

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:

CAFE HOLDINGS CORP. *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 18- \_\_\_\_\_ ( )

(Joint Administration Requested)

**MOTION FOR ENTRY OF AN ORDER (A) AUTHORIZING THE DEBTORS TO PAY  
AND HONOR CERTAIN PREPETITION WAGES, BENEFITS AND OTHER  
COMPENSATION OBLIGATIONS; AND (B) AUTHORIZING FINANCIAL  
INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED  
TO SUCH OBLIGATIONS**

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) hereby move this Court (the “**Motion**”) for entry of an order (the “**Order**”), substantially in the form attached hereto, (a) authorizing the Debtors to pay and honor certain prepetition wages, benefits, and other compensation obligations, (b) authorizing financial institutions to honor and process checks and transfers related to such obligations, and (c) granting related relief. In support of this motion, the Debtors rely on the *Declaration of Eric Easton in Support of Chapter 11 Petitions and First Day Relief* (the “**First Day Declaration**”). In further support of this motion, the Debtors respectfully state as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Local Civil Rule 83.IX.01, D.S.C. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Cafe Holdings Corp. (7910); Cafe Enterprises, Inc. (4946); CE Sportz LLC (2009); and CES Gastonia LLC (0863). The location of the Debtors’ corporate headquarters is 4324 Wade Hampton Blvd., Suite B, Taylors, South Carolina 29687.

Procedure (the “**Bankruptcy Rules**”), to the entry of an order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 101(2), 105(a), 363, 507(a)(4)-(5), 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) and Rules 1015(b) and 6003 of the Bankruptcy Rules.

### **BACKGROUND**

4. On the date hereof (the “**Petition Date**”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. Each Debtor is authorized to continue to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrently with the filing of this motion, the Debtors filed a motion requesting procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). As of the date hereof, no trustee, examiner, or statutory committee has been appointed in these chapter 11 cases.

5. Additional information regarding the Debtors, including their business operations, corporate and capital structure, and the events leading to the Petition Date, is more fully set forth in the First Day Declaration.<sup>2</sup>

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

### **RELIEF REQUESTED**

6. To minimize the personal hardship the Employees will suffer in connection with the filing of these cases, the Debtors request entry of an order (i) authorizing, but not directing, the Debtors to pay, in their sole discretion, the Employee Obligations as described in this Motion, (ii) authorizing, but not directing, the Debtors to maintain and continue to honor the Employee Programs as they were in effect as of the Petition Date, and as may be modified, amended or supplemented from time to time in the ordinary course of business, and (iii) authorizing the applicable banks and other financial institutions to receive, honor, process and pay any and all checks presented for payment and all electronic payment requests made by the Debtors related to the Employee Programs and Obligations, whether such checks were presented or electronic payment requests were submitted before or after the Petition Date.

### **THE EMPLOYEES**

7. The Debtors have a current workforce of approximately 1,671 employees (the “**Employees**”) in the five states in which they conduct their operations. Approximately 435 of those Employees are employed on a full-time basis, while the remainder of the workforce is employed on a part-time basis. The Debtors’ workforce includes approximately 18 corporate support personnel and multi-unit operators (area and regional managers) who are primarily based in, or report to, the Debtors’ headquarters located in Taylors, South Carolina (the “**Support Center Employees**”). The remainder of the Debtors’ workforce includes restaurant managers (“**Restaurant Managers**”) and other field personnel (“**Team Members**”). Approximately 501 of the Debtors’ Employees are eligible to receive benefits under the Debtors’ various benefits plans described herein. All of the Employees are employed by Debtor Café Enterprises, Inc. (“**Café Enterprises**”).

8. The Employees possess the institutional knowledge, experience, and skills necessary to support the Debtors' business operations during the chapter 11 process and to support a successful reorganization of the Debtors' business operations. Additionally, the Employees generally rely on their compensation from the Debtors to pay their daily living expenses. The Debtors also incur a number of obligations related to the Employees, such as paid vacation and other time off, federal and state withholding taxes and other withheld amounts, health and welfare benefits, life and accidental death and dismemberment insurance, long-term disability coverage, 401(k) contributions, HSA contributions, expense reimbursements, and other benefits that the Debtors have historically provided in the ordinary course of business. The Debtors' compensation and benefit programs are referred to herein as the "**Employee Programs**" and the obligations to the Employees thereunder are referred to herein as the "**Employee Obligations**" and are more fully described below.<sup>3</sup>

9. The Debtors need the Employees' continued commitment and support; therefore, the Debtors are requesting the relief set forth in this Motion to minimize any hardship to the Employees resulting from the commencement of the Debtors' chapter 11 cases. The Debtors must take all necessary steps to retain their employees and promote morale to preserve and maximize the value of the Debtors' estates.

10. Accordingly, by this Motion, the Debtors seek authority to pay and honor their prepetition Employee Obligations and to continue the Employee Programs, as further detailed below.

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<sup>3</sup> The summary of the Employee Obligations provided herein is qualified entirely by the Debtors' official policies or other practices, programs, or agreements, whether written or unwritten, evidencing an arrangement among the Debtors and their Employees (each, an "**Official Policy**"). In the event of any inconsistency or ambiguity between this summary and an Official Policy, the terms of such Official Policy shall govern.

**THE EMPLOYEE OBLIGATIONS AND EMPLOYEE PROGRAMS**

**I. Unpaid Wages**

11. In the ordinary course of business, the Debtors, who process all payroll obligations in-house,<sup>4</sup> issue payroll to all Employees every Friday. The Debtors pay, on average, approximately \$530,000<sup>5</sup> in gross wages, salary, and employer-paid payroll taxes each weekly pay period. On or about November 13, 2018, the Debtors funded their payroll obligations for the prior week in the amount of \$415,760.49, including payroll taxes in the amount of \$127,678.56. As of the Petition Date, the Debtors have outstanding, unfunded payroll obligations for the time period between November 14, 2018 and the Petition Date.

12. In total, the Debtors estimate that up to approximately \$180,000 in prepetition wages, adjustments to prepetition wages, and salaries owed to Employees (collectively, the “**Unpaid Wages**”). Pursuant to this Motion, the Debtors seek authorization, but not direction, to pay and honor in the ordinary course of business the Unpaid Wages and to continue to pay their Employees after the Petition Date in the ordinary course.

**II. Independent Contractors**

13. The Debtors engage three independent contractors (the “**Independent Contractors**”). Two of the Independent Contractors provide marketing functions for the Debtors, and the other Independent Contractor assists the Debtors’ payroll department. The Debtors pay the Independent Contractors on a weekly basis.

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<sup>4</sup> The Debtors use First Financial Bank’s services in order to pay Employees via direct deposit pursuant to a Money Network Services Agreement. Employees directly pay all fees associated with First Financial Bank’s services. The Debtors do not pay Money Network on account of these services.

<sup>5</sup> This amount is exclusive of gratuities collected by the Debtors for tipped employees. Gratuities are paid in cash to employees at the restaurant level.

14. The Debtors rely heavily on the Independent Contractors, who are essential and integral parts of the Debtors' business operations. Moreover, the Independent Contractors have worked with the Debtors over time and have gained institutional knowledge and training. If the Debtors do not meet their obligations to the Independent Contractors, the Independent Contractors may refuse to continue working for the Debtors, which would cause a material disruption to the Debtors' operations.

15. The Debtors believe that they owe approximately \$5,000 in unpaid obligations to the Independent Contractors as of the Petition Date and estimate that approximately \$15,000 will come due to the Independent Contractors within 21 days after the Petition Date. The Debtors intend to continue to pay the Independent Contractors going-forward in the ordinary course of business.

### **III. Monthly Performance Plan**

16. In addition to their regular salary or hourly pay, certain Employees participate in a monthly reward program (the "**Monthly Performance Plan**"). The Monthly Performance Plan is designed to incentivize and reward Employees based on their performance and the overall performance of the Debtors' business operations, and is an important part of eligible Employees' overall compensation packages.

17. Participating Employees are entitled to monthly compensation based on achieving performance targets. Participants in the Monthly Performance Plan are Restaurant Managers, including operating partners, general managers, kitchen managers, and service managers. Importantly, none of the participants in the Monthly Performance Program are "insiders" as defined in the Bankruptcy Code.

18. The Debtors believe that a modest amount (less than \$30,000) of rewards are accrued and unpaid as of the Petition Date. The Debtors seek authorization, but not direction, to

pay and honor all amounts owed under the Monthly Performance Plan as they come due in the ordinary course of business.

#### **IV. Paid Time Off**

19. The Debtors, in the ordinary course of business, provide certain eligible Employees with paid time off (the “**PTO**”) in the form of vacation time, sick leave, and paid bereavement leave. According to the Debtors’ policies, the amount of PTO available to eligible Employees and the rate at which such PTO accrues is generally determined by the Employees’ length of employment with the Debtors and ranges from one to 15 days per year. Eligible Employees are not entitled to accrue or carry over any unused PTO. Subject to compliance with applicable state law, eligible Employees are not entitled to cash payment for any unused PTO upon termination. PTO programs are typical and customary in the Debtors’ industry. Failure to continue PTO going-forward would put the Debtors at a competitive disadvantage. Accordingly, the Debtors request that they be authorized to continue to offer PTO postpetition in accordance with the prepetition policies.

#### **V. Workers’ Compensation**

20. Under the laws of various states in which the Debtors operate, the Debtors are required to maintain workers’ compensation liability insurance and to provide employees with workers’ compensation coverage for claims arising from or related to their employment with the Debtors. The Debtors maintain a workers’ compensation policy issued by Zurich (the “**Zurich Policy**”), which provides for statutorily-mandated coverage.

21. Most recently, the Debtors paid approximately \$311,000 for the premium for the Zurich Policy covering July 1, 2018 through July 1, 2019. Over the last 12 months, the costs to the Debtors (inclusive of losses paid, fees, and expense of administration) related to the Zurich Policy has ranged from approximately \$1,000 to \$3,000 per month. Zurich serves as the

administrator under the Zurich Policy. The Debtors estimate that they owe approximately \$13,450 on account of workers' compensation claims under the Zurich Policy as of the Petition Date.

22. Failure to maintain workers' compensation insurance in various states in which the Debtors conduct business could result in the institution of administrative or legal proceedings and material fines against the Debtors and their officers and directors. By this motion, the Debtors seek authority, but not direction, to satisfy prepetition obligations arising under the Zurich Policy and to continue to pay all amounts associated with the Zurich Policy in the ordinary course of business.

## **VI. Employee Benefits**

23. The Debtors have established various plans and policies to provide eligible Employees with various medical, dental, prescription drug, vision, life insurance, severance, retirement savings, and other benefits (collectively, the "**Employee Benefits**," and amounts owed under these plans, the "**Employee Benefit Obligations**"), which they intend to continue after the Petition Date in the ordinary course of business, subject to any adjustments or modifications that they determine are necessary, prudent, and in the best interests of their estates.<sup>6</sup> The Debtors seek the authority, but not the direction, to satisfy all outstanding amounts related to Employee Benefit Obligations that arose prior to the Petition Date including, without limitation, any payments for claims, premiums and fees owed for administrative costs and other amounts required in connection with the Debtors' Employee Benefit Obligations, as such amounts become due in the ordinary

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<sup>6</sup> Where required under applicable non-bankruptcy law, including COBRA, the Debtors provide eligible Employees with the opportunity to continue participating in the applicable Employee Benefits programs following their termination by the Debtors. The Debtors intend for the relief requested herein to apply to such former employees consistent with the Debtors' prepetition practices and the requirements of applicable law. Failure to continue to provide eligible Employees with this opportunity would hurt morale and would lead to Employees seeking other opportunities with better benefits.

course of the Debtors' business. The Employee Benefits include, but are not limited to, the following:

**A. Medical, Vision, and Dental Benefits**

24. The Debtors offer self-insured medical and prescription insurance coverage to their eligible full-time Employees under three plans—(i) a plan administered by UnitedHealthcare (the “**UHC Plan**”); (ii) a plan administered by the Boon Group (the “**Boon Plan**”);<sup>7</sup> and (iii) a high deductible health plan administered by UnitedHealthcare (the “**HSA Plan**”), with an attached health savings account (“**HSA**”) (collectively, the “**Medical Insurance Plans**”). Additionally,

25. Salaried Employees averaging 30 or more hours per week are eligible to participate in the UHC Plan. Approximately 100 Employees participate in the UHC Plan. The UHC Plan provides coverage for, among other medical costs, outpatient and inpatient services and preventative care. Employees pay bi-weekly premiums between approximately \$48 and \$145, depending on the level of coverage selected under the UHC Plan. The Debtors pay, in advance, approximately \$3,800 per month for administrative fees under the UHC Plan.

26. All Salaried Employees are eligible to participate in the HSA Plan. Approximately 30 salaried Employees participate in the HSA Plan. The HSA Plan provides coverage for, among other medical costs, outpatient and inpatient services and preventative care. Employees pay weekly premiums between approximately \$30 and \$115, depending on the level of coverage selected under the HSA Plan.

27. The Debtors pay claims submitted under the UHC Plan and HSA Plan each week and project that, for 2018, they will have average funding requirements of \$17,000 per week on

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<sup>7</sup> As described in more detail in paragraph 28 below, with respect to the Boon Plan, the Debtors remit weekly premiums paid by Employees to the Boon Group Inc., and do not retain such premiums.

account of both Plans. The Debtors believe that they are current on amounts owed on account of the UHC Plan and HSA Plan.

28. Finally, hourly Employees working an average 30 or more hours per week over a ninety day period are eligible to participate in the Boon Plan. Approximately 140 hourly Employees participate in the Boon Plan. The Boon Plan provides coverage for, among other things, medical costs, outpatient and inpatient services and preventative care. The Debtors permit Employees to enroll in the Boon Plan but do not provide any reimbursement for this program. Employees pay weekly premiums between approximately \$10 and \$70, depending on the level of coverage under selected. The Debtors pay approximately \$700 per month for administrative fees under the Boon Plan. The Debtors do not pay claims submitted under the Boon Plan. The Debtors believe that they are current on amounts owed on account of the Boon Plan.

29. To mitigate the risk of large claims under the UHC Plan, the Debtors obtained a \$100,000 per-occurrence stop-loss insurance policy from Sun Life (the “**Sun Life Policy**”). The Debtors pay approximately \$22,000 per month in premiums for the Sun Life Policy for the period February 1, 2018 through January 31, 2019. The Debtors pay all claims to UnitedHealthcare directly and are then reimbursed by Sun Life. The Debtors estimate that they owe approximately \$22,000 on account of the Sun Life Policy as of the Petition Date.

30. By this motion, the Debtors seek the authority, but not direction, to continue the Medical Insurance Plans on a postpetition basis in the ordinary course of business.

31. In addition to the Medical Plans, the Debtors offer vision insurance to eligible full-time Employees through UnitedHealthcare (the “**Vision Plan**”). Participating Employees contribute 100% of the cost of participation in the Vision Plans. As such, nothing is owed on account of the Vision Plan as of the Petition Date. By this motion, the Debtors seek the authority,

but not direction, to continue the Vision Plan on a postpetition basis in the ordinary course of business.

32. Finally, the Debtors offer dental insurance to eligible full-time Employees through Guardian (the “**Dental Plan**”). Approximately, 207 Employees participate in the Dental Plan. The Debtors pay in advance approximately \$1,244 per month for administrative fees under the Dental Plan. The Debtors believe that they are current on amounts owed to Guardian on account of the Dental Plan as of the Petition Date. By this motion, the Debtors seek the authority, but not direction, to satisfy prepetition obligations arising under the Medical Insurance Plans and to continue to pay all amounts associated with the Medical Insurance Plans in the ordinary course of business.

**B. Life Insurance**

33. The Debtors offer employer-paid basic life and accidental death and dismemberment insurance (collectively, the “**Life Insurance**”) to eligible full-time Employees. Employees may also elect to purchase, at their own cost, additional voluntary Life Insurance for themselves and/or their families. Eligible Employees are provided with employer-paid Life Insurance with coverage in an amount equal to their annual earnings. Spouses and dependent children of eligible Employees also receive Life Insurance coverage in the amount of \$2,500. The Debtors pay approximately \$1,700 per month to Guardian on account of the Life Insurance. The Debtors believe that they are current on amounts owed on account of the Life Insurance as of the Petition Date. By this motion, the Debtors seek the authority, but not direction, to satisfy prepetition obligations on account of Life Insurance and to continue to pay all amounts associated with Life Insurance in the ordinary course of business.

**C. Disability Plans**

34. The Debtors also offer self-funded short-term disability and long-term disability coverage through Guardian to eligible full-time Employees. The short-term policy provides income replacement of 66 2/3% of base income for up to 13 weeks, with a weekly maximum income replacement of \$1,500. The Debtors pay approximately \$30 per month in administrative fees related to short-term disability insurance costs, and there are currently no outstanding amounts due on account of the short-term disability policy. The long-term policy provides income replacement of 60% of base income for an extended period of time, with a weekly maximum income replacement of \$5,000. The Debtors pay approximately \$100 per month on account of long-term disability insurance costs. As of the Petition Date, no Employees are actively receiving short-term or long-term disability. By this motion, the Debtors seek the authority, but not direction, to satisfy prepetition obligations on account of the disability plans and to continue to pay all amounts associated with the disability plans in the ordinary course of business..

**D. Severance**

35. The Debtors have historically provided severance payments to eligible terminated Employees (“**Severance Pay**”), although the Debtors do not have a formal Severance Pay policy in place. In lieu of a formal policy, the Debtors typically adhere to the following guidelines when determining Severance Pay:

- (i) **Hourly Employees:** N/A
- (ii) **Restaurant Managers:** Restaurant Managers who have been terminated as a result of a closing and have not been offered an alternative position by the Debtors are generally eligible for Severance Pay in the amount of one week for each year of service worked with the Debtors, up to a maximum of four weeks;
- (iii) **Support Center Employees:** Directors and office staff who have been terminated for reasons other than fraud, gross negligence, or other serious handbook violations are generally eligible for Severance Pay in the amount

of one week for each year of service worked with the Debtors, up to a maximum of four weeks;

- (iv) **Vice presidents and other executives:** Vice presidents and other executives who have been terminated by the Debtors are generally eligible for Severance Pay in the amount of one week for each year of service worked with the Debtors, plus a four-week base;
- (v) **Certain officers, senior management members, and Employees:** Certain officers, senior management members, and other Employees have pre-negotiated severance packages as part of their employment agreements.

Severance Pay is considered for approval by the Chief Executive Officer and Chief Financial Officer of the Debtors. Employees are not eligible for Severance Pay if the Employee committed a crime while working for the Debtors.

36. Severance Pay is conditioned on a release of the Debtors and their affiliates, successors, assigns, and employees from any and all claims, liabilities, causes of action, and expenses, of any nature whatsoever pertaining or related to the Employee's employment with or separation from the Debtors. Severance Pay is distributed as part of the Debtors' normal payroll cycle, rather than through a lump sum payment.

37. The Debtors have already effectuated closure of underperforming restaurant locations and certain reductions in force. While there is currently no plan for further reductions in force, it is possible that the Debtors may close additional underperforming restaurants during the course of this case. To ensure that all Employees will aid the Debtors in achieving their restructuring initiatives, including maximizing value for stakeholders, the Debtors believe it is prudent and necessary to continue their prepetition Severance Pay practices. Doing so will ensure that all Employees, including some whose efforts may be necessary to the effective implementation of the Debtors' restructuring at the time when they are personally facing the loss

of their own employment (such as managers of closing restaurants), will continue to work towards achieving the goals of these chapter 11 cases.

38. The Debtors intend, going-forward, to continue to provide eligible non-insider Employees who are terminated with Severance Pay consistent with their past practices, including conditioning all Severance Pay on a release of the Debtors, to all eligible employees terminated as a result of the anticipated store closings. The Debtors are *not* asking for authority in this Motion to pay Severance Pay to any current or former officer of the Debtors or other insiders.

39. Given the critical need to continue their Severance Pay practices, the Debtors are requesting authority to continue their Severance Pay practices upon entry of the Order approving the relief requested herein.

40. The Debtors are current on all Severance Pay obligations as of the Petition Date. By this motion, the Debtors request authority, but not direction, to continue to pay Severance Pay on a postpetition basis in the ordinary course of business with respect to eligible, non-insider Employees.

## **VII. 401(k) Plan**

41. The Debtors maintain a retirement savings plan (the “**401(k) Plan**”), administered by ADP that meets the requirements of Section 401(k) of the Internal Revenue Code of 1986. ADP’s fees for its 401(k) Plan services are approximately \$1,000 to \$1,300 per pay period. The Debtors believe that they are current on all amounts owed to ADP as of the Petition Date. By this motion, the Debtors request authority to pay any amounts owed to ADP as of the Petition Date and to continue to pay ADP in the ordinary course of business.

42. The Debtors collect contributions from eligible, participating Employees each payroll cycle and transfer those contributions into the 401(k) Plan as directed by the Employees. Some of these amounts collected from Employees may not have been transferred into the 401(k)

Plan prior to the Petition Date. Such amounts are not assets of the Debtors' estates. Accordingly, by this motion, out of an abundance of caution, the Debtors request authority to continue to transfer the Employees' contributions to the 401(k) Plan as directed by the Employees on a going-forward basis in the ordinary course of business.

### **VIII. HSA Program**

43. As noted above, under the Debtors' HSA Plan, the Debtors offer eligible Employees the ability to contribute a portion of their pre-tax compensation to an HSA to pay for qualified medical and dependent care expenses (the "**HSA Program**"). As of the Petition Date, the Debtors estimate owing approximately \$12,000 on account of the HSA Program. Accordingly, by this Motion, the Debtors request authority, but not direction, to pay all prepetition amounts due under the HSA Program and to continue to honor their obligations related to the HSA Program on a going-forward basis in the ordinary course of business.

### **IX. Employee Payroll Garnishments, Other Payroll Deductions, and Employer-Paid Taxes**

44. The Debtors deduct from their Employees' paychecks certain taxes, such as payroll and social security taxes, required to be withheld by certain federal, state and local taxing authorities (the "**Payroll Deductions**"). The Debtors directly pay the amounts to the appropriate governmental authorities. The Debtors believe such Payroll Deductions are not assets of their estates and seek authority to continue to forward any Payroll Deductions not forwarded as of the Petition Date in the ordinary course of business.

45. Occasionally, the Debtors are presented with garnishment or child support orders requiring the withholding of Employee wages to satisfy such Employee obligations. Additionally, certain Employees have voluntary deductions for items such as whole life, accident, critical illness, and hospital indemnity insurance programs. Payments of these obligations are made from amounts

otherwise payable to the Employees and are not an incremental cost obligation of the Debtors' estates.

46. The Debtors seek authority to continue making such Payroll Deductions and to pay over such amounts to third parties as requested or required.

47. Finally, the Debtors are subject to certain taxes, fees, and expenses, including federal wage and social security taxes and unemployment taxes and contributions (the "**Employer Taxes and Fees**"). The Employer Taxes and Fees are determined, for the most part, based on the gross wages and salaries that the Debtors pay to their Employees, and are required to be paid on a periodic basis.

48. The Debtors estimate that, as of the Petition Date, the Debtors have withheld approximately \$128,000 in Employer Taxes and Fees to be remitted to the appropriate third-party recipient. Failure to remit Employer Taxes and Fees could result in the institution of administrative or legal proceedings and material fines against the Debtors and their officers and directors. The Debtors hereby seek authorization, but not direction, to remit these amounts to the applicable authorities consistent with the Debtors' prepetition practices in the ordinary course of business.

#### **X. Reimbursable Business Expenses**

49. The Debtors reimburse their employees who incur and pay a variety of approved business-related expenses in the ordinary course of performing their duties ("**Reimbursement Obligations**"). Some Employees initially incur and pay such expenses by using personal credit cards but are subsequently reimbursed by the Debtors after submission and approval of expense reimbursement requests.

50. Employees must submit all expense reimbursement requests in accordance with the Debtors' internal policy in order to qualify for reimbursement, and each request is reviewed by a supervisor to ensure compliance with the Debtors' policies.

51. The Debtors receive and process Reimbursable Obligations on a rolling basis. Consequently, it is difficult for the Debtors to determine the exact amount of Reimbursable Expenses outstanding as of the Petition Date because, among other things, Employees may have expenses that they have yet to submit to the Debtors for reimbursement. The Debtors estimate that they remit approximately \$48,000 per month on account of Reimbursement Obligations. As of the Petition Date, the Debtors estimate that they owe approximately \$5,000 for submitted but unpaid Reimbursement Obligations.

52. To avoid harming Employees who incurred Reimbursement Obligations, the Debtors request authority, in their discretion and in the exercise of their business judgment, to satisfy all prepetition Reimbursement Obligations and to continue to honor all of their Reimbursement Obligations postpetition in the ordinary course of business.

#### **XI. Corporate Credit Card**

53. The Debtors provide a single corporate credit card (the “**Corporate Credit Card**”) issued by National Bank of South Carolina (“**NBSC**”) issued to the Debtor’s controller. (the “**Corporate Credit Card Holder**”). The Corporate Credit Card Holder uses the Corporate Credit Card to pay for regular recurring business expenses, including business travel, regulatory fees, information technology expenses, and necessary payments to vendors (collectively, the “**Credit Card Expenses**”). At the end of each billing cycle, NBSC sends monthly statements directly to the Debtors and the Debtors pay any outstanding balances on the 1<sup>st</sup> day of each month. On average, the Debtors pay approximately \$20,000 per month to NBSC for amounts incurred on the Corporate Credit Card.

54. As of the Petition Date, the Debtors estimate there is an outstanding balance of approximately \$21,000 on the Corporate Credit Card that is due and owing. By this Motion, the Debtors respectfully request authority to pay all prepetition Credit Card Expenses.

55. The Corporate Credit Card Holder uses the Corporate Credit Cards on a regular basis to pay for valid and legitimate business expenses, the amounts of which can often be significant, with the understanding that the Debtors will pay the balances incurred.

56. Accordingly, the Debtors seek authority to (a) pay the prepetition outstanding balance on the Corporate Credit Card and (b) continue to offer the Corporate Credit Card and pay any balances incurred thereon on a postpetition basis in the ordinary course of business and consistent with past practices.

## **XII. Miscellaneous Benefits**

57. The Debtors are currently aware of and may discover other de minimis prepetition obligations that are owed with respect to the employees (the “**Miscellaneous Benefits**”). For example, certain Employees are entitled to reduced-price meals for each shift worked. The Debtors intend to continue to honor these Miscellaneous Benefits in the ordinary course of business.

### **BASIS FOR RELIEF**

#### **I. Authority to Honor the Employee Obligations and Continue the Employee Programs Is Warranted Under the Facts of These Chapter 11 Cases**

##### **A. Certain of the Employee Obligations and Benefits Are Entitled to Priority Treatment**

58. Section 507(a)(4) and 507(a)(5) of the Bankruptcy Code entitle the Unpaid Wages and a number of other prepetition Employee-related obligations to priority treatment. Likewise, section 507(a)(8) of the Bankruptcy Code affords statutory priority to many of the Employer Taxes and Fees. To confirm a chapter 11 plan, the Debtors must pay priority claims in full. *See* 11 U.S.C. § 1129(a)(9)(B) and (C) (requiring payment in full under a plan of certain allowed unsecured claims for (a) wages, salaries, or commissions, including vacation or sick leave pay, earned by an individual, (b) contributions to an employee benefit plan, and (c) priority tax obligations). Thus, granting the relief sought herein would only affect the timing of payments of

Employee Obligations that are entitled to priority treatment under sections 507(a) of the Bankruptcy Code.

**B. Authority to Honor the Employee Obligations Is Authorized Under Section 363(b) of the Bankruptcy Code**

59. Section 363 of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], 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). Under section 363(b), courts require only that the debtor “show that a sound business purpose justifies such actions.” *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (requiring that the debtor show a “sound business purpose” to justify its actions under section 363 of the Bankruptcy Code) (internal citations omitted); *see also In re Phx. Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (requiring a “good business reason” for a sale under section 363 of the Bankruptcy Code); *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (same). Moreover, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *In re Johns Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”).

60. As described above and in the First Day Declaration, the Employees are essential to the continued operation of the Debtors’ business. The Debtors believe their enterprise value will be materially impaired by any workforce instability or attrition at this critical juncture. The relief requested in this Motion is, therefore, a necessary and critical element of the Debtors’ efforts to preserve value for their stakeholders. Absent approval of the relief requested in this Motion, Employees may face significant financial hardship and could seek alternative employment

opportunities or will become demoralized and less productive. The Debtors cannot readily replace their human capital without significant efforts—which may not be successful given the overhang of these chapter 11 cases and the widespread and disparate workforce that the Debtors have across the Southeast. Paying the Employee Obligations is necessary for the Debtors to avoid unnecessary recruitment and related costs, to avoid certain operating risks, to ensure safe food preparation and high quality customer service in the Debtors’ restaurants, and to minimize the disruption to their operations during these chapter 11 cases. As such, the costs of the Employee Obligations are far outweighed by the benefit of preserving the Debtors’ operations as a going concern and far outweigh the potential destruction in value that would occur if the Debtors were unable to operate their business.

**C. Continuation of the Employee Programs and Payment of the Employee Obligations Are Warranted Under the Doctrine of Necessity**

61. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The Court may use its power under section 105(a) to authorize payment of the Employee Compensation and Benefits under the “necessity of payment” rule (also referred to as the “doctrine of necessity”). See *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992).

62. Courts have recognized “the existence of the judicial power to authorize a Debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the Debtor.” *In re Synteen Tech, Inc.*, No. 00-002203, 2000 WL 33709667 at \*2 (Bankr. D.S.C. April 14, 2004)(quoting *In re Ionosphere*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that necessity of payment doctrine permits “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”).

63. Continuation of the Employee Programs is warranted under the doctrine of necessity. The Employees provide the Debtors essential services necessary to conduct their business. As discussed above, the Debtors and their stakeholders cannot afford to lose their vital human capital during this critical period. Payment of the Employee Obligations will give the Debtors the greatest likelihood to retain their Employees as the Debtors seek to preserve and maximize the value of their assets and business while in chapter 11. The failure to continue the Employee Programs and pay obligations related thereto (including the Employee Obligations) would place the Debtors’ efforts in this regard in material jeopardy.

## **II. Payment of Certain Employee Compensation and Benefits Obligations Is Required by Law and the U.S. Trustee’s Operating Guidelines**

64. Additionally, the failure to pay the Payroll Taxes could result in tax liabilities and penalties for both the Employees and the Debtors, and potentially to the Debtors’ directors and officers. Likewise, the failure to transmit garnishments and other similar deductions can cause hardship to certain Employees and an administrative burden for the Debtors. Indeed, if the Debtors were to be prohibited from transmitting such deductions, the Debtors would expect inquiries from garnishors regarding the Debtors’ failure to submit, among other things, child support and alimony payments that are not the Debtors’ property, but, rather, have been withheld from Employees’ paychecks on such parties’ behalves. Further, if the Debtors cannot remit these amounts, the Employees may face legal action due to the Debtors’ failure to submit such payments.

65. Moreover, maintaining the workers’ compensation policy is indisputably justified because applicable state law and the Chapter 11 Operating Guidelines (the “**Guidelines**”) promulgated by the Office of the United States Trustee (“**U.S. Trustee**”) require that the Debtors

maintain appropriate insurance, including workers' compensation insurance. If the Debtors fail to maintain the workers' compensation insurance, state laws may prohibit the Debtors from operating in those states and the U.S. Trustee may also take action against the Debtors as a result of their failure to adhere to the Guidelines. Payment of all amounts that may be owed under the workers' compensation policy, therefore, is important to the Debtors' continued operations and the success of the Debtors' efforts in these chapter 11 cases.

**III. The Severance Pay and Monthly Performance Plans are Reasonable and a Sound Exercise of Business Judgment**

66. The Debtors further request that they be allowed to continue to honor the Monthly Performance Plans and continue the Severance Pay program in the ordinary course of business and to pay to all non-insider Employees such amounts that become due during the course of these chapter 11 cases. The Debtors submit that these programs should be reviewed under section 363(c)(1) of the Bankruptcy Code because these programs are simply a preexisting program that the Debtors have maintained in the ordinary course, and seek to make outstanding payments to the Employees on a post-petition basis. *See In re Blitz U.S.A. Inc.*, 475 B.R. 209, 215 (Bankr. D. Del. 2012). The Debtors are not seeking to make bonus or severance payments to insiders under this motion; therefore, any limitations imposed by section 503(c) of the Bankruptcy Code are not applicable.

67. The Debtors submit that continuing to maintain the Monthly Performance Plan and Severance Pay, and honor related obligations as set forth herein, is a sound exercise of their business judgment and in the best interests of the estates. The Monthly Performance Plans are long-standing components of the Debtors' overall employee compensation package. The Severance Pay is also a long-standing business practice of the Debtors that helps to facilitate the orderly wind-down of closing stores and allows the Debtors to retain valuable Employees to assist

in the transition that typically accompanies a reduction in force. The Debtors therefore believe that it is necessary to continue these programs on a post-petition basis, and honor their obligations thereunder, in order to ensure that the Employees are not exposed to significant financial constraints due to these chapter 11 cases and to continue to provide the Employees with the appropriate motivation and compensation to help the Debtors succeed.

68. Accordingly, the Debtors seek authority to continue the Monthly Performance Plans and to continue their Severance Pay program in the ordinary course of business, including payment of prepetition obligations related thereto, if any, as set forth herein.

**THE REQUIREMENTS OF BANKRUPTCY RULE 6003 ARE SATISFIED**

69. Pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to use property of the estate within 21 days after the Commencement Date if the relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001).

70. As described above, the Debtors submit that, consistent with Bankruptcy Rule 6003(b), immediate entry of an order approving payment of the Employee Obligations is necessary to avoid immediate and irreparable harm to the Debtors and their estates, in addition to the Employees. The vast majority of the Employees rely exclusively on their full compensation, benefits and reimbursement of their expenses to continue to pay their daily living expenses, and these Employees will be exposed to significant financial difficulties if the Debtors are not permitted to pay the unpaid Employee Obligations. The Debtors believe that if they are unable to

honor such obligations, Employee morale and loyalty will be jeopardized at a time when such support is critical.

71. Preservation of the value of the estates depends upon a stable work force. Thus, any significant number of Employee departures or deterioration in morale at this time will substantially and adversely impact the Debtors' business and result in immediate and irreparable harm to the estates and their creditors. There is a real, immediate risk that, if the Debtors are not authorized to continue to satisfy Employee Obligations in the ordinary course, Employees would no longer support and maintain the operations of the Debtors, thereby crippling the Debtors' business operations and instantly destroying the prospects of a successful reorganization. Consequently, it is critical that the Debtors continue in their ordinary course personnel policies, programs and procedures that were in effect prior to the Petition Date, except as otherwise set forth herein, for all of their Employees. Cause therefore exists for the Court to grant the relief requested herein immediately, as permitted by Bankruptcy Rule 6003.

**WAIVER OF BANKRUPTCY RULES 6004(A) AND 6004(H)**

72. To successfully implement the foregoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h) to the extent applicable to this motion.

**RESERVATION OF RIGHTS**

73. Authorization to pay any amounts under this Motion shall not be deemed to constitute post-petition assumption or adoption of any contract, program or policy pursuant to section 365 of the Bankruptcy Code. The Debtors reserve all their rights under the Bankruptcy Code with respect thereto. Moreover, authorization to pay all amounts under this Motion shall not affect the Debtors' right to contest the amount or validity of any Employee Obligations, including

without limitation the Payroll Deductions or Employer Taxes and Fees that may be due to any taxing authority.

74. Accordingly, as authorized by sections 105(a) and 363(b) of the Bankruptcy Code, the Debtors seek authority to pay the Employee Obligations that become due and owing during the pendency of these cases and to continue at this time their practices, programs and policies with respect to the Employees, as such practices, programs and policies were in effect as of the Petition Date. The Debtors submit that the relief requested herein is essential and critical to their ability to maximize value for their creditors.

#### **NOTICE**

75. Notice of this motion has been provided to the following parties: (i) the Office of the United States Trustee for the District of South Carolina; (ii) the Office of the United States Attorney General for the District of South Carolina; (iii) the Internal Revenue Service; (iv) Atalaya Administrative LLC; (v) ACM Fatz VII LLC; (vi) Midtown Madison Management LLC; (vii) Shrayne Capital, LLC; (viii) Benefit Street Partners; (ix) Milestone Partners; (x) Old Mill Stream, LLC; (xi) Triangle Mezzanine Fund LLLP; (xii) Sysco; (xiii) the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (xiv) all parties who, as of the filing of this motion, have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002; and (xv) all applicable government agencies to the extent required by the Bankruptcy Rules and the Local Rules. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**NO PRIOR REQUEST**

76. The Debtors have not previously sought the relief requested herein from this or any other Court.

**CONCLUSION**

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter an order, substantially in the form attached hereto, granting the relief requested herein, and (b) grant such other and further relief as is just and proper.

**McNAIR LAW FIRM, P.A.**

November 15, 2018

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**TABLE OF AUTHORITIES PURSUANT TO LOCAL RULE 9013-2**

1. *In re Synteen Tech., Inc.*, No. 00-02203, 2000 WL 33709667 (Bankr. D.S.C. April 14, 2000).

2000 WL 33709667

Only the Westlaw citation is currently available.  
United States Bankruptcy Court, D. South Carolina.

In re: SYNTEEN TECHNOLOGIES, INC. Debtor.

No. 00-02203-W.

|  
April 14, 2000.

#### ORDER

WAITES, Bankruptcy J.

\*1 THIS MATTER comes before the Court upon Synteen Technologies, Inc.'s ("Debtor") Motion for Order Authorizing Debtor to Pay Certain Pre-Petition Claims ("Motion") filed on March 10, 2000. A preliminary hearing was held on March 16, 2000, and by Order entered March 24, 2000, the Court granted in part and denied in part Debtor's Motion. The Court denied at that time Debtor's request to pay the pre-petition claim of Marchem Dublin, Inc. ("Marchem"), pending a final hearing on the Motion. Rutland Plastics Technologies, Inc. ("Rutland") objected to the Motion and was present at the final hearing to prosecute its objection. After considering the pleadings filed, the evidence presented at the hearing on the Motion, and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to [Rule 52 of the Federal Rules of Civil Procedure](#), made applicable by [Rule 7052 of the Federal Rules of Bankruptcy Procedure](#).<sup>1</sup>

#### FINDINGS OF FACT

1. On March 10, 2000, Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Debtor is operating its business as debtor-in-possession pursuant to [11 U.S.C. §§ 1107\(a\) and 1108](#)<sup>2</sup> of the Bankruptcy Code.

2. Notice of the hearing on Debtor's Motion appears to have been properly served on all creditors and parties in interest.

3. Debtor is a company with forty-four (44) employees and engaged in the business of manufacturing and distributing technical industrial textiles in the North American market. Debtor converts fiberglass and polyester yarns into fabric which is then used as a reinforcement mesh in synthetic stucco; as the primary reinforcement in soil retaining wall applications and soil stabilization applications (collectively "geogrid"); in asphalt overlay applications; in welding and

other high temperature applications, such as insulation; and as a reinforcement in single-ply roofing membranes.

4. In its Motion, Debtor seeks to pay the pre-petition claim of Marchem in the amount of \$47,177.89. Marchem provides a coating for Debtor's geogrid which was developed specifically for Debtor.

5. If Marchem's pre-petition claim is not paid immediately, Marchem indicated that it will cease providing its products to Debtor.

6. Debtor's production of geogrid constitutes forty percent (40%) of its overall business.

7. Pursuant to an oral agreement between Debtor and Marchem, Marchem agreed not to provide the coating to any of Debtor's competitors; however, under the agreement, Debtor is not required to purchase a set amount of product from Marchem.

8. Rutland is an unsecured trade creditor of Debtor in the approximate amount of \$34,749.60. Rutland manufactures a coating similar in nature to Marchem's and has provided such product to Debtor in the past.

9. Rutland and Marchem are essentially competitors in the market place. Not only do Marchem and Rutland compete for customers, but, in the past, they have also competed for qualified employees. In fact, Marchem's sales/marketing representative which deals with Debtor's account formerly serviced Debtor in the same capacity for Rutland.

\*2 10. As of the date of the hearing, Debtor had a limited supply of Marchem's product, less than a week's worth. Debtor needs more of Marchem's coating in order to fill a major order; furthermore, because the business is entering its busy season, its continuing operations would be seriously jeopardized if it were forced to suffer a delay in the provision of the coating.

11. Rutland indicates that it can meet the specifications of Marchem's product with its own new product for Debtor's use within two to four weeks.

12. Rutland filed an Objection to the Motion for Entry of Order Authorizing Debtor to Pay Certain Pre-Petition Claims on March 22, 2000.<sup>3</sup>

#### CONCLUSIONS OF LAW

[Section 363\(b\)\(1\) of the Bankruptcy Code](#) provides 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." In addition, bankruptcy courts have inherent equitable power under [§ 105\(a\)](#) to "issue any order, process, or judgment that is necessary to carry out

the provisions of this title.” While authorization to pay a pre-petition claim is an extraordinary relief, the equitable powers as specified in § 105(a) give bankruptcy courts the permission to allow payment of a pre-petition claim “when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr.E.D.Va.1992). As the court in *In re NVR* noted, however, “section 105 may not be used as a vehicle to discriminate among priority claims when there is no compelling business need for such discrimination.” *Id.*<sup>4</sup>

Generally, in order for the court to authorize the payment of a pre-petition claim, the movant must meet the “necessity of payment” rule which “recognizes the existence of the judicial power to authorize a Debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of Debtor.”<sup>5</sup> *In re Ionosphere*, 98 B.R. 174, 176 (Bankr.S.D.N.Y.1989); see also *In re Boston and Maine Corp.*, 634 F.2d 1359, 1382 (1st Cir.1980) (recognizing the existence of judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to debtor’s continued operation); *In re Eagle-Picher Ind., Inc.*, 124 B.R. 1021, 1023 (Bankr.S.D. Ohio 1991) (“In applying the view of the law which we adopt, we consider that to justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr.S.D.N.Y.1989) (quoting *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3rd Cir.1981) (“The ‘necessity of payment’ doctrine ... [permits] 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.” ). The “rule of necessity” is not one of mere convenience; and, in proposing payment of a pre-petition obligation, the movant must show a “compelling business justification” that is in the best interest of both the debtor and other creditors. *In re NVR*, 147 B.R. at 127. Courts usually take into consideration whether the payment of the obligation at issue is critical to the reorganization of debtor’s business or fundamentally necessary to the continuation of debtor’s operations. *Id.*

\*3 In the case now before the Court, Debtor has proved that a compelling business justification warrants payment of Marchem’s claim. Rutland objected on the ground that Debtor has failed to show that it cannot obtain a similar or identical product from another vendor without the necessity of paying pre-petition claims. Rutland further argued that it has previously sold similar coating products to Debtor and presently offers to supply Debtor with either the product it formerly produced for Debtor or with any modified version of the product that Debtor might require, without payment of the pre-petition claim held by Rutland.

First, the Court finds that Marchem’s coating and the coating that Rutland has previously sold to Debtor do differ. Testimony offered by Debtor at the hearing on the

Motion indicated that Debtors’ management believes that Marchem’s coating is more durable and resistant and is better suited for Debtor’s application than Rutland’s present product. As to Rutland’s argument that it can produce a comparable product to Marchem’s and provide Debtor a sample of the coating in approximately two to four weeks; the Court concludes that such a time delay in the provision of the product would interrupt the continuing operations of Debtor which in turn would harm the bankruptcy estate and all creditors.

At the hearing on the Motion, counsel for Marchem indicated that the demand that it be paid its pre-petition claim before it will further provide Debtor its products was unequivocal. Evidence indicates that Marchem’s pre-petition claim represents the first significant billing due to Marchem since its new relationship with Debtor; therefore, the claim is seen as more critical to their business dealings. The Court finds that Debtor has a genuine need for Marchem’s product and ongoing contracts with clients currently require additional coating from Marchem in order for Debtor to fulfill its obligations. Due to the technical and specialized nature of the products in question, the Court shall not second guess Debtor’s business judgment and in effect mandate that Debtor use another supplier’s coating. Debtor has decided that the Marchem product is a superior product and essential to Debtor’s business.<sup>6</sup> Furthermore, Debtor cannot afford any delays at this time, given the fact that it presently needs the coating in order to fill its customers’ current orders. It is therefore,

ORDERED that Debtor is authorized to pay the pre-petition claim of Marchem in the amount of \$47,177.89.<sup>7</sup>

AND IT IS SO ORDERED.

#### All Citations

Not Reported in B.R., 2000 WL 33709667

#### Footnotes

- 1 The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.
- 2 Further references to the Bankruptcy Code shall be by section number only.
- 3 Prior to filing the formal objection, on or about March 16, 2000, Rutland filed a letter with the Court indicating that they objected to the proposed payment of the pre-petition claim of Marchem.
- 4 The parties agree that precedent in the Fourth Circuit does not establish a *per se* rule against the authorization to pay pre-petition claims. See, e.g., [Official Committee of Equity Security Holders v. Mabey \(In re A.H. Robbins Co., Inc.\)](#), 832 F.2d 299, 302 (4th Cir.1987).
- 5 In analyzing the Fourth Circuit decision of [In re A.H. Robbins Co., Inc.](#), 832 F.2d at 302, the court in *In re NVR* noted in a footnote:  
The Fourth Circuit has interpreted § 105(a) as generally not permitting a distribution to unsecured creditors in a Chapter 11 proceeding except under and pursuant to a plan of reorganization that has been properly presented and approved. However, it is unclear whether the broad language in *Mabey* failed to address the “necessity of payment” exception deliberately or by happenstance. This court assumes the latter for purposes of this opinion since the “necessity of payment” rule was not directly at issue in *Mabey*.  
[In re NVR](#), 147 B.R. at 127 n. 2.
- 6 The Court would caution that its recognition of a debtor’s business judgment in the context of the payment of pre-petition claims is not a blank check. A debtor has a fiduciary duty to all creditors of the bankruptcy estate. To fulfill its duty when faced with a demand by an essential supplier for payment of a prepetition claim, a debtor must attempt to negotiate the most lenient payment terms possible. As such, even though the Court has authorized payment of the Marchem pre-petition claim, Debtor, in fulfilling its fiduciary duty to protect all creditors, should use its best efforts in good faith to negotiate with Marchem in an attempt to pay the pre-petition amount over time. A lump-sum payment, in fact, would most likely strain Debtor’s finances. Debtor also has a fiduciary duty to continue examining comparable products and to look for better products at a more affordable price.
- 7 After the ruling in this matter but prior to the entry of this Order, counsel for Debtor advised the Court, by letter dated April 4, 2000, that Marchem had modified its demand to have its claim paid in full in order for it to further provide its products to Debtor. The letter informed the Court that, as a result of Debtor’s negotiations with Marchem concerning the payment of the Marchem’s pre-petition claim, Marchem had agreed to accept immediate payment of 50% of its pre-petition claim, approximately in the amount of \$23,589, with the remaining claim to be paid through the Chapter 11 Plan. On this basis, Marchem agreed to continue to provide Debtor with its coating on a “cash in advance” basis.