

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Chapter 11
)
AcuSport Corporation,) Case No. 18-52736
)
Debtor.) Honorable John E. Hoffman, Jr.

**MOTION FOR AN ORDER (I) AUTHORIZING DEBTOR TO
(A) PAY PREPETITION EMPLOYEE WAGES, SALARIES, AND OTHER
COMPENSATION, (B) REIMBURSE PREPETITION EMPLOYEE BUSINESS
EXPENSES, (C) PAY PREPETITION PAYROLL TAXES AND BENEFITS FOR WHICH
PAYROLL DEDUCTIONS WERE MADE, (D) MAKE PREPETITION
CONTRIBUTIONS AND PAY PREPETITION BENEFITS UNDER EMPLOYEE
BENEFIT PROGRAMS, AND (E) PAY RELATED COSTS AND EXPENSES; AND
(II) DIRECTING FINANCIAL INSTITUTIONS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH RELIEF**

AcuSport Corporation, the debtor and debtor in possession (“*Debtor*” or “*AcuSport*”) in this chapter 11 case (the “*Case*”), files this motion (the “*Motion*”) for entry of an order (i) authorizing Debtor to (a) pay prepetition Employee wages, salaries, and other compensation, (b) reimburse prepetition Employee business expenses, (c) pay prepetition payroll taxes and benefits for which payroll deductions were made, (d) make prepetition contributions and pay prepetition benefits under employee benefit programs, and (e) pay related costs and expenses; and (ii) directing financial institutions to honor and process checks and transfers related to such relief, pursuant to sections 105, 363, 507, and 541 of title 11 of the United States Code (the “*Bankruptcy Code*”). In support of this Motion, Debtor respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On May 1, 2018 (the “*Petition Date*”), Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continues to manage and operate its business as a debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

3. No request has been made for the appointment of a trustee or examiner, and no official committee has been appointed in this case.

4. A detailed description of Debtor’s business, capital structure, and events leading to this Case is more fully set forth in the Declaration of John K. Flanagan (the “*Flanagan Declaration*”) filed contemporaneously herewith, which is incorporated herein by reference.

5. AcuSport is recognized nationwide as one of the leading distributors of outdoor and shooting sports products. The company is headquartered in Bellefontaine, Ohio and has regional sales offices in Pennsylvania, Georgia, Minnesota, Montana, California and Texas. To ensure and enable customer service to the West Coast, AcuSport also operates a warehouse and distribution facility located in Salt Lake City, Utah.

6. As part of its business, AcuSport provides consulting services to independent retailers, helping them to efficiently acquire products, utilize state-of-the-art business tools and provide value-added services that increase profitability and strengthen retailers’ businesses. AcuSport’s commitment to independent retailers is the cornerstone of its business.

7. AcuSport prospered for years following its inception in 1982, with substantial sales growth leading to the expansion of its facility in Bellefontaine. However, AcuSport began to experience financial difficulty in late 2016 and early 2017.

8. In the time leading up to the 2016 presidential election, consumers were concerned about the possibility of stricter gun control laws, which led to increased sales of firearms and accessories. As a result, AcuSport, along with other firearms businesses, prepared

for a spike in demand by, among other things, purchasing substantial amounts of inventory. Contrary to expectations, no spike in demand for firearms occurred following the 2016 election. Indeed, demand decreased. The reduction in sales directly impacted AcuSport's gross revenue, and, ultimately, its bottom line. The harm to AcuSport's financial position was further exacerbated because AcuSport had expected — and prepared for — an increase in sales. The reduction in sales negatively impacted AcuSport's operational performance, resulting in defaults under AcuSport's prepetition secured credit agreement, and ultimately, the company entered into a series of forbearance agreements with the Prepetition Lenders.

9. In connection with the forbearance agreements with the Prepetition Lenders, AcuSport retained Huron Consulting Services LLC as its financial advisor and Huron Transaction Advisory LLC as its investment banker. AcuSport also agreed to seek a refinancing process of its secured debt obligations. Huron Transaction Advisory LLC was retained for the purposes of preparing, marketing, and leading the consummation of one or more potential strategic alternatives, including a refinancing process, and eventually, a sale process. In that regard, AcuSport spent several months prior to the filing of this Case exploring potential sales and other strategic options.

10. AcuSport eventually obtained an offer from United Sporting Companies, Inc. ("*United*") to purchase (through an affiliate), among other things, AcuSport's inventory, real estate, equipment, technology, and certain other intangible assets. In order to effectuate a transaction to United (or another higher or better bidder or bidders), and to maximize the value of its assets for the benefit of all its constituents, AcuSport filed for bankruptcy relief and has sought the approval of bidding and sale procedures with United as the stalking horse.

RELIEF REQUESTED

11. By this Motion, Debtor requests entry of an order authorizing Debtor to pay certain prepetition obligations to current and recent employees, including for wages, salaries, various benefits, expense reimbursements, payroll taxes, and related items, and authorizing and directing Debtor's financial institutions to honor such payments.

12. As set forth herein, as of the Petition Date, Debtor owed certain Prepetition Compensation, Prepetition Deductions, Employee Benefits, and Business Expenses (each as defined below) to its current employees and those who were terminated just prior to the commencement of the Case. Any delay in paying such items would seriously harm the Debtor's relationship with its workforce and could irreparably impair employee morale at the very time the dedication, confidence, and cooperation of Debtor's employees is most critical. Accordingly, Debtor faces the imminent risk that its operations will be severely impaired if it is not immediately granted authority to make the payments described in this Motion.

I. Debtor Requests Authority to Pay Prepetition Employee Claims and Benefits.

A. Prepetition Compensation and Deductions

13. As of the Petition Date, Debtor had approximately 220 employees, 211 of which were full time employees ("**FT Employees**") and 9 of which were part time employees ("**PT Employees**," and collectively with FT Employees, "**Employees**"). None of the Employees were members of a union. On the Petition Date, and immediately prior to commencing this Case, Debtor terminated approximately 32 Employees (the "**Former Employees**") as part of its

ongoing cost-reduction efforts, leaving the Debtor with just under 200 Employees on a postpetition basis.¹

14. Debtor pays Employees directly, rather than through a third-party vendor. On or prior to each regular pay date, Debtor deposits funds in its payroll or general disbursement accounts to cover gross payroll and related benefits and taxes.

15. Depending on their respective roles, Employees are either hourly wage earners or salaried. Of the Employees, approximately 141 are hourly, and 79 are salaried. Employees are paid on a biweekly basis every other Friday for services performed through the period ending one week prior to the pay date. In other words, following each payroll payment, Employees are owed for one week of earned but unpaid compensation. Employees are paid through direct deposit.

16. In addition, certain Employees are compensated through commissions based on sales in the previous month. Commissions are paid once per month, in arrears. Debtor's obligation for commissions varies; it historically has been in the approximate range of \$100,000.00 per month, but in the time period leading up to the filing of this Case, commissions owed have been substantially lower.

17. Debtor's current average biweekly gross payroll (including commissions and including taxes owed for Employee withholding taxes) is approximately \$490,000.00, plus applicable employer-paid payroll taxes of approximately \$35,000.00 related to such earnings.

¹ The relief requested in this Motion applies to all Employees, including the Former Employees, as it was not feasible for Debtor to make final payments to the Former Employees for wages or other obligations owing prior to filing this Case. As set forth herein, Debtor believes honoring its obligations to both current Employees and Former Employees is absolutely vital to Debtor's ability to maintain a stable workforce and to preserve value for all creditors during this Case, the failure of which will be extremely detrimental to Debtor's ability to continue functioning in chapter 11. Thus, references herein to "Employees" include both remaining employees and Former Employees, unless otherwise noted.

As noted, payroll obligations are higher for payroll periods when commissions are paid, and lower for periods when commissions are not included.

18. Debtor last paid payroll to Employees on April 27, 2018 for work completed through April 22, 2018.

19. Debtor estimates that as of the Petition Date, it owes Employees approximately \$380,000.00 for earned but unpaid wages, salaries, commissions, and other compensation, including applicable payroll taxes and withholdings (“*Prepetition Compensation*”). Of this amount, approximately \$10,000.00 is attributable to commissions earned in March 2018. In addition, approximately \$36,500.00 of the Prepetition Compensation relates to the Former Employees. Debtor believes that no individual Employee is owed more than \$12,850.00 in Prepetition Compensation.

20. In connection with the Prepetition Compensation, prior to the Petition Date, Debtor made certain deductions (“*Prepetition Deductions*”) from Employees’ compensation in order to make payments to third parties on behalf of Employees for items such as taxes, loan repayments to third parties, garnishments, support payments, and employee benefits, including retirement accounts and insurance. These amounts essentially belong to Employees but are temporarily held on their behalf by Debtor. In the ordinary course of business, Debtor’s Prepetition Deductions totaled approximately \$182,000.00 per payroll period, including deductions for retirement account contributions, which totaled approximately \$38,000.00 per period.

21. The Prepetition Deductions owing to Employees as of the Petition Date are included in the estimated amount of Prepetition Compensation set forth above, and thus do not represent additional amounts owing beyond the Prepetition Compensation. To further clarify the

nature and magnitude of the Prepetition Deductions, however, Debtor estimates that the total amount of Prepetition Deductions held and owing by Debtor on the Petition Date was approximately \$91,000.00, of which approximately \$19,000.00 relates to Employee contributions to retirement accounts and \$8,500.00 relates to deductions for the Employees' portion of medical and other insurance premiums, with the rest relating to taxes and other various obligations.

22. Payment to Employees of Prepetition Compensation and the remittance of Prepetition Deductions are critical to Debtor's ability to continue its business operations and to maintain satisfactory Employee morale. Indeed, without an order of this Court authorizing Debtor to timely satisfy its obligations to Employees for Prepetition Compensation and Prepetition Deductions, Debtor's ongoing operations, and, ultimately, its ability to maximize the value of its assets will be in serious jeopardy. Employees (and their families) rely on their compensation and benefits to pay daily living expenses and provide for their households. To minimize the personal hardship that Employees would face if Debtor could not timely pay Prepetition Compensation and Prepetition Deductions, and to maintain morale and stability during this challenging time, Debtor seeks authority to pay and honor all Prepetition Compensation and Prepetition Deductions that have accrued but remain unpaid. Debtor does not intend to pay any individual Employee more than \$12,850.00 in Prepetition Compensation, which is the statutory "priority cap" set forth in section 507(a)(4) of the Bankruptcy Code.

B. Reimbursement of Prepetition Expenses

23. In the ordinary course of business, Debtor's Employees incurred a variety of business expenses prior to the Petition Date ("*Prepetition Expenses*"), relating to such items as automobile mileage, parking, meals, postage, packaging, and office supply, for which they have

not been reimbursed. Debtor's existing policy and procedure is to reimburse Employees on a weekly basis for such expenses, subject to the approval of Employees' expense reports. On average, Debtor reimburses Employees approximately \$21,878.00 on a monthly basis for business expenses. As of the Petition Date, Debtor estimates that less than \$5,000.00 in unpaid Prepetition Expenses were outstanding. Thus, Debtor requests authority to pay all Prepetition Expenses owing to Employees in accordance with its existing procedures. Further, Debtor requests authority to continue its company policy allowing for the incurrence and reimbursement of Employees' business-related expenses.

24. Failure to pay the Prepetition Expenses would hinder Debtor's ability to successfully operate its business in this Case. Without such relief, Employees will be concerned about personal liability for business-related expenses, which will further diminish Employees' attention to satisfactorily doing their jobs.

C. Employee Benefit Programs

25. In the ordinary course of its business, Debtor provides Employees with various employee benefits, including various types of medical and other insurance, health savings and flexible spending accounts, educational assistance, paid time off, 401(k) savings plans, workers' compensation coverage, and other similar programs and miscellaneous benefits (collectively, the "*Employee Benefits*"). Debtor's monthly cash outlay for expenses related to its various Employee Benefits plans is approximately \$205,000.00 (exclusive of the Prepetition Deductions referenced above). Interruption of any Employee Benefits would harm Employee morale and undermine Debtor's efforts to preserve value of its estate. Accordingly, Debtor requests authority to pay all prepetition amounts attributable to such Employee Benefits, as and when

such amounts become due and payable in the ordinary course of Debtor's business in this Case, as set forth in more detail below.

(i) *Insurance Benefits*

26. Debtor provides eligible Employees with various insurance benefits, including medical, dental, vision, short-term and long-term disability coverage, and life and accidental death and dismemberment insurance. With respect to all insurance benefits, a portion of the monthly premium is paid by Employees via payroll deductions, with Debtor paying the rest of the costs.

27. Debtor offers a comprehensive health insurance plan for its Employees through United Healthcare. Debtor's health insurance plan is self-insured, and Debtor utilizes additional stop-loss insurance coverage to address potential large claims under the plan. Debtor's stop-loss coverage is provided by Alto Holdings, LLC. Debtor also provides a supplemental health insurance plan for executives through ArmadaCare.

28. Debtor's monthly fixed costs in connection with the United Healthcare medical plan (including applicable stop-loss insurance) total approximately \$33,000.00. Debtor's monthly cost to provide the supplemental ArmadaCare health insurance plan is approximately \$6,262.00.

29. Debtor offers Employees dental insurance through Delta Dental of Ohio ("***Delta Dental***"). Debtor's dental insurance plan is also self-insured, and its monthly fixed payments to Delta Dental total approximately \$840.00, in addition to any premiums paid by Employees through payroll deductions.

30. Vision insurance is provided to Debtor's Employees through Vision Service Plan ("***VSP***"). The vision insurance plan is fully insured. Debtor's monthly premium payments to

VSP total approximately \$2,000.00, which is in addition to any premiums paid by Employees through payroll deductions.

31. Short-term and long-term disability insurance is provided to Employees through programs administered by Cigna Health Insurance (“*Cigna*”). The short-term disability program is self-insured, but the long-term disability program is not. Debtor makes monthly premium payments in respect of such insurance totaling approximately \$2,066.00.

32. Life and accidental death and dismemberment insurance is also provided to Employees through Cigna. Debtor makes monthly premium payments in respect of such insurance totaling approximately \$1,755.00.

33. With respect to the self-insured plans described above, Debtor historically has been obligated to pay an aggregate amount between \$150,000.00 and \$300,000.00 per month in respect of medical, dental, and other covered claims under such plans.

34. As of the Petition Date, Debtor owes the following approximate amounts in respect of its insurance benefit programs:

- (a) United HealthCare: Approximately \$110,000.00 currently owing for known trailing medical claims relating to prepetition periods under the self-insured health plan.
- (b) ArmadaCare: No monthly premiums or other obligations owing (not including Prepetition Deductions as discussed above).
- (c) Delta Dental: Approximately \$12,000.00 for known obligations currently owing covering early 2018 (exclusive of Prepetition Deductions as discussed above).
- (d) VSP: No monthly premiums or other obligations owing (not including Prepetition Deductions as discussed above).
- (e) Cigna: No obligations for short-term and long-term disability and life and accidental death and dismemberment not otherwise captured in the payroll obligations described in connection with the Prepetition Compensation (not including Prepetition Deductions as discussed above).

With respect to Employees' insurance benefits, Debtor requests authority to pay all amounts due and payable as of the Petition Date, including the foregoing, plus any other *de minimus* prepetition amounts that have not been expressly identified in this Motion. In addition, Debtor requests authority to continue paying any prepetition claims made under the self-insured plans described above that may not yet be known (or may not be capable of being known). Debtor believes it will have sufficient funding to pay all such amounts when they become due under its anticipated financing arrangements.

(ii) *Health Savings and Flexible Spending Accounts*

35. Eligible Employees are permitted to enroll in a health savings account ("**HSA**") or flexible spending account ("**FSA**") for health and dependent care. Employees who elect to participate in an HSA or FSA make contributions that are deducted from their gross pay at a pre-determined amount set by Employees. In addition, Debtor historically has made contributions to certain of its Employees' HSAs at the beginning of each year.

36. WageWorks is the administrator for Employees' FSAs, and Optum Bank, Inc. ("**Optum**") is the administrator for Employees' HSAs. Debtor believes it is current on all obligations in respect of the FSAs and HSAs, other than for certain Prepetition Deductions as described above. However, as of the Petition Date, Debtor may owe a nominal amount to WageWorks and Optum in connection with their ongoing administration of the FSAs and HSAs, respectively. Thus, Debtor requests authority to pay such amounts in order to ensure the uninterrupted administration of Employees' accounts.

(iii) *Paid Time Off*

37. Eligible Employees accrue paid time off, which may be used for vacation, sick leave, and personal time off ("**PTO**"). In the ordinary course of Debtor's business, Debtor has

paid Employees for unused but accrued PTO upon termination of employment as part of their compensation. The amount of PTO that an Employee earns, and that is eligible for a payout upon separation, is based upon the number of days or months that the Employee worked during the year of separation, the number of hours accrued, and the number of paid vacation hours taken during the year. As of the Petition Date, Debtor estimates that Employees had accrued approximately 6,500 hours in PTO for prepetition work. The rough dollar value of such PTO would be approximately \$237,000.00 in total, if paid out all at once. The amount owing to Former Employees for PTO at the time of their separation was approximately \$15,000.00.

38. Debtor seeks authority to permit Employees to continue to use their PTO in the ordinary course of business, including prepetition PTO, during this Case. Debtor further requests authority to continue to pay Employees for unused but accrued PTO upon termination or expiration of employment in the ordinary course of business, pursuant to company policy. In addition, Debtor requests authority to pay the PTO amounts owing to Former Employees who were terminated just prior to the filing of this Case. Failure to pay all such amounts would have serious negative consequences for Debtor's operations and would adversely affect the ability to retain the Employees during the Case.

(iv) 401(k) Plan

39. Eligible Employees may elect to participate in a 401(k) retirement savings plan administered by Prudential Retirement (the "**401(k) Plan**"). Under the 401(k) Plan, Employees may contribute certain percentages of their gross earnings in order to gain tax benefits while saving for retirement. With respect to those Employees who participate in the 401(k) Plan, Debtor historically has had the option to contribute a discretionary match amount each calendar quarter, limited to the first 6% of Employees' contributed pretax earnings, but no such amounts

were owing as of the Petition Date. Aside from the Prepetition Deductions to be contributed to the 401(k) Plan for Employees (as discussed above), Debtor believes that it has no outstanding prepetition obligations under the 401(k) Plan. Nevertheless, out of an abundance of caution, Debtor respectfully requests authority to make payments for any prepetition or postpetition amounts attributable to the 401(k) Plan, whether constituting a Prepetition Deduction or otherwise.

(v) *Workers' Compensation*

40. In addition to the employee benefits discussed above, Debtor provides Employees with workers' compensation insurance through the State of Ohio, as required under state law. The workers' compensation program is a fully insured plan with annual premiums being assessed at the outset of each annual coverage period based on the total dollar amount of claims made in the prior annual coverage period. Debtor's premium payments are paid in advance of each quarter throughout the annual coverage period.

41. Debtor's current coverage period began in July 2017 and will end June 30, 2018, with a new period beginning on July 1, 2018. Payments under the program are due to the State of Ohio every other month in the amount of approximately \$28,000.00. Debtor made its last payment of \$28,000.00 for the current period on April 27, 2018, and thus, believes no prepetition amounts are owing in respect of such insurance. Debtor anticipates that its next payment will not be due until July 1, 2018, and the amount due at such time may be somewhat less than has historically been owed. Although Debtor believes no prepetition premiums are due and owing as of the Petition Date, out of an abundance of caution, Debtor respectfully requests authority to make any necessary payments to the extent prepetition amounts to the State of Ohio for workers' compensation coverage may be outstanding.

D. Costs and Expenses Incidental to Prepetition Employee Obligations

42. As of the Petition Date, Debtor estimates it may owe approximately \$9,500.00 in additional administration and processing costs relating to prepetition obligations to or on behalf of Employees in connection with their Employee Benefits, and accordingly, Debtor requests authority to pay such amounts.

43. Debtor does not believe any prepetition amounts are owing to Prudential Retirement, the 401(k) Plan's third party administrator, or to The Ultimate Software Group, Inc. ("*Ultimate Software*"), Debtor's provider of payroll processing software. Nevertheless, Debtor hereby requests authority to make payments for any unknown prepetition obligations in nominal amounts that may be owing to Prudential Retirement and Ultimate Software in order to avoid any disruptions in service related to Employee Benefits and obligations.

II. Debtor Requests That Financial Institutions Be Directed to Honor Checks and Transfers Relating to Prepetition Employee Obligations and Claims.

44. In order to make the payments contemplated herein, Debtor requests that all applicable banks and financial institutions be authorized and directed to receive, process, honor, and pay any and all checks drawn on Debtor's payroll and general disbursement accounts, and all automatic transfers related to Debtor's payroll and compensation, whether presented prior to or after the Petition Date, to the extent such payments relate to Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, or Employee Benefits. Debtor represents that each of these checks is or will be drawn on Debtor's payroll and general disbursement accounts and can be readily identified as relating directly to Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, and Employee Benefits discussed herein.

BASIS FOR RELIEF REQUESTED

45. Pursuant to sections 105, 363, 507, and 541 of the Bankruptcy Code, the Court should authorize Debtor to pay Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, and Employee Benefits and all costs and expenses incidental thereto. It is imperative that Debtor be authorized to continue to pay and honor Employee obligations and claims, including Employee Benefits.

A. Certain of Employees' Prepetition Claims Are Entitled to Priority Claim Status Pursuant to 11 U.S.C. § 507(a).

46. A majority of the amounts for which this Motion seeks relief are entitled to priority claim status pursuant to sections 507(a)(4) and (a)(5) of the Bankruptcy Code. Specifically, Employees with prepetition claims for “wages, salaries, or commissions, including vacation, severance, and sick leave pay” that was “earned within 180 days before” the Petition Date are entitled to priority treatment to the extent of \$12,850.00 of any allowed unsecured claim. *See* 11 U.S.C. § 507(a)(4).

47. Likewise, to the extent of \$12,850.00 (in the aggregate with the compensation referenced above), Employees are entitled to priority status of “allowed unsecured claims” for “contributions to an employee benefit plan” so long as those contributions were for services “within 180 days before” the Petition Date. *See* 11 U.S.C. § 507(a)(5). In addition, costs and expenses incidental to these obligations are entitled to priority treatment under section 507(a)(5). *See, e.g., In re Garden Ridge Corp.*, No. 04-10324 (Bankr. D. Del. March 2, 2006); *Allegheny Int'l, Inc. v. Metro Life Ins. Co.*, 145 B.R. 820, 822-23 (W.D. Pa. 1992); *see also In re GLC Ltd.*, No. 11-11090, [Docket No. 24] (Bankr. S.D. Ohio March 3, 2011) (authorizing debtor to pay costs incidental to prepetition employee obligations, including compensation and benefits). Because such claims are given priority status, Debtor would be required to pay them in full in

order to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for wages, salaries, and commissions and for contributions to an employee benefit plan). This is true for all Employees, including Former Employees. Therefore, to the extent a plan is confirmed in this Case, these amounts will ultimately be paid in full to Employees, irrespective of the relief requested herein, such that granting the relief requested in this Motion will only impact the timing of those payments.

48. Finding and training new, qualified employees would be extremely difficult under the circumstances, and it would distract Debtor from its primary focus of maximizing value of its estate for creditors. Failure to make payments for current wages and benefits to all Employees, including Former Employees, would have a serious detrimental effect on Debtor's workforce and the ability to continue operations on a postpetition basis. For these reasons, and because Debtor does not seek to pay Employees more than they would otherwise be entitled to pursuant to a chapter 11 plan, Debtor submits that there is adequate cause to support the related relief requested herein.

B. Section 105 of the Bankruptcy Code and the Necessity Doctrine Permit Debtor to Preserve the Value of its Estate by Paying Prepetition Employee Claims and Benefits.

49. Numerous courts have used their equitable powers under section 105(a) of the Bankruptcy Code to authorize payment of a debtor's prepetition obligations when such payment is determined to be necessary to "avert a serious threat to the chapter 11 process." *See, e.g., In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991); *In re Just for Feet*, 242 B.R. 821, 825 (D. Del. 1999); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991); *In re SIS Corp.*, 108 B.R. 608, 609-10 (Bankr. N.D. Ohio 1989); *see also* 11 U.S.C. § 105(a) (A court "may issue any order, process, or judgment that is necessary or appropriate to

carry out the provisions of [title 11].”). Section 1107(a) of the Bankruptcy Code requires that Debtor “protect and preserve the estate, including [its] operating business’s going-concern value.” See *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). And, it is well established that debtors may pay certain prepetition claims in the performance of their fiduciary duty to preserve the estate and the business’s going-concern value. See, e.g., *Miltenberger v. Logansport Ry.*, 106 U.S. 286, 312 (1882). Thus, courts developed the “necessity doctrine” as a tool for determining whether payment of a prepetition claim is necessary to the Debtor’s chapter 11 case. See *In re Just for Feet, Inc.*, 242 B.R. 821, 825-26 (D. Del. 1999) (developing and discussing the doctrine of necessity); see also *Quality Interiors, Inc.*, 127 B.R. at 396 (citations omitted) (in addressing payment of prepetition wages, the court noted that “[a] general practice has developed, however, where bankruptcy courts permit the payment of certain prepetition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment”).

50. Numerous bankruptcy courts, including many in the Sixth Circuit, have approved payment of prepetition claims for compensation, benefits, and expense reimbursements similar to those described herein on the grounds that the payment of such claims was necessary to effectuate a successful reorganization. See e.g., *In re Summitville Titles, Inc.*, No. 03-46341 (Bankr. N.D. Ohio December 12, 2003); *In re Republic Engineered Products LLC.*, No. 03-55118 (Bankr. N.D. Ohio October 6, 2003); *In re Pittsburgh-Canfield Com.*, No. 00-43394 (Bankr. N.D. Ohio Nov. 16 2000); *In re LTV Steel Co.*, No. 00-43866 (Bankr. N.D. Ohio December 29, 2000); *In re DeVlieg-Bullard, Inc.*, No. 99-52111 (Bankr. N.D. Ohio July 15 1999); *In re Youngstown Osteopathic Hospital Association*, No. 99-40663 (Bankr. N.D. Ohio March 11, 1999); *In re Fretter, Inc.*, Nos. 96- 15177 - 96- 15184 (Bankr. N.D. Ohio Oct. 2 1996);

In re Quality Interiors, Inc., 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991). Debtor submits that the present circumstances warrant similar relief in this Case.

51. If Debtor does not pay Employees the amounts they are owed as of the Petition Date, Debtor will almost certainly suffer harm that will by far outweigh any savings to Debtor's estate. The current Employees are critical – indeed necessary – to Debtor's efforts in this Case. Without such Employees, Debtor could not operate, which would result in immediate harm to the estate and its creditors and would jeopardize Debtor's ability to consummate the sale of its business. Given the circumstances, Debtor believes it would be not only impractical but virtually impossible to find replacements for the current Employees should they terminate their employment.

52. Moreover, if Debtor fails to pay the amounts it owes to the Former Employees as described above, the remaining workforce will almost certainly have an extremely negative reaction. The remaining Employees will know the Debtor has not kept its promises to the Former Employees and will question whether they can be comfortable working for Debtor in that environment. The estimated amounts owing to the Former Employees for Prepetition Compensation and PTO are approximately \$51,500.00 -- a relatively small payment in the context of this Case. Yet the consequences of failure to honor such obligations could be catastrophic.

53. Thus, Debtor seeks immediate relief, pursuant to section 105 of the Bankruptcy Code, to authorize Debtor to pay Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, and Employee Benefits, as well as all necessary costs and expenses that are incidental thereto.

C. Certain of Prepetition Deductions Are Held in Trust and Are Not Property of Debtor's Estate.

54. Prepetition Deductions include, without limitation, deductions from Prepetition Compensation for federal, state, or local income, FICA, Medicare, and other “trust-fund” taxes. Section 541 of the Bankruptcy Code provides, in relevant part, that “[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) and (2) of this section only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.” 11 U.S.C. § 541(d). Certain of the Prepetition Deductions are held in trust for the benefit of third party payees, such as taxing authorities, and are, therefore, not property of Debtor’s estate. *See, e.g., Begier v. IRS*, 496 U.S. 53 (1990) (holding that prepetition payment of trust fund taxes could not be avoided because such funds transferred were not property of the estate); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96 (3d Cir. 1994) (holding that income required to withheld by city ordinance and state law is held “in trust” for taxing authorities); *In re Am. Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (holding withholding taxes were not property of debtor’s estate); *see also In re Hanson*, 8 B.R. 34, 37 (Bankr. N.D. Ohio 1980) (sales tax in connection with sale of business was held by counsel for the purchaser and was, therefore, held in trust for the “benefit of the State of Ohio sales tax authority”). Accordingly, payment of Prepetition Deductions that are held in trust on behalf of third party payees, such as taxing authorities, will not prejudice the Debtor’s estate and its creditors, as they are not property of Debtor’s estate.

D. Payment of Prepetition Employee Claims and Benefits Is a Sound Exercise of Debtor's Business Judgment and in the Best Interest of Debtor's Estate.

55. Section 363(b)(1) of the Bankruptcy Code states that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate” 11 U.S.C. § 363(b)(1). If a debtor’s determination to use estate assets represents a reasonable business judgment, the bankruptcy court should approve such use. *See, e.g., In re Weatherly Frozen Food Group, Inc.*, 149 B.R. 480, 482-83 (Bankr. N.D. Ohio 1992) (a section 363 sale may be authorized when a sound business purpose dictates such action); *see also In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (section 363 of the Bankruptcy Code requires that the debtor’s decision be supported by a “sound business purpose”); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (Bankr. D. Del. 1999). Once a debtor articulates a valid business judgment, “the business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’” *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *In re Engman*, 331 B.R. 277, 289 (Bankr. D. Mich. 2005) (the business judgment rule creates a presumption in favor of the fiduciary). The business judgment rule has vitality in chapter 11 cases and shields a debtor’s management from judicial second-guessing. *In re Integrated Res., Inc.*, 147 B.R. at 650.

56. The importance of the relief sought in this Motion cannot be overstated. Debtor relies on Employees to run its business and sell its products. In turn, Employees rely on Debtor for compensation and benefits to support their livelihoods and families. Without payment of the amounts sought herein, Debtor will lose its Employees, who are trained and who possess institutional knowledge. It is therefore a sound business decision to continue to pay these

obligations in the ordinary course. Moreover, as detailed above, certain of the Employees' claims against Debtor are entitled to priority treatment under the Bankruptcy Code, so payment of these claims does not prejudice any parties in interest. And, again, to the extent the payments requested herein relate to Former Employees, the benefits (and avoidance of negative consequences) from making such payments far outweighs the costs involved. Thus, it is in the best interest of Debtor's estate, and a reasonable exercise of Debtor's business judgment, to pay such Employee claims and benefits in the ordinary course of business during this Case.

57. To the extent payment of any medical or other insurance claims under self-insured Employee Benefit plans might exceed the statutory cap on priority claims of \$12,850.00 for any individual Employee, such payments are likewise necessary and appropriate. Employees are not commercial parties that can readily evaluate the credit risk attendant to their employment and benefits. They rely on Debtor to assist in paying their medical and other insurance claims under the Employee Benefit plans in return for their work and the premiums they have paid under the plans. If Debtor does not fulfill its obligations under the Employee Benefits plans, including the payment of medical and dental claims, Employee morale will be irreparably damaged, and Debtor risks quickly losing its workforce. Under the circumstances, relief to pay such claims as they become due in accordance with Debtor's financing arrangements is crucial to the success of this Case.

E. Cause Exists to Authorize and Direct Financial Institutions to Honor Checks and Transfers in Connection with Prepetition Employee Claims and Benefits.

58. Courts routinely grant the relief requested herein when authorizing debtors to pay prepetition claims and obligations owing to or on behalf of employees. *See, e.g., In re Eden Cryogenics, LLC*, No. 14-53294 [Docket No. 38] (Bankr. S.D. Ohio May 15, 2014); *In re STAR Dynamics Corporation*, No. 13-59657-CMC [Docket No. 18] (Bankr. S.D. Ohio Dec. 12, 2013);

In re GLC Ltd., No. 11-11090 [Docket No. 24] (Bankr. S.D. Ohio March 3, 2011); *In re First Community Village*, No. 10-54533 [Docket No. 68] (Bankr. S.D. Ohio May 3, 2010). Debtor has sufficient funds to satisfy the amounts identified in this Motion, by virtue of expected cash flows from ongoing business operations and anticipated access to cash collateral and/or postpetition financing. Also, under Debtor's cash management system, it can identify checks or transfer requests that relate to an authorized payment in connection with Employees' prepetition obligations and claims. Accordingly, Debtor submits that in light of the relief requested in this Motion, the Court should direct banks and financial institutions to honor checks and transfers related to payments that the Court authorizes the Debtor to make in connection with Employees' Prepetition Compensation, Prepetition Deductions, Prepetition Benefits, and costs and expenses incidental thereto, including without limitation, payroll expenses and processing costs.

NOTICE

59. Notice of this Motion has been provided to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the Southern District of Ohio; (b) Debtor's twenty (20) largest unsecured creditors; and (c) the agent for the Debtor's primary secured lender group, Wells Fargo Bank, National Association. Debtor respectfully submits that such notice is appropriate under the circumstances and no other or further notice need be given.

REQUEST FOR WAIVER OF MEMORANDUM IN SUPPORT

60. Debtor requests that the Court deem the contents of this Motion to be sufficient for purposes of satisfying the memorandum in support of Rule 9013-1(a) of the Local Rules of Bankruptcy Procedure for the Southern District of Ohio. The relief requested in the Motion raises no novel issues of law.

WHEREFORE Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: May 1, 2018

Respectfully submitted,

/s/ Thomas R. Allen

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Chapter 11
)
AcuSport Corporation,) Case No. 18-52736
)
Debtor.) Honorable John E. Hoffman, Jr.

**ORDER GRANTING MOTION FOR AN ORDER (I) AUTHORIZING DEBTOR TO
(A) PAY PREPETITION EMPLOYEE WAGES, SALARIES, AND OTHER
COMPENSATION, (B) REIMBURSE PREPETITION EMPLOYEE BUSINESS
EXPENSES, (C) PAY PREPETITION PAYROLL TAXES AND BENEFITS FOR WHICH
PAYROLL DEDUCTIONS WERE MADE, (D) MAKE PREPETITION
CONTRIBUTIONS AND PAY PREPETITION BENEFITS UNDER EMPLOYEE
BENEFIT PROGRAMS, AND (E) PAY RELATED COSTS AND EXPENSES; AND
(II) DIRECTING FINANCIAL INSTITUTIONS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED
TO SUCH RELIEF [RELATED TO DOC. NO. X]**

Upon the motion (the “*Motion*”)¹ of AcuSport Corporation, the debtor and debtor in possession (“*Debtor*”), in this chapter 11 case (the “*Case*”), for entry of an order (this “*Order*”),

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

pursuant to sections 105, 363, 507, and 541 of title 11 of the United States Code (the “*Bankruptcy Code*”), authorizing Debtor to (a) pay prepetition Employee wages, salaries, and other compensation, (b) reimburse prepetition Employee business expenses, (c) pay prepetition payroll taxes and benefits for which payroll deductions were made, (d) make prepetition contributions and pay prepetition benefits under employee benefit programs, and (e) pay related costs and expenses; and (ii) directing financial institutions to honor and process checks and transfers related to such relief [Docket No. ___]; and upon consideration of the Flanagan Declaration and the entire record of this Case; and it appearing that the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157; and it appearing that the Motion is a core matter pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and it appearing that the relief requested in the Motion is in the best interests of Debtor’s estate, its creditors, and other parties in interest; and after due deliberation, and good and sufficient cause appearing therefore,

IT IS ORDERED that:

1. The Motion is granted as set forth herein.
2. Debtor is authorized, but not directed, to make all payments required under or related to the Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, and Employee Benefits, including payroll expenses, processing costs, and other costs and expenses incidental thereto.

3. This Order shall be without prejudice to Debtor's rights to dispute any claim on any grounds and shall not be construed as an implication of admission that any particular claim constitutes an allowed claim entitled to relief requested in the Motion or otherwise.

4. All applicable banks and financial institutions shall be authorized, subject to the terms of any order entered in this Case governing the cash management systems of Debtor, to receive, process, honor and pay any and all checks drawn on Debtor's payroll or disbursement accounts and any other transfers that are related to the Prepetition Compensation, Prepetition Deductions, Prepetition Expenses, Employee Benefits, and costs and expenses incidental thereto, whether presented prior to or after the Petition Date.

5. The authorizations in this Order for Debtor to make payments and otherwise disburse funds are subject to the terms and conditions of the Court's orders authorizing the use of cash collateral or postpetition financing entered in this Case.

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

IT IS SO ORDERED.

Submitted By:

/s/ Thomas R. Allen _____

Thomas R. Allen (0017513)

Richard K. Stovall (0029978)

J. Matthew Fisher (0067192)

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