components: (i) a "Variable Incentive Rebate," which rewards Distributors for achieving key metrics related to net sales and inventory reporting; (ii) a "Distributor Linearity Rebate," which rewards Distributors for exceptional contributions related to hardware sales; and (iii) a "Targeted Partner Growth Rebate," which provides

Distributors with a quarterly rebate for year-over-year growth in revenues. Together, these Distributor Rebate Programs help the Debtors reward their most productive Distributors for their commitment to and growth of the Debtors' business.

27. As of the Petition Date, the Debtors do not believe they owe any amounts on account of the Distributor Rebate Programs because the Distributor Rebate Programs provide purchase price adjustments to Distributors, rather than cash payments. The Debtors request authorization to continue the Distributor Rebate Programs in the ordinary course of business on a postpetition basis consistent with past practice.

## **II. Back-End Credits Programs.**

28. The Debtors also provide certain Partners with opportunities to participate in more individualized Partner Programs (collectively, the "Back-End Credits Programs"). The Back-End Credits Programs are generally driven by special bids or discounts offered to Partners, determined on a specific opportunity basis. Specifically, the Debtors offer three Back-End Credits Programs to Channel Partners: (1) a program through which the Debtors may offer additional discounts to Customers to assist the Partners in completing a sale to the Customer; (2) a status-based rewards program for Partners; and (3) a program that offers discounts to Partners in countries with relatively lower costs of living.

29. As of the Petition Date, the Debtors do not believe they owe any amounts on account of the Back-End Credits Programs, because the Back-End Credits Programs provide purchase price adjustments to Partners, rather than cash payments. The Debtors request authorization to continue the Back-End Credits Programs in the ordinary course of business on a postpetition basis consistent with past practice.

### **III. RingCentral Commission Programs.**

30. To support the partnership formed in 2019 between the Debtors and RingCentral, Inc. (“RingCentral”) to develop and market the Avaya Cloud Office (the “ACO”), the Debtors offer their Channel Partners certain incentives designed to promote the sale of the ACO, which is a key component of the Debtors’ cloud-based strategy (the “RingCentral Commission Programs”). Under the terms of the agreement between Avaya and RingCentral, Avaya acts as an agent to Avaya’s Channel Partners with respect to the sale of ACO. RingCentral pays commissions to Avaya, including for the benefit of its Channel Partners and their sales agents, for each sale of the ACO. In turn, Avaya is responsible for remitting the appropriate commissions to its Channel Partners for such sales. In addition, Avaya pays certain commissions to its Channel Partners to incentivize sales of the ACO.

31. As of the Petition Date, the Debtors estimate they owe approximately \$33 million in outstanding prepetition obligations to Channel Partners related to the RingCentral Commission Programs. The Debtors request authorization to pay all outstanding prepetition amounts incurred on account of the RingCentral Commission Programs and to continue the RingCentral Commission Programs in the ordinary course of business on a postpetition basis consistent with past practice.

### **IV. Warranty Programs.**

#### **A. Standard Warranty Obligations.**

32. Consistent with industry practices, the Debtors issue two general product warranties covering defects in materials and workmanship on all hardware and software product purchases (collectively, the “Manufacturer Warranties”), as well as warranties related to the performance of various services provided by the Debtors to their Customers (collectively,

the “Service Warranties,” and, together with the Manufacturer Warranties, collectively, the “Standard Warranties”).

33. As a general matter, the Standard Warranties cover defects that are not attributable to external factors such as natural disasters or physical damage caused by the user and vary in duration based upon the particular product (*i.e.*, hardware or software) purchased.

34. Based on historical practices, the Debtors recognize a liability for the estimated costs that may be incurred to satisfy the Standard Warranties. As of the Petition Date, the Debtors estimate that approximately \$2 million would be required to satisfy their outstanding prepetition obligations under the Standard Warranties. The Debtors request authorization to continue the Standard Warranties in the ordinary course of business on a postpetition basis consistent with past practice.

**B. Extended Service Contracts.**

35. In addition to their Standard Warranties, the Debtors also offer a variety of contracts (collectively, the “Extended Service Contracts,” and, together with the Standard Warranties, collectively, the “Warranties”) to purchasers of their products, with the most commonly sold contracts extending services for either one or three years beyond the Standard Warranties discussed above. The Debtors also offer five-year Extended Service Contracts, although these are generally purchased less frequently. The one- and three-year Extended Service Contracts are pre-paid on an annual basis, while the five-year Extended Service Contracts are pre-paid entirely in advance.<sup>4</sup> All contracts are amortized over the life of the agreement.

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<sup>4</sup> Any amounts pre-paid on account of the Extended Service Contracts are considered obligations arising under the Warranties for purposes of this Motion and are not duplicated as Prepayments and Credits (defined below).

36. The Debtors' approximately 6,000 Extended Service Contracts are a key component of their business operations and account for a substantial amount of the Debtors' revenue. The continued satisfaction of the Extended Service Contracts is necessary not only to maintain their ongoing operations, but also vital to preserving one of the Debtors' most significant revenue-generating business segments. The Debtors request authorization to continue honoring their Extended Service Contracts in the ordinary course of business on a postpetition basis consistent with past practice.

**V. Prepayments and Credits.**

37. In the ordinary course of business, the Debtors accept prepayments with respect to ongoing projects that are often related to the achievement of specific defined milestones (collectively, the "Prepayments"). Upon receipt, the Prepayments are typically transitioned to a credit allocated against future amounts owed by the Customer in relation to the project. As of the Petition Date, certain of the Debtors' Customers have made Prepayments and will anticipate the application of their Prepayment to their future purchases from the Debtors.

38. The Debtors also occasionally incur credits (collectively, the "Credits") in their accounts receivable in the ordinary course of business arising from, among other things: (a) deposits from Customers that are not related to a specific charge or invoice but are paid in advance for subsequent application against future purchased services or products; (b) duplicate Customer payments or overpayments that result in a net Credit balance in the Customer's account; (c) amounts due to Customers on account of refunds that had not yet completed the escheatment process; and (d) other miscellaneous Customer Credits appearing in the Debtors' books and records.

39. The ability to process Prepayments and Credits in accordance with past practice is critically important to the reputation of the Debtors and the continuation of their services to

Customers. The Debtors request authorization to process such Prepayments and Credits in the ordinary course of business on a postpetition basis consistent with past practice.

### **The Customer Agreements**

40. Leading up to the Petition Date, the Debtors engaged with their Customers to reinforce that these Chapter 11 Cases would not disrupt their existing relationships. However, during this outreach, certain Customers expressed concerns about the Debtors' ability to continue operating under the Customer Agreements. To be clear, the Debtors intend to continue honoring their obligations under the Customer Agreements in the ordinary course, as evidenced by this Motion and the Plan, which provides that each Executory Contract (including the Customer Agreements) shall be deemed assumed as of the Effective Date. However, to fortify their Customer relationships and facilitate a smooth transition into chapter 11, the Debtors seek authority to assume the Customer Agreements at the beginning of this process rather than upon emergence.

41. Notably, given the nature of the Customer Agreements, the Debtors do not believe they owe any related outstanding prepetition amounts to Customers. However, in the event that it is determined that the Debtors owe undisputed prepetition obligations under the Customer Agreements, such Claims shall be Reinstated or paid in full under the Plan.

42. Maintaining Customer relationships is vital to the Debtors' go-forward business. Accordingly, the Debtors believe that assumption of the Customer Agreements at this juncture is in the best interests of the Debtors' estates and sends a strong message to their Customers, Partners, and all stakeholders that the Debtors are open for business.

**Basis for Relief**

**I. Continuing to Honor the Customer and Partner Programs in the Ordinary Course Is Warranted Under Sections 105(a) and 363 of the Bankruptcy Code and Is in the Best Interests of the Debtors' Estates.**

43. Section 363(c) 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. Consequently, the postpetition continuation, renewal, and replacement of obligations under the Customer and Partner Programs in the ordinary course of business is likely permitted by sections 363(c), 1107(a), and 1108 of the Bankruptcy Code, without further application to the Court. Out of an abundance of caution, however, the Debtors request the relief described herein.

44. Courts have generally acknowledged that it is appropriate to authorize the payment of prepetition obligations where necessary to protect and preserve the estate, including an operating business's going-concern value. *See, e.g., In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). In so doing, these courts acknowledge that several legal theories rooted in sections 105(a) and 363(b) of the Bankruptcy Code support the payment of prepetition claims as provided herein.

45. Pursuant to section 363(b) of the Bankruptcy Code, courts may authorize payment of prepetition obligations where a sound business purpose exists for doing so. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (noting that section 363(b) provides "broad flexibility" to authorize a debtor to honor prepetition claims where supported by an appropriate business justification).

46. In addition, courts may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code. Under section 105(a) of the Bankruptcy Code, courts may authorize pre-plan payments of prepetition obligations when essential to the continued operation of a debtor's business. *See In re Just for Feet, Inc.*, 242 B.R.

821, 824 (D. Del. 1999); *see also In re Fin. News Network Inc.*, 134 B.R. 732, 735–36 (Bankr. S.D.N.Y. 1991) (holding that the “doctrine of necessity” stands for the principle that a bankruptcy court may allow pre-plan payments of prepetition obligations where such payments are critical to the debtor’s reorganization). Specifically, the Court may use its power under section 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”). *Ionosphere Clubs*, 98 B.R. at 176.

47. The Court can authorize the Debtors to continue the Customer and Partner Programs and satisfy prepetition obligations related thereto pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. There is no doubt that continuing to administer the Customer and Partner Programs without interruption during the pendency of these Chapter 11 Cases is critical to preserving the value of the Debtors’ estates. Customers expect and rely on the Customer and Partner Programs and may not continue supporting the Debtors’ businesses if the Customer and Partner Programs are discontinued. It is incontrovertible that support from the Debtors’ Customers and the communities in which they conduct business is essential for go-forward operations.

48. The substantial benefit conferred on the Debtors’ estates by the Customer and Partner Programs warrants the authority to honor the Customer and Partner Programs and any of the Debtors’ obligations related thereto. The Debtors request the authority to continue administering their Customer and Partner Programs and honor prepetition obligations related thereto in the ordinary course of business consistent with past practices on a postpetition basis.

## **II. Assumption of the Customer Agreements Is a Sound Exercise of Business Judgment.**

49. Section 365(a) of the Bankruptcy Code provides that a debtor in possession “subject to the court’s approval, may assume . . . any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). A debtor’s assumption of an executory contract or unexpired lease is ordinarily governed by the “business judgment” standard. *See Mission Prod. Holdings, Inc. v. Tempnology*,



*LLC*, 139 S. Ct. 1652, 1658 (2019) (“The bankruptcy court will generally approve that choice [to assume or reject], under the deferential ‘business judgment’ rule.”). The business judgment standard requires a court to approve a debtor’s business decision unless that decision is the product of “bad faith, whim, or caprice.” See *In re Idearc Inc.*, 423 B. R. 138, 162 (Bankr. N.D. Tex. 2009) (“The issue . . . is whether [the debtor’s decision] is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.”) (quoting *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985)) (internal quotation marks omitted).

50. Assumption of an executory contract or an unexpired lease is appropriate where such assumption would benefit the estate. See *In re Pisces Energy, LLC*, No. 09-36591-H5-11, 2009 WL 7227880, at \*6 (Bankr. S.D. Tex. Dec. 21, 2009) (“Courts apply the ‘business judgment test,’ which requires a showing that the proposed course of action will be advantageous to the estate and the decision be based on sound business judgment.”). Upon finding that a debtor exercised its sound business judgment in determining that assumption of certain contracts or leases is in the best interests of its creditors and all parties in interest, a court should approve the assumption under section 365(a) of the Bankruptcy Code. See *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) (“As long as assumption of a lease appears to enhance a debtor’s estate, court approval of a debtor-in-possession’s decision to assume the lease should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code . . . .”) (quoting *Allied Technology, Inc. v. R.B. Brunemann & Sons*, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982)).

51. Assumption of the Customer Agreements is within the Debtors’ business judgment and is in the best interests of their estates. The Customer Agreements are critical to the Debtors’

operations and bottom line, and the Debtors have determined that there is little risk in assuming the Customer Agreements at this time given the nature of the agreements and the terms of the Plan. The Debtors have determined that assumption at this juncture will only benefit the Debtors' estates, providing a clear message to all Customers that the Debtors remain committed to their existing relationships and business obligations. Moreover, the payment of any cure amounts at this juncture, rather than upon emergence from these Chapter 11 Cases, is simply a matter of timing. Accordingly, the Debtors' decision to assume the Customer Agreements is appropriate under the circumstances and reflects the Debtors' sound business judgment.

### **III. The Debtors Have Satisfied, or Will Satisfy, the Adequate Assurance Requirements of Section 365 of the Bankruptcy Code.**

52. Pursuant to section 365(b)(1)(A) of the Bankruptcy Code, a debtor may not assume an executory contract or unexpired lease unless, at the time of assumption, the debtor cures or provides adequate assurance that the debtor will promptly cure any existing default. *See* 11 U.S.C. § 365(b)(1)(A); *see also In re Liljeberg Enters., Inc.*, 304 F.3d 410, 444 (5th Cir. 2002) (holding that the debtor must provide adequate assurance that it will cure the default amount); *L.R.S.C. Co. v. Rickel Home Ctrs. Inc. (In re Rickel Home Ctrs.)*, 209 F.3d 291, 298 (3d Cir. 2000) (finding that the debtor must cure defaults or provide adequate assurance of prompt cure). Further, pursuant to section 365(b)(1)(C) of the Bankruptcy Code, if a default is outstanding, a debtor seeking to assume an executory contract or unexpired lease must provide adequate assurance of future performance under such contract or lease.

53. As discussed above, the Debtors do not believe they owe any outstanding prepetition amounts to Customers on account of the Customer Agreements. Moreover, the Debtors will otherwise satisfy any outstanding obligations under the Customer Agreements in the ordinary course of business. In the event that it is later determined that the Debtors owe any undisputed

prepetition obligations under the Customer Agreements, the Customers' Claims will be Reinstated or paid in full in accordance with the terms of the Plan. For these reasons, the Debtors' assumption of the Customer Agreements on an emergency basis is an appropriate exercise of their business judgment.

**Processing of Checks and Electronic Fund Transfers Should Be Authorized**

54. The Debtors have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to cash collateral and debtor in possession financing. Under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the relief requested herein. Checks or wire transfer requests that are not related to authorized payments will not be honored inadvertently. The Debtors request that the Court authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested herein.

**Emergency Consideration**

55. The Debtors request emergency consideration of this Motion pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm." An immediate and orderly transition into chapter 11 is critical to the viability of the Debtors' operations. Failure to receive the requested relief during the first twenty-one days of these Chapter 11 Cases would imperil the Debtors' restructuring and cause irreparable harm. The Debtors have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 and request that the Court approve the relief requested in this Motion on an emergency basis.

**Waiver of Bankruptcy Rules 6004(a) and 6004(h)**

56. The Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the fourteen-day stay period under Bankruptcy Rule 6004(h).

**Reservation of Rights**

57. Nothing contained herein or any actions taken pursuant to such relief requested is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors', or any other party in interest's, rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in this Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtors' or any other party in interest's rights to subsequently dispute such claim.

**Notice**

58. The Debtors have provided notice of this Motion to the following parties or their respective counsel: (a) the U.S. Trustee for the Southern District of Texas; (b) the holders of the thirty largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to the Akin Ad Hoc Group; (d) counsel to the PW Ad Hoc Group; (e) the Prepetition ABL Agent and counsel thereto; (f) the Prepetition Term Loan Agent and counsel thereto; (g) the 6.125% Senior Secured First Lien Notes Trustee and counsel thereto; (h) the 8.00% Exchangeable Senior Secured Notes Trustee and counsel thereto; (i) the 2.25% Convertible Notes Trustee and counsel thereto; (j) the DIP Term Loan Agent and counsel thereto; (k) the proposed DIP ABL Agent and counsel thereto; (l) the Office of the United States Attorney for the Southern District of Texas; (m) the state attorneys general for states in which the Debtors conduct business; (n) the Internal Revenue Service; (o) the Securities and Exchange Commission; (p) the Environmental Protection Agency; (q) other governmental agencies having a regulatory or statutory interest in these cases; and (r) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, no other or further notice is required.

The Debtors request that the Court enter the Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas  
Dated: February 14, 2023

*/s/ Matthew D. Cavanaugh*

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*Proposed Co-Counsel to the Debtors  
and Debtors in Possession*

*Proposed Co-Counsel to the Debtors  
and Debtors in Possession*

**Certificate of Accuracy**

I certify that the foregoing statements are true and accurate to the best of my knowledge. This statement is being made pursuant to Bankruptcy Local Rule 9013-1(i).

*/s/ Matthew D. Cavanaugh*

\_\_\_\_\_  
Matthew D. Cavanaugh

**Certificate of Service**

I certify that on February 14, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

*/s/ Matthew D. Cavanaugh*

\_\_\_\_\_  
Matthew D. Cavanaugh

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

<p>In re:</p> <p>AVAYA INC., <i>et al.</i>,<sup>1</sup></p> <p style="text-align: center;">Debtors.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 23-90088 (DRJ)</p> <p>(Joint Administration Requested)</p> <p><b>Re: Docket No.</b> _____</p>
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**ORDER (I) AUTHORIZING THE DEBTORS TO  
MAINTAIN AND ADMINISTER THEIR EXISTING CUSTOMER  
AND PARTNER PROGRAMS AND HONOR CERTAIN PREPETITION  
OBLIGATIONS RELATED THERETO, (II) AUTHORIZING ASSUMPTION OF  
CERTAIN CUSTOMER AGREEMENTS, AND (III) GRANTING RELATED RELIEF**

Upon the emergency motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”), (a) authorizing the Debtors to maintain, administer, and honor certain prepetition obligations related to the Customer and Partner Programs; (b) authorizing the Debtors to assume the Customer Agreements; and (c) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and

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<sup>1</sup> A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ proposed claims and noticing agent at <http://www.kcellc.net/avaya>. The location of Debtor Avaya Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 350 Mount Kemble Avenue, Morristown, New Jersey 07960.

<sup>2</sup> Capitalized terms used and not defined herein have the meanings ascribed to them in the Motion.



other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Debtors are authorized, but not directed, to continue to administer the Customer and Partner Programs described in the Motion and satisfy prepetition obligations related thereto; *provided that* the Debtors are authorized, but not directed, to pay or honor only amounts or obligations that are or become due and payable as of the Petition Date.

2. The banks and financial institutions on which checks were drawn or electronic funds transfer requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved by this Order.

3. Notwithstanding the relief granted herein and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in the Motion or any order

granting the relief requested by the Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors', or any other party in interest's, rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in the Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens.

4. The Debtors will notify the United States Trustee, any statutory committee appointed in these cases, the PW Ad Hoc Group, and the Akin Ad Hoc Group if the Debtors make any material changes to the Debtors' Customer Programs practices and procedures.

5. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these Chapter 11 Cases with respect to prepetition amounts owed in connection with the relief granted herein.

6. Notwithstanding anything to the contrary in this Order, any payment made or to be made hereunder, and any authorization herein, shall be subject to the requirements (if any) imposed on the Debtors under any order(s) of this Court approving the postpetition secured debtor-in-possession financing facility and the use of cash collateral (any such order, a "Financing Order"), including any documentation with respect to such financing and any budget in connection with such Financing Order. In the event of any conflict between the terms of this

Order and a Financing Order, the terms of the applicable Financing Order shall control (solely to the extent of such conflict).

7. The Debtors are authorized to assume the Customer Agreements pursuant to section 365(b) of the Bankruptcy Code; *provided that* any party-in-interest may object to the proposed assumption of the Customer Agreements on or before March 7, 2023 (the “Objection Period”). The Customer Agreements shall be deemed assumed, subject to the conditions set forth herein, upon the (i) expiration of the Objection Period, or (ii) resolution of any objection.

8. The Debtors are authorized to execute and deliver all instruments and documents and take any additional actions as are necessary or appropriate to implement and effectuate the assumption of the Customer Agreements approved by this Order, including, without limitation, the payment of any postpetition amounts and other charges under the Customer Agreements.

9. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

10. 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) and the Bankruptcy Local Rules are satisfied by such notice.

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

12. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order.

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

Dated: \_\_\_\_\_, 2023

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UNITED STATES BANKRUPTCY JUDGE