

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

In re:

PROSOMNUS, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10972 (JTD)

(Joint Administration Requested)

**MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS  
AUTHORIZING PAYMENT OF PREPETITION OBLIGATIONS  
OWED TO CRITICAL VENDORS**

The above-captioned debtors and debtors in possession (the “**Debtors**”) hereby move (the “**Motion**”) for entry of an interim order (the “**Interim Order**”) and a final order (the “**Final Order**”), pursuant to sections 105(a), 363(b), 503(b)(9), 1107(a), and 1108 of title 11 of the United States Code (the “**Bankruptcy Code**”); Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”); and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), authorizing, but not directing, the Debtors to pay the prepetition claims (the “**Critical Vendor Claims**”) of certain vendors, suppliers, service providers, and other similar parties and entities that are essential to maintaining the going concern value of the Debtors’ business (the “**Critical Vendors**”). In support of the Motion, the Debtors rely upon the *Declaration of Brian Dow, Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings*, filed with the Court concurrently herewith (the “**First Day**”).

---

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors’ principal place of business and the Debtors’ mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.



**Declaration**”). In further support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent as follows:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). In accordance with Local Rule 9013-1(f), the Debtors consent to entry of a final order if it is determined that the Court lacks Article III jurisdiction to enter such final order or judgment absent consent of the parties. Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105(a) and 366, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1(m).

### **BACKGROUND**

#### **A. General Background**

3. On the date hereof (the “**Petition Date**”), each of the Debtors filed a voluntary petition in this Court commencing a case for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the First Day Declaration and fully incorporated herein by reference.

### **RELIEF REQUESTED**

4. By this Motion, the Debtors seek entry of orders, substantially in the forms of Exhibit A (the “**Interim Order**”) and Exhibit B (the “**Final Order**,” and together with the Interim Order, the “**Proposed Orders**”) attached hereto, authorizing, but not directing, the Debtors to pay all or a portion of their Critical Vendor Claims to Critical Vendors in an amount not to exceed

\$750,000.00 on an interim basis and \$1,250,000.00 on a final basis, which amounts include approximately \$376,000.00 on account of claims entitled to administrative priority under Bankruptcy Code section 503(b)(9) (with respect each of the interim and final periods, as applicable, the “**Critical Vendor Cap**”)<sup>2</sup>. The Debtors are still reconciling goods received in the immediate prepetition and will provide a further accounting for claims entitled to administrative priority.

### **OVERVIEW OF THE DEBTORS’ CRITICAL VENDORS**

5. In the ordinary course of their businesses, the Debtors purchase essential goods and utilize services from certain vendors and suppliers that are unaffiliated with the Debtors without which the Debtors could not operate. The Critical Vendors are essential to maintaining business continuity, delivering essential services to clients in a timely manner and, ultimately, maintaining customer satisfaction.

6. Pursuant to this Motion, the Debtors are requesting relief similar to that received by other distressed companies heavily reliant on non-workforce continuity to preserve their viability as a going-concern enterprise. The requested Critical Vendor relief is necessary for the reasons outlined herein.

7. Because the Debtors will benefit from maintaining lower costs of goods and services purchased during the postpetition period and avoiding the severe disruption to the Debtors’ operations that would occur if the Debtors were to lose certain vendors, it is prudent for the Debtors, at their discretion, to pay selected Critical Vendors some or all of their prepetition claims (including Critical Vendors with claims under section 503(b)(9) of the Bankruptcy Code).

---

<sup>2</sup> These amounts are based on prepetition balances in the Debtors’ accounts payable system as of May 6, 2024. Certain adjustments and reconciliations will be necessary to account for those invoices which had been issued by certain vendors but not yet received by the Debtors at the time of the filing of this Motion.

Consistent with these needs, and to ensure that the Debtors' liquidity is preserved as they transition their business into chapter 11, the Debtors seek authority to implement procedures that will assist them in securing favorable terms and to deal with any vendors that may repudiate or otherwise refuse to honor existing obligations to the Debtors.

**A. Payment of Section 503(b)(9) Claims**

8. In addition, the Debtors believe that approximately \$376,000.00 of the Critical Vendor Claims are entitled to administrative expense priority. Under Bankruptcy Code section 503(b)(9), claims of Critical Vendors for the value of goods received by the Debtors in the ordinary course of their businesses during the twenty-day period prior to the Petition Date are entitled to administrative claim status. As administrative claims incurred in the ordinary course of the Debtors' businesses, the Debtors believe that they are authorized to pay such Critical Vendor Claims pursuant to Bankruptcy Code section 363(c)(1); however, the Debtors also believe that they are not required to reconcile or pay the Critical Vendors with claims under Bankruptcy Code section 503(b)(9) prior to the conclusion of these Chapter 11 Cases. Accordingly, for the avoidance of doubt, the Debtors request that the Court enter an order clarifying that the Debtors are authorized, but not directed, to pay Critical Vendors with claims under Bankruptcy Code section 503(b)(9), or any portion thereof, in the ordinary course of the Debtors' businesses and on such terms and conditions as the Debtors deem appropriate.

**B. Identification of Critical Vendors**

9. The Debtors are mindful of their fiduciary obligations to seek to preserve and maximize the value of their estates. Toward that end, the Debtors have carefully estimated all potential vendor claims as of the Petition Date, including the Critical Vendor Claims, and have determined that the ability to satisfy Critical Vendor Claims is absolutely necessary to maximize

enterprise value and avoid immediate and irreparable harm to the Debtors. To be clear, the Debtors are aware of the need to seek relief only for those vendors truly critical to the Debtors' ongoing operations. Furthermore, as discussed above, the Debtors believe that a portion of the Critical Vendor Claims may be entitled to administrative priority under Bankruptcy Code section 503(b)(9), and that payment of those Critical Vendor Claims would merely expedite the treatment they are otherwise entitled to and abides by the priority scheme of the Bankruptcy Code

10. The Debtors have spent significant time reviewing and analyzing their books and records to identify truly critical suppliers of goods and services. The Debtors have carefully reviewed their suppliers to determine, among other things, (i) which suppliers were sole source or limited source suppliers, without whom the Debtors could not continue to operate without disruption, (ii) the Debtors' ability to find alternative sources of supply and the potential disruption or lost revenues while a new supplier was resourced, (iii) which suppliers would be prohibitively expensive to replace, (iv) which suppliers would present an unacceptable risk to the Debtors' operations given the volume of essential services or products that such suppliers provide, and (v) the extent to which suppliers may have an administrative expense claim pursuant to Bankruptcy Code section 503(b)(9). After compiling this information, the Debtors estimated the amount they believe they would be required to pay to ensure the continued supply of critical goods and services.

11. As discussed in further detail below, the Critical Vendors are so essential to the Debtors' business that the absence of any of their particular goods or services, even for a short duration, could disrupt the Debtors' operations and cause irreparable harm to the Debtors' business, goodwill, and client satisfaction. This irreparable harm to the Debtors and to the recovery of all of the Debtors' creditors will far outweigh the cost of payment of the Critical Vendor Claims.

**C. Description of Critical Vendors**

12. The Critical Vendors generally fall into 3 categories: (i) suppliers; and (ii) shippers, and (iii) service providers.

13. Generally speaking, the Critical Vendors provide essential manufacturing supplies, information technology, shipping, and other services that are essential to the generation of new business, the fulfillment of already-placed orders, and the collection of associated revenues. As a direct-to-provider manufacturing firm, the Company's future (and its going concern value) hinges on the Company's ability to continue building its sleep apnea machines and delivering those machines timely to its customers. As is true in any manufacturing enterprise, the loss of even one critical supplier can be catastrophic, and cause the Company's operations (and revenue) to drop precipitously. Moreover, the Company operates in a niche market with a relatively high number of repeat customers. Thus, it is particularly important that the Company maintain its goodwill and reputation that it has earned with its loyal customers. Any disruption in the Company's ability to quickly, efficiently, and reliably ship its products will risk those relationships, perhaps irretrievably, at a time when the Debtors can least afford to do so.

14. A chart outlining the categories and approximate amounts of the Critical Vendor Claims that the Debtors are seeking to pay pursuant to this Motion, including those Critical Vendor Claims that would be entitled to administrative expense priority pursuant to the section 503(b)(9) of the Bankruptcy Code, is set forth below:<sup>3</sup>

<b>Critical Vendor Category</b>	<b>Interim Amount Sought</b>	<b>Final Amount Sought</b>	<b>503(b)(9) Amount</b>
Suppliers	\$620,000.00	\$1,020,000.00	\$376,000.00

<sup>3</sup> The values in the tables below represent the Debtors' best estimates as of the Petition Date. Nothing contained in this Motion or any order granting the relief herein is intended to, or shall be construed as, any admission of liability or stipulation as to the allowance or priority of any claim against the Debtors.

Shippers	\$65,000.00	\$117,500.00	\$0.00
Service Providers	\$65,000.00	\$112,500.00	\$0.00

**D. The Relief Requested is Specifically Designed to Ensure Operational Continuity**

15. The relief requested herein is specifically designed to ensure that the Debtors can meet their obligations under the RSA, successfully restructure, and successfully emerge from these Chapter 11 Cases. The Debtors will suffer irreparable harm if essential supplies and services are not provided by the Critical Vendors. Having devoted substantial time and resources to the negotiation of the RSA and the commencement of the Chapter 11 Cases, the Debtors cannot take the material risk that the Critical Vendors will refuse to perform postpetition if their prepetition claims are not paid in short order, which will jeopardize the success of the Debtors' entire restructuring strategy. While the Debtors have historically enjoyed productive working relationships with the Critical Vendors, the limited number of vendors who can supply the Debtors with the quantity and quality of supplies and services that meets their operational needs—including highly specialized parts and materials necessary for their manufacturing operations—provides such vendors with considerable bargaining power in the event of non-payment by the Debtors. At this critical time following the filing of these Chapter 11 Cases, the loss of such vendors will significantly impair the Debtors' ability to maximize value for the benefit of all stakeholders.

16. There is very real risk that certain Critical Vendors will not continue to work with the Debtors in the absence of being made whole on some or all of their outstanding prepetition balances, and the Debtors cannot afford to take that risk. The Debtors have every intention of using the relief requested herein to recoup working capital, prevent disruption, and maximize earnings, which will benefit all creditors of the Debtors' estates.

**PROPOSED TREATMENT OF CRITICAL VENDORS**

17. While the Debtors expect to secure a continuing postpetition supply of supplies and services in most cases through consensual negotiation with the Critical Vendors, the Debtors recognize that their fiduciary duties bind them to consider and plan for the vendors that may refuse to provide future goods or services unless their prepetition claims are paid. The Critical Vendors are so important to the Debtors' businesses that the lack of each of their particular supplies or services, even for a short duration, would damage the Debtors' business, disrupt the Debtors' operations and cause irreparable harm to the Debtors' business, goodwill, and client satisfaction. This irreparable harm to the Debtors and to the recovery of all creditors will far outweigh the cost of payment of the prepetition claims of the Critical Vendors.

18. The Debtors seek authority to pay Critical Vendor Claims in an aggregate amount not to exceed the Critical Vendor Cap. To minimize the amount of payments required, the Debtors propose that the Interim Order and Final Order each provide authorization for the Debtors to condition payment of all or a portion of the Critical Vendor Claims upon each Critical Vendor's agreement to continue supplying goods and/or services in accordance with certain procedures, generally as follows:<sup>4</sup>

- a. The Debtors may, in their sole discretion, condition payment of the Critical Vendor Claims of each Critical Vendor upon an agreement to continue to supply goods or services to the Debtors on such terms that were most favorable to the Debtors and in effect within the twelve (12) months prior to the Petition Date (the "**Customary Trade Terms**") during these Chapter 11 Cases.

---

<sup>4</sup> To ensure that Critical Vendors continue business with the Debtors, the Debtors propose (i) that a letter substantially in the form of the letter attached to the Proposed Orders as Exhibit 1 (the "**Vendor Agreement**") be delivered to, and executed by, the Critical Vendors, along with a copy of the order granting the relief requested herein and (ii) that payment of Critical Vendor Claims include a communication of the following statement:

"By accepting this payment, the payee agrees to the terms of the Order of the U.S. Bankruptcy Court for the District of Delaware, dated [\_\_\_\_\_], 2024 in the Chapter 11 Cases of ProSomnus, Inc., *et al.* (Case No. 24-10972 (JTD)), authorizing the Debtors to pay prepetition obligations of critical vendors and submits to the jurisdiction of that Court for enforcement thereof."



- b. The Debtors reserve the right to negotiate trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, that vary from the Customary Trade Terms (the “**Negotiated Trade Terms**”) to the extent the Debtors determine that such terms are necessary to procure essential goods or services or are otherwise in the best interests of the Debtors’ estates.
- c. The Debtors are authorized to obtain written verification of the Customary Trade Terms or the Negotiated Trade Terms, to be supplied by the Critical Vendors, before issuing payment hereunder.

19. The Debtors further propose that if a Critical Vendor later refuses to continue to supply goods or services to the Debtors on the Customary Trade Terms for the applicable period, or on such terms as were individually agreed to between the Debtors and such Critical Vendor pursuant to Negotiated Trade Terms, then the Debtors may, without further order of the Court: (i) declare that the payment of the creditor’s Critical Vendor Claim is a voidable postpetition transfer pursuant to Bankruptcy Code section 549(a) that the Debtors may recover from such Critical Vendor in cash or in goods, and (ii) demand that the creditor immediately return such payments in respect of the Critical Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or setoffs of any type whatsoever, and the creditor’s Critical Vendor Claim shall be reinstated in such an amount as to restore the Debtors and the Critical Vendor to their original positions, as if the agreement had never been entered into and the payment of the Critical Vendor Claim had not been made. In short, the Debtors will return the parties to their positions immediately prior to the entry of the order approving the relief sought herein.

20. The Debtors believe that payment of some or all Critical Vendor Claims owed to Critical Vendors will be necessary to preserve the Debtors’ business and operations at the outset of these Chapter 11 Cases and successfully reorganize. During this period, it is imperative that the Debtors remain focused and avoid distractions from vendors attempting to assert leverage or deny

provision of goods and services going forward, suddenly and without notice, which could cripple the Debtors' operations and throw these Chapter 11 Cases into freefall. Moreover, the loss of Critical Vendors and the efforts that would be required to replace such vendors would be a substantial and costly distraction at a time when the Debtors must focus on sustaining their operations maintaining their going concern value, and successfully emerging from these Chapter 11 Cases.

21. Furthermore, if the relief sought herein is not granted, Critical Vendors will have no incentive to continue to finance the Debtors on Customary Trade Terms. The Customary Trade Terms are important to the Debtors' profitability and overall business. The Debtors' historical practice has been to obtain favorable trade terms from their vendors.

22. The continued availability of trade credit, in amounts and on terms consistent with those the Debtors have maintained over the years, is advantageous to the Debtors. It allows the Debtors to maintain and enhance necessary liquidity over the next 105 days until they have successfully emerged from the Chapter 11 Cases. The Debtors believe that preserving working capital through the retention and reinstatement of advantageous trade credit terms will enable the Debtors to stabilize business operations at this critical time, to maintain their competitiveness, and to maximize the value of their businesses for the benefit of all interested parties. Conversely, any deterioration of trade credit, or disruption or cancellation of deliveries of goods or provision of essential services, could spell disaster for the Debtors' restructuring efforts. Any occurrence affecting operations could severely disrupt the Debtors' Chapter 11 Cases, increase administrative expenses, and jeopardize the value-maximizing results intended under the RSA.

**REQUEST FOR AUTHORITY FOR FINANCIAL INSTITUTIONS TO HONOR AND  
PROCESS RELATED CHECKS AND TRANSFERS**

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

**BASIS FOR RELIEF**

**I. This Court May Authorize Payment of the Critical Vendor Claims Pursuant to Bankruptcy Code Sections 105(a), 363(b), 1107(a), and 1108.**

24. The Debtors, operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108, are fiduciaries "holding the bankruptcy estate[s] and operating the business for the benefit of [their] creditors and (if the value justifies) equity owners." *In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to protect and preserve the estate, including an operating business's going-concern value." *Id.* Consistent with a debtor's fiduciary duties to preserve the estate, courts have authorized payment of prepetition obligations pursuant to Bankruptcy Code sections 105(a) and 363(b). *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (stating that section 363(b) provides "broad flexibility" for a debtor to satisfy prepetition claims where supported by a proper business justification); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) ("Section 105(a) of the Code provides a statutory basis for the payment of pre-petition claims."). Indeed, courts have recognized that there are instances when

a debtor's fiduciary duty can "only be fulfilled by the preplan satisfaction of a prepetition claim." *CoServ*, 273 B.R. at 497.

25. Pursuant to Bankruptcy Code section 363(b), a debtor's decision to use, sell, or lease assets outside the ordinary course of business under Bankruptcy Code section 363(b) must be based upon the sound business judgment of the debtor. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *see also In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a judge determining a section 363(b) application must find from the evidence presented before him or her a good business reason to grant such application); *see also Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 674 (Bankr. S.D.N.Y. 1989) (noting the standard for determining a section 363(b) motion is "a good business reason"). The debtor must "articulate some business justification, other than mere appeasement of major creditors." *Ionosphere Clubs, Inc.*, 98 B.R. at 175. Courts have consistently declined to interfere with a debtor's business decision, provided that the debtor can demonstrate that the decision was made in good faith and on an informed basis. *In re Dura Auto. Sys.*, 2007 Bankr. LEXIS 2764, at \*259–60 (Bankr. D. Del. Aug. 15, 2007) ("[O]nce 'the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct.'" (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986))); *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 797 (Bankr. D. Del. 2007) ("[I]f the Court determines that a transaction is in the ordinary course of a debtor's business, the Court will not entertain an objection to the transaction, provided that the conduct involves a business judgment made in good faith upon a reasonable basis and within the scope of authority under the Bankruptcy Code.").

26. In addition, courts may authorize payment of prepetition claims in appropriate circumstances under Bankruptcy Code section 105(a). The Court's general equitable powers are codified in Bankruptcy Code section 105(a). Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition 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 Bankruptcy Code section 105(a), the Court "can permit pre-plan payment of a prepetition 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); *see also Just for Feet, Inc.*, 242 B.R. at 825 ("to invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is critical to the debtor's reorganization").

27. Numerous courts, including the Third Circuit, have recognized the "doctrine of necessity" as a mechanism by which a bankruptcy court can exercise its equitable powers to authorize payment of a debtor's prepetition obligations where, as here, such payment is necessary to effectuate the "paramount purpose" of chapter 11 reorganization, which is to prevent the debtor from going into liquidation and preserve the debtor's potential for rehabilitation. *See In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that "if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during reorganization, payment may be authorized even if it is made out of [the] corpus"); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the doctrine of necessity "permit[s] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid"); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A.*

*Phillips, Inc.*), 29 B.R. 391, 394–95 (S.D.N.Y. 1983) (upholding the bankruptcy court’s order authorizing the debtor to make postpetition payment of prepetition claims in the ordinary course without notice and a hearing). The doctrine of necessity “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” *Ionosphere Clubs*, 98 B.R. at 176; *see also In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987). This rule is consistent with the paramount goal of chapter 11, i.e., “facilitating the continued operation and rehabilitation of the debtor” *Ionosphere Clubs*, 98 B.R. at 176.

28. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay the prepetition claims of certain critical vendors. *See In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a pre-petition claim ‘is essential to the continued operation of [the debtor], payment may be authorized’” (quoting another source)). Indeed, it is not uncommon for courts in this District to authorize the payment of critical trade claims where, as here the payment of such claims is essential to the debtor’s continued operations.

## **II. Certain of the Critical Vendor Claims are Postpetition Administrative Claims as Contemplated in Bankruptcy Code Section 503(b)(9)**

29. Pursuant to Bankruptcy Code section 503(b)(9), “there shall be allowed administrative expenses . . . including . . . the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.” 11 U.S.C. § 503(b)(9).

30. The Debtors believe that approximately \$376,000.00 of the Critical Vendor Claims may be entitled to administrative expense priority under Bankruptcy Code section 503(b)(9)

because they are on account of goods that were received by the Debtors in the ordinary course of business within the twenty-day period before the Petition Date.

31. The Debtors do not seek to alter the priority of claims entitled to administrative expense priority under Bankruptcy Code section 503(b)(9), nor do they seek to pay such claims in a manner that prejudices the rights of the Debtors' general unsecured creditors. Rather, the Debtors believe that the payment of such claims now is a simple timing issue. Instead of waiting to satisfy those Critical Vendor Claims entitled to administrative priority under Bankruptcy Code section 503(b)(9), the Debtors seek to pay some of these claims in the ordinary course of business, while such payments can still induce the individual vendor to adhere to favorable trade terms and do business with the Debtors going forward. Although Bankruptcy Code section 503(b)(9) does not specify a time for payment of these expenses, debtors have the discretion to pay administrative claims earlier if the debtor has the ability and there is a need to pay. *See, e.g., Dura Auto. Sys.*, No. 06-11202 (KJC) (Bankr. D. Del. Nov. 6, 2006) (“[A]rguably the debtor could pay its 503(b)(9) claimants without court approval.”). The timing of such payments also lies squarely within the Court’s discretion. *See In re Global Home Prods., LLC*, No. 06-10340 (KG), 2006 WL 3791955, at \*3 (Bankr. D. Del. Dec. 21, 2006) (agreeing with parties that “the timing of the payment of that administrative expense claim is left to the discretion of the Court”).

32. There is no conceivable harm to the Debtors' other creditors by paying the Critical Vendors' administrative expenses early. With the exception of the Prepetition Secured Parties, who have consented to their treatment through the RSA, the Debtors' proposed Plan will provide that all creditors—including general unsecured creditors—will receive payment in full.

### **III. Payment of Critical Vendor Claims is Necessary to the Debtors' Restructuring**

33. The Debtors submit that the requested relief represents a sound exercise of the Debtors' business judgment, is justified under Bankruptcy Code sections 105(a), 363(b), and

503(b)(9), and is in line with the relief granted in this and other districts. As further set forth in this Motion, the Debtors have sound business reasons for seeking authority to pay the Critical Vendors Claims. It is the Debtors' business judgment that the failure to pay the Critical Vendor Claims would likely have a material adverse impact on the operations of their business, maintaining core client relationships and, ultimately, their efforts to maximize the value of their estates. Absent such payment, the operations and value of the Debtors' estates will suffer, possibly precipitously, and the requested relief is necessary to avoid immediate and irreparable harm. Because the Debtors use a limited number of vendors to maintain their operations, each Critical Vendor is the vital provider of an essential good or service, without which the Debtors cannot operate core segments of their business. Quickly securing a replacement vendor without a disruption to the Debtors' supply chain and business operations would be extremely difficult and likely impact the Debtors' ability to maintain their going concern value and effectuate the recapitalization contemplated under the RSA.

34. From the outset of the process, the Debtors and their advisors have developed a rigorous process that will ensure that payments are only made to vendors that are truly critical and pose a material risk of nonperformance postpetition. The relief requested provides a material benefit to creditors that are not Critical Vendors, as it will enhance the value of the estates by ensuring that critical goods and services continue to be supplied without interruption on a postpetition basis on terms that will help improve the Debtors' working capital. The Debtors believe that, if this Motion is not granted and certain Critical Vendors refuse to perform key services or supply essential goods, the Debtors' core businesses will be severely impacted, if not devastated. The authority to pay Critical Vendor Claims as set forth herein is therefore necessary to maximize the value of the estates by ensuring that the Debtors continue to receive essential



goods and services that are actually or practically unavailable from other sources while preserving critical relationships with the Debtors' vendors and clients.

35. In addition, it is the Debtors' business judgment that continued availability of trade credit in amounts and on terms similar to the Customary Trade Terms is essential to maintaining competitiveness, maintaining liquidity, and maximizing the value of the Debtors' core business. A deterioration of trade credit and a disruption or cancellation of deliveries of goods or provisions of services would jeopardize the Debtors' ongoing business operations.

36. The Debtors' requested relief is specifically designed only to pay those Critical Vendor Claims where nonpayment of such claims would lead to the interruption of the delivery of goods and services or otherwise disrupt the Debtors' ongoing operations. Moreover, the Debtors believe that a portion of the Critical Vendor Claims are entitled to administrative expense priority pursuant to Bankruptcy Code section 503(b)(9). Payment of such Critical Vendor Claims at the onset of these Chapter 11 Cases, therefore, merely accelerates the timing of payments that will be necessary to confirm any chapter 11 plan. Paying those Critical Vendor Claims entitled to administrative priority under Bankruptcy Code section 503(b)(9) at the outset of the case is in the best interest of the Debtors' estates because maintaining favorable trade terms at this critical juncture of the Debtors' Chapter 11 Cases will prevent irreparable harm to the Debtors' ongoing business operations.

37. Overall, the sums involved are small compared to the irreparable harm that the Debtors would suffer if relationships with the Critical Vendors were terminated. Thus, the Debtors submit that the requested relief is specifically designed to facilitate the Debtors' restructuring. The Court should authorize the payment of Critical Vendor Claims to prevent enormous disruptions to the Debtors' business and resulting losses in value of the Debtors' estates.

**IV. Bankruptcy Rule 6003 Has Been Satisfied and Bankruptcy Rule 6004 Should Be Waived**

38. Certain isolated aspects of the relief requested herein may, if granted, be subject to Bankruptcy Rule 6003. Pursuant to Bankruptcy Rule 6003, a court may grant such relief if it is necessary to avoid immediate and irreparable harm. The Debtors submit that the facts set forth herein demonstrate the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and, thus, Bankruptcy Rule 6003 has been satisfied.

39. Additionally, to the extent that any aspect of the relief sought herein constitutes a use of property under Bankruptcy Code section 363(b), the Debtors seek a waiver of the fourteen-day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors seek in this Motion is immediately necessary in order for the Debtors to be able to continue to operate and preserve the value of their estates. The Debtors thus submit that the requested waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h) is appropriate.

**NOTICE**

40. Notice of this Motion has been or will be provided to: (a) the United States Trustee for the District of Delaware; (b) the holders of the twenty (20) largest unsecured claims on a consolidated basis against the Debtors; (c) counsel to the Prepetition Agents; (d) counsel to the Sponsoring Noteholders and Proposed DIP Lenders; (e) counsel to the proposed DIP Agent; (f) the Internal Revenue Service; (g) the United States Securities and Exchange Commission; (h) the Office of the United States Attorney for the District of Delaware; and (i) all parties entitled to notice pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

**NO PRIOR REQUEST**

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

**WHEREFORE**, the Debtors respectfully request that the Court enter the Interim Order and the Final Order, substantially in the forms attached hereto as Exhibit A and Exhibit B, respectively, granting the relief requested in the Motion and such other and further relief as the Court deems appropriate.

Dated: May 7, 2024  
Wilmington, Delaware

Respectfully submitted,

**POLSINELLI PC**

/s/ Shanti M. Katona  
Shanti M. Katona (Del. Bar No. 5352)  
Katherine M. Devanney (Del. Bar No. 6356)  
Michael V. DiPietro (Del. Bar No. 6781)  
222 Delaware Avenue, Suite 1101  
Wilmington, Delaware 19801  
Telephone: (302) 252-0920  
Facsimile: (302) 252-0921  
skatona@polsinelli.com  
kdevanney@polsinelli.com  
mdipietro@polsinelli.com

-and-

Mark B. Joachim (*Pro Hac Vice* Pending)  
1401 Eye Street, N.W., Suite 800  
Washington, D.C. 20005  
Telephone: (202) 783-3300  
Facsimile: (202) 783-3535  
mjoachim@polsinelli.com

*Proposed Counsel to the Debtors and  
Debtors in Possession*

**EXHIBIT A**

Proposed Interim Order

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

In re:

PROSOMNUS, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10972 (JTD)

(Joint Administration Requested)

**Re: Docket No. \_\_**

**INTERIM ORDER AUTHORIZING PAYMENT OF PREPETITION  
OBLIGATIONS OWED TO CRITICAL VENDORS**

Upon the motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of an interim order (this “**Interim Order**”) authorizing the Debtors to pay, in their sole discretion, prepetition obligations owed to certain vendors, suppliers, service providers, and other similar parties and entities that are essential to maintaining the going concern value of the Debtors’ business (the “**Critical Vendors**”) and the prepetition obligations owed to such Critical Vendors, the “**Critical Vendor Claims**”), all as more fully set forth in the Motion; and the Court having reviewed the Motion and the First Day Declaration; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; 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 from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter

---

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors’ principal place of business and the Debtors’ mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

a final order consistent with Article III of the United States Constitution; and the 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 it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motion is GRANTED on an interim basis, as set forth herein.
2. The Debtors are authorized, but not directed, pursuant to Bankruptcy Code sections 105(a), 363(b), and 503(b)(9), in the reasonable exercise of their business judgment, to pay some or all of the Critical Vendor Claims.
3. The Debtors' payment of Critical Vendor Claims shall not exceed \$750,000.00 in the aggregate during the period from the date of this Interim Order until the date that a final order is entered in this matter (during such period, the "**Critical Vendor Cap**"), unless otherwise ordered by the Court, as set forth herein.
4. The Debtors are authorized but not directed to pay the portion of prepetition claims owed to Critical Vendors that, in the Debtors' sole determination, is afforded administrative treatment under Bankruptcy Code section 503(b)(9), or any part thereof, in the ordinary course of the Debtors' business. Payment of such Critical Vendor Claims entitled to administrative priority under Bankruptcy Code section 503(b)(9) shall count towards the Critical Vendor Cap.
5. The Debtors are authorized to negotiate trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, that vary from the Customary Trade Terms (the "**Negotiated Trade Terms**") to the extent the Debtors determine that such terms are necessary to procure essential goods or services or are otherwise in the best interests of the Debtors' estates.

6. A Critical Vendor's acceptance of payment is deemed to be acceptance of the terms of this Order, and if the Critical Vendor thereafter does not provide the Debtors with Customary Trade Terms or Negotiated Trade Terms during these Chapter 11 Cases, then any payments of prepetition claims made after the Petition Date may be deemed to be unauthorized postpetition transfers and therefore recoverable by the Debtors in these Chapter 11 Cases.

7. The Debtors, in their sole discretion, may require Critical Vendors (including Critical Vendors with claims under Bankruptcy Code section 503(b)(9)) to enter into an agreement (the "**Vendor Agreement**") including provisions substantially in the form attached hereto as Exhibit 1 as a condition to paying a Critical Vendor Claim. However, the Debtors' inability to enter into a Vendor Agreement shall not preclude them from paying a Critical Vendor Claim when, in their sole discretion, such payment is necessary to the Debtors' operations.

8. As a further condition of receiving payment on a Critical Vendor Claim, the Debtors are authorized, in their sole discretion, to require that such Critical Vendor agree to take whatever action is necessary to remove any trade liens at such Critical Vendor's sole cost and expense and waive any right to assert a trade lien on account of the paid Critical Vendor Claim.

9. In accordance with this Interim Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the obligations described in the Motion are authorized to receive, process, honor, and pay any and all checks, drafts, wires, and automated clearing house transfers issued, whether before or after the Petition Date, for payment of obligations described in the Motion to the extent that sufficient funds are on deposit in such amounts.

10. The Debtors are authorized to issue postpetition checks, or to affect postpetition wire transfer requests, in replacement of any checks or wire transfer requests in respect of payments of prepetition obligations described in the Motion that are dishonored or rejected.

11. If the Debtors, in their sole discretion, determine that a Critical Vendor has not complied with the terms and provisions of the Vendor Agreement or has failed to continue to provide Customary Trade Terms following the date of the Vendor Agreement, or on such terms as were individually agreed to between the Debtors and such Critical Vendor, the Debtors may terminate a Vendor Agreement, together with the other benefits to the Critical Vendor as contained in this Interim Order, provided, however, that the Vendor Agreement may be reinstated if (i) such determination is subsequently reversed by the Court for good cause after it is shown that the determination was materially incorrect after notice and a hearing following a motion from the Critical Vendor, (ii) the underlying default under the Vendor Agreement is fully cured by the Critical Vendor not later than five business days after the date the initial default occurred, or (iii) the Debtors, in their sole discretion, reach a subsequent agreement with the Critical Vendor.

12. If a Vendor Agreement is terminated as set forth above, or if a Critical Vendor that has received payment of a prepetition claim later refuses to continue to supply goods or services for the applicable period in compliance with the Vendor Agreement or this Interim Order, then (i) the Debtors may, in their sole discretion, declare that the payment of the creditor's Critical Vendor Claim is a voidable postpetition transfer pursuant to Bankruptcy Code section 549(a) that the Debtors may recover in cash or in goods from such Critical Vendor, (ii) the creditor shall immediately return such payment in respect of a Critical Vendor Claim to the extent that the aggregate amount of such payment exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type



whatsoever, and (iii) the creditor's Critical Vendor Claim shall be reinstated in such an amount so as to restore the Debtors and the Critical Vendor to their original positions as if the Vendor Agreement had never been entered into and no payment of such Critical Vendor Claim had been made.

13. Notwithstanding anything to the contrary in this Interim Order, the Motion, or attachments, the priority status of a creditor's claim, including claims arising under Bankruptcy Code section 503(b)(9), shall not be affected by whether such creditor executes a Vendor Agreement, or provides services or goods to the Debtors under customary trade terms or otherwise.

14. Nothing contained in this Interim Order shall be deemed to constitute (i) a rejection, assumption, or postpetition reaffirmation of any executory contract or to require the Debtors to make any of the payments or to post any of the deposits authorized herein, (ii) a grant of third-party beneficiary status or bestowal of any additional rights on any third party, or (iii) a waiver of any rights, claims, or defenses of the Debtors.

15. Nothing in this Interim Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest the amount of, priority of, or basis for any claims against the Debtors arising in connection with the Critical Vendor Claims.

16. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b) because the relief granted in this Interim Order is necessary to avoid immediate and irreparable harm to the Debtors' estates.

17. Notice of this Motion shall be deemed good and sufficient notice of such Motion under the circumstances and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

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

19. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

20. The final hearing (the “**Final Hearing**”) to consider the entry of a final order granting the relief requested in the Motion shall be held on \_\_\_\_\_, 2024, at \_\_\_\_:\_\_\_\_m. Prevailing Eastern Time.

21. Any objection to the entry of a final order granting the relief requested in the Motion shall be filed with the Court and served on the following parties **no later than 4:00 p.m. Prevailing Eastern Time on \_\_\_\_\_, 2024**: (a) the Debtors, c/o ProSomnus, Inc., 5675 Gibraltar Dr., Pleasanton, California 94588; (b) proposed counsel to the Debtors, Polsinelli PC, 222 Delaware Avenue, Suite 1101, Wilmington, Delaware 19801, Attn: Shanti M. Katona (skatona@polsinelli.com) and Katherine M. Devanney (kdevanney@polsinelli.com); (c) counsel to the Sponsoring Noteholders and proposed DIP Lenders, Kilpatrick Townsend & Stockton LLP, 1114 Avenue of the Americas, New York, New York 10036, Attn: David M. Posner (dposner@ktslaw.com) and Gianfranco Finizio (gfinizio@ktslaw.com) and Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington, Delaware 19801, Attn: Eric J. Monzo (emonzo@morrisjames.com) and Brya M. Keilson (bkeilson@morrisjames.com); (d) counsel to the Prepetition Agents, Alston & Bird LLP, 1120 South Tryon Street, Suite 300, Charlotte, North Carolina 28203-6818, Attn: Adam Smith (adam.smith@alston.com) and Lauren McHale (lauren.mchale@alston.com); (e) counsel to the proposed DIP Agent, Seward & Kissel LLP, One Battery Park Plaza, New York, NY 10004, Attn: Gregg Bateman (bateman@sewkis.com) and (f)

the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Jon Lipshie (jon.lipshie@usdoj.gov).

22. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation and/or interpretation of this Interim Order.

**Exhibit 1**

Vendor Agreement

**ProSomnus, Inc.**

\_\_\_\_\_, 2024

TO: [Critical Vendor]  
[Name]  
[Address]

Dear Valued Supplier:

As you are aware, ProSomnus, Inc. and certain of its affiliates (collectively, the “**Company**”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Cases**” and the “**Bankruptcy Court**,” respectively) on May 7, 2024 (the “**Petition Date**”). On the Petition Date, the Company requested the Bankruptcy Court’s authority to pay the prepetition claims of certain suppliers in recognition of the importance of the Company’s relationship with such suppliers and its desire that the Bankruptcy Cases have as little effect on the Company’s ongoing business operations as possible. On \_\_\_\_\_, the Bankruptcy Court entered an order (the “**Order**”) authorizing the Company, under certain conditions, to pay the prepetition claims of certain suppliers that agree to the terms set forth below and to be bound by the terms of the Order. A copy of the Order is enclosed.

In order to receive payment on account of prepetition claims, you must agree to continue to supply goods and services to the Company based on “Customary Trade Terms.” However, execution of this letter agreement is not a requirement for payment of claims arising under Bankruptcy Code section 503(b)(9), general unsecured claims under a chapter 11 plan, or as otherwise ordered by the Court. In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices, and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability, and other applicable terms and programs), that were most favorable to the Company and in effect between you and the Company prior to the Petition Date, or such other trade terms as you and the Company agree.

For purposes of administration of this trade program as authorized by the Bankruptcy Court, you and the Company both agree that:

1. The estimated accrued balance of the prepetition claim (net of any setoffs, credits, or discounts) that is due and owing is \$ \_\_\_\_\_ (the “**Claim**”).
2. The Debtors hereby agree to pay \$ \_\_\_\_\_ (the “**Vendor Claim**”) on account of the Claim, subject to the terms and conditions set forth in this agreement, it being understood that the remaining amount of your Claim shall be forever released and waived. If you have already filed a proof of claim with the Bankruptcy Court, you will take all necessary steps to withdraw the proof of claim.
3. Nothing herein waives the Company’s or your rights under Bankruptcy Code section 365.

4. You will provide Customary Trade Terms as follows (if more space is required, attach continuation pages), which credit terms shall be no less favorable than those in effect between you and the Company at any time during the one-year period immediately before the Petition Date.

---

---

---

---

---

---

---

---

---

---

5. You will not demand a lump sum payment upon consummation of a plan of reorganization in the Bankruptcy Cases on account of any administrative expense priority claim that you assert, but instead agree that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms.

6. Payment of your Vendor Claim in the manner set forth in the Order may only occur upon execution of this letter agreement by a duly authorized representative of your company and the return of this letter to the Company. The undersigned, a duly authorized representative of [Critical Vendor], has reviewed the terms and provisions of the Order and agrees that [Critical Vendor] is bound by such terms.

7. You will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless your participation in the Vendor payment program authorized by the Order (the “**Vendor Payment Program**”) is terminated.

8. You will not file or otherwise assert against the Company, the estates, or any other person or entity or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to you by the Company arising from agreements entered into prior to the Petition Date. Furthermore, you agree to take (at your own expense) all necessary steps to remove any such lien as soon as possible.

9. If either the Vendor Payment Program or your participation therein terminates as provided in the Order, or you later refuse to continue to supply goods to the Company on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments you receive on account of your Vendor Claim (including claims arising under Bankruptcy Code section 503(b)(9)) will be deemed voidable postpetition transfers pursuant to Bankruptcy Code section 549(a). You will immediately repay to the Company any payments made to you on account of your Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Your Vendor Claim shall be reinstated in such an amount so as to restore the Company and you to the same positions as would have existed if payment of the Vendor Claim had not been made.

10. Any dispute with respect to this letter agreement, the Order, and/or your participation in the Vendor Payment Program shall be determined by the Bankruptcy Court.

11. You will keep the existence and the terms of this letter agreement confidential and will not disclose it to any person or entity without the prior written consent of the Company, other than as required by law to any court or governmental authority.

12. If you have any questions about this Agreement or our financial restructuring, please do not hesitate to call.

Sincerely,

[Name of Applicable Debtor]

By: \_\_\_\_\_

[Name]

[Title]

Agreed and Accepted by:

[Vendor]

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_, 2024

**EXHIBIT B**

Proposed Final Order



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

In re:

PROSOMNUS, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10972 (JTD)

(Joint Administration Requested)

**Re: Docket Nos. \_\_**

**FINAL ORDER AUTHORIZING PAYMENT OF PREPETITION  
OBLIGATIONS OWED TO CRITICAL VENDORS**

Upon the motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of a final order (this “**Order**”) authorizing the Debtors to pay, in their sole discretion, prepetition obligations owed to certain vendors, suppliers, service providers, and other similar parties and entities that are essential to maintaining the going concern value of the Debtors’ business (the “**Critical Vendors**” and the prepetition obligations owed to such Critical Vendors, the “**Critical Vendor Claims**”), all as more fully set forth in the Motion; and the Court having reviewed the Motion, the First Day Declaration and the Interim Order entered on \_\_\_\_\_, 2024 [Docket No. \_\_]; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; 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 from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that this is a core proceeding

---

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors’ principal place of business and the Debtors’ mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and the 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 it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motion is GRANTED on a final basis, as set forth herein.
2. All objections to the entry of this Final Order, to the extent not withdrawn or settled, are overruled.
3. The Debtors are authorized, but not directed, pursuant to Bankruptcy Code sections 105(a), 363(b), and 503(b)(9), in the reasonable exercise of their business judgment, to pay some or all of the Critical Vendor Claims.
4. The Debtors' payment of Critical Vendor Claims shall not exceed \$1,250,000.00 in the aggregate, unless otherwise ordered by the Court, as set forth herein (the "**Critical Vendor Cap**").
5. The Debtors are authorized but not directed to pay the portion of prepetition claims owed to Critical Vendors that, in the Debtors' sole determination, is afforded administrative treatment under Bankruptcy Code section 503(b)(9), or any part thereof, in the ordinary course of the Debtors' business. Payment of such Critical Vendor Claims entitled to administrative priority under Bankruptcy Code section 503(b)(9) shall count towards the Critical Vendor Cap.
6. The Debtors are authorized to negotiate trade terms with any Critical Vendor, as a condition to payment of any Critical Vendor Claim, that vary from the Customary Trade Terms

(the “**Negotiated Trade Terms**”) to the extent the Debtors determine that such terms are necessary to procure essential goods or services or are otherwise in the best interests of the Debtors’ estates.

7. A Critical Vendor’s acceptance of payment is deemed to be acceptance of the terms of this Order, and if the Critical Vendor thereafter does not provide the Debtors with Customary Trade Terms or Negotiated Trade Terms during these Chapter 11 Cases, then any payments of prepetition claims made after the Petition Date may be deemed to be unauthorized postpetition transfers and therefore recoverable by the Debtors in these Chapter 11 Cases.

8. The Debtors, in their sole discretion, may require Critical Vendors (including Critical Vendors with claims under Bankruptcy Code section 503(b)(9)) to enter into an agreement (the “**Vendor Agreement**”) including provisions substantially in the form attached hereto as Exhibit 1 as a condition to paying a Critical Vendor Claim. However, the Debtors’ inability to enter into a Vendor Agreement shall not preclude them from paying a Critical Vendor Claim when, in their sole discretion, such payment is necessary to the Debtors’ operations.

9. As a further condition of receiving payment on a Critical Vendor Claim, the Debtors are authorized, in their sole discretion, to require that such Critical Vendor agree to take whatever action is necessary to remove any trade liens at such Critical Vendor’s sole cost and expense and waive any right to assert a trade lien on account of the paid Critical Vendor Claim.

10. In accordance with this Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the obligations described in the Motion are authorized to receive, process, honor, and pay any and all checks, drafts, wires, and automated clearing house transfers issued, whether before or after the Petition Date, for payment of obligations described in the Motion to the extent that sufficient funds are on deposit in such amounts.

11. The Debtors are authorized to issue postpetition checks, or to affect postpetition wire transfer requests, in replacement of any checks or wire transfer requests in respect of payments of prepetition obligations described in the Motion that are dishonored or rejected.

12. If the Debtors, in their sole discretion, determine that a Critical Vendor has not complied with the terms and provisions of the Vendor Agreement or has failed to continue to provide Customary Trade Terms following the date of the Vendor Agreement, or on such terms as were individually agreed to between the Debtors and such Critical Vendor, the Debtors may terminate a Vendor Agreement, together with the other benefits to the Critical Vendor as contained in this Order, provided, however, that the Vendor Agreement may be reinstated if (i) such determination is subsequently reversed by the Court for good cause after it is shown that the determination was materially incorrect after notice and a hearing following a motion from the Critical Vendor, (ii) the underlying default under the Vendor Agreement is fully cured by the Critical Vendor not later than five business days after the date the initial default occurred, or (iii) the Debtors, in their sole discretion, reach a subsequent agreement with the Critical Vendor.

13. If a Vendor Agreement is terminated as set forth above, or if a Critical Vendor that has received payment of a prepetition claim later refuses to continue to supply goods or services for the applicable period in compliance with the Vendor Agreement or this Order, then (i) the Debtors may, in their sole discretion, declare that the payment of the creditor's Critical Vendor Claim is a voidable postpetition transfer pursuant to Bankruptcy Code section 549(a) that the Debtors may recover in cash or in goods from such Critical Vendor, (ii) the creditor shall immediately return such payment in respect of a Critical Vendor Claim to the extent that the aggregate amount of such payment exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type

whatsoever, and (iii) the creditor's Critical Vendor Claim shall be reinstated in such an amount so as to restore the Debtors and the Critical Vendor to their original positions as if the Vendor Agreement had never been entered into and no payment of such Critical Vendor Claim had been made.

14. Nothing contained in this Order shall be deemed to constitute (i) a rejection, assumption, or postpetition reaffirmation of any executory contract or to require the Debtors to make any of the payments or to post any of the deposits authorized herein, (ii) a grant of third-party beneficiary status or bestowal of any additional rights on any third party, or (iii) a waiver of any rights, claims, or defenses of the Debtors.

15. Nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest the amount of, priority of, or basis for any claims against the Debtors arising in connection with the Critical Vendor Claims.

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

17. Notice of the Motion shall be deemed good and sufficient notice of such Motion under the circumstances and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

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

19. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

20. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation and/or interpretation of this Order.

**Exhibit 1**

Vendor Agreement

**ProSomnus, Inc.**

\_\_\_\_\_, 2024

TO: [Critical Vendor]  
[Name]  
[Address]

Dear Valued Supplier:

As you are aware, ProSomnus, Inc. and certain of its affiliates (collectively, the “**Company**”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Cases**” and the “**Bankruptcy Court**,” respectively) on May 7, 2024 (the “**Petition Date**”). On the Petition Date, the Company requested the Bankruptcy Court’s authority to pay the prepetition claims of certain suppliers in recognition of the importance of the Company’s relationship with such suppliers and its desire that the Bankruptcy Cases have as little effect on the Company’s ongoing business operations as possible. On \_\_\_\_\_, the Bankruptcy Court entered an order (the “**Order**”) authorizing the Company, under certain conditions, to pay the prepetition claims of certain suppliers that agree to the terms set forth below and to be bound by the terms of the Order. A copy of the Order is enclosed.

In order to receive payment on account of prepetition claims, you must agree to continue to supply goods and services to the Company based on “Customary Trade Terms.” However, execution of this letter agreement is not a requirement for payment of claims arising under Bankruptcy Code section 503(b)(9), general unsecured claims under a chapter 11 plan, or as otherwise ordered by the Court. In the Order, Customary Trade Terms are defined as the normal and customary trade terms, practices, and programs (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability, and other applicable terms and programs), that were most favorable to the Company and in effect between you and the Company prior to the Petition Date, or such other trade terms as you and the Company agree.

For purposes of administration of this trade program as authorized by the Bankruptcy Court, you and the Company both agree that:

1. The estimated accrued balance of the prepetition claim (net of any setoffs, credits, or discounts) that is due and owing is \$ \_\_\_\_\_ (the “**Claim**”).
2. The Debtors hereby agree to pay \$ \_\_\_\_\_ (the “**Vendor Claim**”) on account of the Claim, subject to the terms and conditions set forth in this agreement, it being understood that the remaining amount of your Claim shall be forever released and waived. If you have already filed a proof of claim with the Bankruptcy Court, you will take all necessary steps to withdraw the proof of claim.
3. Nothing herein waives the Company’s or your rights under Bankruptcy Code section 365.

4. You will provide Customary Trade Terms as follows (if more space is required, attach continuation pages), which credit terms shall be no less favorable than those in effect between you and the Company at any time during the one-year period immediately before the Petition Date.

---

---

---

---

---

---

---

---

---

---

5. You will not demand a lump sum payment upon consummation of a plan of reorganization in the Bankruptcy Cases on account of any administrative expense priority claim that you assert, but instead agree that such claims will be paid in the ordinary course of business after consummation of a plan under applicable Customary Trade Terms.

6. Payment of your Vendor Claim in the manner set forth in the Order may only occur upon execution of this letter agreement by a duly authorized representative of your company and the return of this letter to the Company. The undersigned, a duly authorized representative of [Critical Vendor], has reviewed the terms and provisions of the Order and agrees that [Critical Vendor] is bound by such terms.

7. You will not separately seek payment for reclamation and similar claims outside of the terms of the Order unless your participation in the Vendor payment program authorized by the Order (the “**Vendor Payment Program**”) is terminated.

8. You will not file or otherwise assert against the Company, the estates, or any other person or entity or any of their respective assets or property (real or personal) any lien (regardless of the statute or other legal authority upon which such lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to you by the Company arising from agreements entered into prior to the Petition Date. Furthermore, you agree to take (at your own expense) all necessary steps to remove any such lien as soon as possible.

9. If either the Vendor Payment Program or your participation therein terminates as provided in the Order, or you later refuse to continue to supply goods to the Company on Customary Trade Terms during the pendency of the Bankruptcy Case, any payments you receive on account of your Vendor Claim (including claims arising under Bankruptcy Code section 503(b)(9)) will be deemed voidable postpetition transfers pursuant to Bankruptcy Code section 549(a). You will immediately repay to the Company any payments made to you on account of your Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding without giving effect to alleged setoff rights, recoupment rights, adjustments, or offsets of any type whatsoever. Your Vendor Claim shall be reinstated in such an amount so as to restore the Company and you to the same positions as would have existed if payment of the Vendor Claim had not been made.



10. Any dispute with respect to this letter agreement, the Order, and/or your participation in the Vendor Payment Program shall be determined by the Bankruptcy Court.

11. You will keep the existence and the terms of this letter agreement confidential and will not disclose it to any person or entity without the prior written consent of the Company, other than as required by law to any court or governmental authority.

12. If you have any questions about this Agreement or our financial restructuring, please do not hesitate to call.

Sincerely,

[Name of Applicable Debtor]

By: \_\_\_\_\_

[Name]

[Title]

Agreed and Accepted by:

[Vendor]

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_, 2024