

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	
	)	
ATLANTIC FABRICATION & DESIGN	)	Case No. 17-14891-JDL
LLC,	)	Chapter 11
	)	
Debtor.	)	
	)	

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**DEBTOR’S EXPEDITED MOTION FOR ORDER PURSUANT TO 11 U.S.C. § 105  
AUTHORIZING PAYMENT OF PRE-PETITION CLAIMS OF CRITICAL TRADE  
CREDITORS AND BRIEF IN SUPPORT  
AND NOTICE OF OPPORTUNITY FOR HEARING**

**Your rights may be affected. You should read this document carefully and consult your attorney about your rights and the effect of this document.** If you do not want the Court to grant the requested relief, or you wish to have your views considered, you must file a written response or objection to the requested relief with the Clerk of the United States Bankruptcy Court for the Western District of Oklahoma, 215 Dean A. McGee Ave., Oklahoma City, OK 73102 no later than Tuesday, December 5<sup>th</sup>, 2017 at 2:00PM. You should also serve a file-stamped copy of your response or objection to the undersigned movant’s attorney and all others required to be served and file a certificate of service with the Court. If no response or objection is timely filed, the Court may grant the requested relief without a hearing or further notice.

**A hearing will be held on this Pleading on Wednesday, December 6th, 2017 at 9:00AM before The Honorable Chief Judge Janice Loyd, 215 Dean A. McGee Ave, 2nd Floor Courtroom, Oklahoma City, OK 73102.**

**If necessary, the Final Hearing on any interim orders entered regarding this Pleading will be held on Wednesday, January 3rd, 2018, at 9:00AM before The Honorable Chief Judge Janice Loyd, 215 Dean A. McGee Ave, 2nd Floor Courtroom, Oklahoma City, OK 73102**

Atlantic Fabrication & Design LLC, debtor in the above-captioned case (“Debtor”), hereby respectfully moves this Court for entry of an order granting them the authority to pay

prepetition claims of critical trade creditors and service providers set forth in the attached exhibit ("Critical Trade Creditors"). In support of this Motion, the Debtor relies on and incorporates the Declaration of Paul D. Stitt (the "Declaration"). In further support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION, VENUE, AND BACKGROUND

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. On December 4<sup>th</sup>, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Court").

3. The Debtor continues to operate the business as debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. The United States Trustee has not yet appointed any official committees in this case, and no request has been made for the appointment of a trustee or examiner.

4. Debtor only has three employees, the two principals and an office manager. All other labor is provided to Debtor by various professional staffing companies. In addition, Debtor has certain raw material and consumable supply needs in order to manufacturer their finished goods. Without the ability to continue receiving labor from their professional staffing vendors and necessary raw materials the Debtor will not be able to operate.

5. In order to continue receiving goods and services from Debtor's most critical vendors, some pre-petition claims will need to be paid post-petition.

6. Debtor now seeks the relief contained herein permitting Debtor to pay certain prepetition claims in order to facilitate Debtor's operational requirements in bankruptcy.

RELIEF REQUESTED

7. Debtor requests authority to pay prepetition Trade Claims, as such term is defined in § 101(5) of the Bankruptcy Code, of the Critical Trade Creditors. Debtor has carefully analyzed their vendors and have determined the vendors that are critical and necessary to the continued operation of Debtor's business based on the goods and services supplied and the availability of other sources of supply of similar cost and quality.

8. Debtor proposes to pay prepetition claims for 15 of the 21 known unsecured creditors. Proposed Trade Claims of Critical Trade Creditors represents a combined \$201,105.70, or approximately 21% of Debtor's unsecured debt. However, five creditors totaling \$35,317.71, or ~18% of Debtor's proposed Critical Trade Creditors, represent material vendors with possible reclamation rights under §546 of the Bankruptcy Code. Further, two creditors with claims totaling \$81,152.95 represents Debtor's labor force as described herein, totaling ~40% of the proposed Critical Trade Creditors.

9. The relief requested in this Motion, if granted, will enable Debtor to continue to receive essential goods and services enabling it to preserve the value of the estate.

AUTHORITY

10. Although § 549(a)(2)(B) of the Code prohibits Debtors from paying prepetition claims without Court approval, the Court has power to permit a debtor-in-possession to pay certain prepetition indebtedness prior to ultimate distribution to other creditors under a plan of reorganization. This Court's general equitable powers are codified in § 105(a) of the Code which

authorizes the Court to “issue an order, process, or judgment that is necessary to carry out the provisions of this title.” 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (citing *Miltenberger v. Logansport, Ry. Co.*, 106 U.S. 286 (1882)). Such use of the Court's equitable powers, commonly referred to as the "doctrine of necessity" or the "necessity of payment rule," is not new; its purpose is to preserve the debtor as a going concern. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Under § 105(a), a court "can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere*, 98 B.R. at 176). Courts allowing such relief have found that such distributions “enable a successful reorganization and make even the disfavored creditors better off.” *In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004) (discussing the justifications for critical-vendor orders).

11. Debtor strongly believes continuous and uninterrupted shipments and services from Critical Trade Creditors are imperative to the Debtor’s reorganization and that the payment of the Trade Claims as requested herein is critical, necessary, and essential to assure such result.

12. The "necessity of payment" rule "recognizes the existence of the judicial power to authorize a debtor in reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor." *Ionosphere Clubs*, 98 B.R. at 176; *Michigan Bureau of Workers Disability Compensation v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279 (S.D.N.Y. 1987). This rule is consistent with the paramount goal of chapter 11, i.e., "facilitating the continued operation and rehabilitation of the debtor . . ." *Ionosphere Club*, 98 B.R. at 176.

13. It is not uncommon for courts to authorize payments to vital suppliers and trade creditors. See, e.g., *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945), cert. denied, 325 U.S. 873 (1945) ("[t]he expenses of continued operation of a business may be necessary to preserve its value for the secured creditors themselves, and for that reason that the receiver's creditors have priority, so it may be before insolvency. To take the case at bar, upon the continued operation of a hotel its goodwill depends; let it once shut down, and it will lose much of its value...Some priority [to the hotel's prepetition suppliers] may be essential to preservation of the business."); *In re UNR Industries, Inc.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) ("Necessity Doctrine may be used to permit a debtor to pay the pre-petition claims of suppliers or employees whose continued cooperation is essential to the debtor's successful reorganization."), *rev'd on other grounds, UNR Industries, Inc. v. Bloomington Factory Workers*, 173 B.R. 149 (Bankr. N.D. Ill. 1994); *In re Just For Feet, Inc.*, 224 B.R. 821, 826 (D. Del. 1999) (authorizing payment of prepetition claims of trade creditors that continue customary trade terms); *In re Discovery Zone, Inc. et al.*, Case No. 99-941 (JJF) (D. Del. April 21, 1999) (critical vendor payments); *In re Acme Steel Company, et al.*, Case No. 98-2179 (MFW) (Bankr. D. Del. June 10, 1998) (critical vendor payments).

14. Debtor believes payment of prepetition Trade Claims of Critical Trade Creditors is essential, necessary and critical to a successful reorganization. Any business interruption caused by the reluctance of Critical Trade Creditors to continue providing goods and services will jeopardize chances for reorganization.

15. If the relief requested herein is not granted, Critical Trade Creditors are likely to, at a minimum, delay supplying Debtor at a time when it is critical that Debtor have the ability to continue operations.

16. Additionally, the requested relief will avert and resolve needless disputes, uncertainty and litigation that otherwise could arise over Critical Trade Creditors' reclamation demands under §546 of the Bankruptcy Code. Avoiding such claims will benefit the Debtor and the estate.

17. Simply put, the failure to pay prepetition Trade Claims of Critical Trade Creditors would damage Debtor, the estate, the creditors and other parties in interest.

18. Nothing in this motion should be construed as an assumption of any executory contract or unexpired lease between Debtors and any of their Trade Creditors, nor should it be construed as a rejection of any executory contract or unexpired lease with any Trade Creditor. Furthermore, Debtors reserve the right to contest on non-bankruptcy grounds the amount claimed to be due by any of the Trade Creditors in the ordinary course of business.

Wherefore, Debtor requests that this court enter an order authorizing Debtor to pay the Trade Claims of Critical Trade Creditors and granting such other relief as the Court deems just.

Respectfully Submitted,  
**SANSONE HOWELL PLLC**

/s/ Jason A. Sansone

Jason A. Sansone, OBA No. 30913

Sansone Howell PLLC

4600 SE 29th St., Suite 500

Del City, Oklahoma 73115

Telephone: (405) 455-1032

Facsimile: (866) 679-1329

Email: JSansone@SansoneHowell.com

**PROPOSED COUNSEL FOR DEBTOR**

Dated: December 4<sup>th</sup>, 2017