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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

MOTION OF DEBTORS AND DEBTORS IN POSSESSION, PURSUANT TO SECTIONS 105(a) AND 503 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 3002 AND 3003, FOR AN ORDER ESTABLISHING PROCEDURES FOR THE ASSERTION OF SECTION 503(b)(9) CLAIMS RELATING TO GOODS RECEIVED BY THE DEBTORS WITHIN TWENTY DAYS BEFORE THE PETITION DATE

TO THE HONORABLE
UNITED STATES BANKRUPTCY JUDGE:

Chrysler LLC ("Chrysler") and 24 of its domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively with Chrysler, the "Debtors"), respectfully represent as follows:

Background

1. On the date hereof (the "Petition Date"), the Debtors commenced their reorganization cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). By a motion filed on the Petition Date, the Debtors have requested that their chapter 11 cases be consolidated for procedural purposes only and administered jointly.

2. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Debtors and their nondebtor direct and indirect subsidiaries (collectively, the "Chrysler Companies") comprise one of the world's largest manufacturers and distributors of automobiles and other vehicles, together with related parts and accessories. On the Petition Date, the Chrysler Companies employed approximately 55,000 hourly and salaried employees worldwide, 70% of whom were based in the United States. In addition, as of the Petition Date, the Debtors made payments for health care and related benefits to more than 105,000 retirees.

4. Chrysler's ultimate parent company, Chrysler Holding LLC ("Chrysler Parent"), also owns a financing company, nondebtor Chrysler Financial Services Americas LLC ("Chrysler Financial"), that operates under a governance structure separate from Chrysler, with

its own board and management. Historically, Chrysler Financial has provided financing to both Chrysler's dealers and consumers.

5. For the twelve months ended December 31, 2008, the Chrysler Companies recorded revenue of more than $48.4 billion and had assets of approximately $39.3 billion and liabilities totaling $55.2 billion.

6. A more detailed explanation of Chrysler's businesses and operations, and the events leading to the commencement of these cases, can be found in the Affidavit of Ronald E. Kolka, which was filed contemporaneously herewith and is incorporated herein by reference.

Overview of These Cases

7. The significance of this chapter 11 filing to Chrysler and to the United States economy is difficult to overstate. In connection with the filing, Chrysler is seeking approval from this Court to consummate the only sale transaction that preserves some portion of its business as a going concern and averts a liquidation of historic proportions. If the proposed transaction, designed to effect an alliance with Italian automobile manufacturer Fiat S.p.A. ("Fiat"), is rejected and Chrysler liquidates, it will mean the end of an iconic, 83-year-old American car company whose name has been synonymous with innovative engineering, from the Slant-Six and HEMI engines, to power windows, power brakes and power steering, to the minivan. A liquidation would also have impacts on the nation's economy and Chrysler's stakeholders that are grim:

- 38,500 hourly and salaried Chrysler workers in the U.S. will lose their jobs;
- Chrysler's workers and retirees and their surviving spouses will lose over $9.8 billion of health care and other benefits and $2 billion in annual pension payments;

- All 23 of Chrysler's manufacturing plants and facilities and 15 parts depots in the United States will shut down (as well as 18 additional plants and parts depots worldwide);

- Approximately 3,200 Chrysler dealers will be put out of business and the over 140,000 employees of those dealerships will lose their jobs;

- Over $5.7 billion in outstanding auto parts and service supplier invoices will not be paid to Chrysler's suppliers and new business will be cancelled, forcing hundreds of suppliers out of business and the loss of hundreds of thousands of additional jobs;

- Over 31 million Chrysler, Jeep and Dodge owners would lose significant value in their cars and trucks, particularly due to questions about the ongoing availability of warranties and replacement parts and services;

- Local, state and federal governments will lose tens of billions of dollars in tax revenues, according to a research memorandum published by the Center for Automotive Research in November 2008;[1]

- Over $100 billion in annual sales will disappear from local economies; and

- Chrysler's first lien secured creditors will receive net present value recoveries of less than 38 cents on the dollar and possibly as little as 9 cents; the U.S. government, another secured creditor, will receive less than that; and Chrysler's unsecured creditors will receive nothing.

8. The economic and market conditions that led to the commencement of Chrysler's chapter 11 cases and the need for the proposed sale transaction are well known, but sobering nonetheless. The automotive market meltdown, the worst in at least 26 years,[2] disrupted Chrysler's substantial progress in implementing a long-term plan to reduce costs and transform its businesses for the next generation of cars. With sales plummeting and credit markets frozen, Chrysler undertook an intense effort to address the challenges it faced. After months of hard work and dedication by Chrysler's management, employees and advisors,

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1 Daniel Cole, *et al*., Center for Automotive Research Memorandum, *The Impact on the U.S. Economy of a Major Contraction of the Detroit Three Automakers*, at http://www.cargroup.org (Nov 4, 2008).

2 Chris Isidore, *Auto Sales Are Worst in 26 Years. January Sales Tumble More Than Expected at GM, Ford and Toyota as Rental Car Companies Slash Purchases*, CNNMoney.com, Feb. 3, 2009 (4:22 p.m., ET).

working with all key stakeholders and with the support of the U.S. government, the Debtors have commenced these cases to implement a prompt sale to preserve the going concern value of their businesses and return these businesses to viability under new ownership.

9. The proposed sale transaction would create the sixth-largest global automaker by volume unit, increasing competitiveness with other Original Equipment Manufacturers ("OEMs") and creating billions of dollars in synergies. This transaction is the result of thousands of hours of negotiations among multiple parties. The transaction is being financially backed by the United States Department of the Treasury (the "U.S. Treasury") and Export Development Canada, an affiliate of the Canadian government, which together will provide the new alliance with approximately $6 billion of taxpayer money to start up and maintain operations. In addition to this unprecedented government support, virtually all of the major constituencies that would be affected by a Chrysler liquidation have recognized how devastating it would be and have made important concessions in support of the proposed alliance:

- The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") has agreed to wage and benefit reductions in the context of a sale to the new company, which would receive the benefit of a new collective bargaining agreement eliminating certain severance benefits, and would be a party to an agreement with the UAW containing restructured retiree health care benefits;

- Chrysler's dealers have agreed to reduce their dealer and service contract margins;

- Chrysler's already financially troubled suppliers have agreed to a further 3% price reduction and other measures that will save millions of dollars;

- Chrysler's largest secured creditors, JPMorgan Chase, Goldman Sachs, Morgan Stanley and Citigroup, have agreed to the transaction that would substantially compromise their first lien debt, comprising 70% of the $6.9 billion total outstanding, for an estimated recovery of approximately 28 cents on the dollar; and

- Chrysler Parent's minority shareholder, Daimler AG ("Daimler"), has agreed as part of a settlement with Chrysler to (a) forgive $1.5 billion of second lien debt, at the same time that $500 million of second lien debt is forgiven by majority shareholder Cerberus Capital Management L.P. ("Cerberus"); and (b) assist in funding Chrysler's pension plans.

Representatives of these constituencies have devoted the past six months to reaching these agreements.

10. As the culmination of these efforts, Chrysler, Fiat and New Chrysler (as defined below) have reached an agreement in principle and are expected to entered into a Master Transaction Agreement (collectively with other ancillary and supporting documents, the "Purchase Agreement") in short order. Pursuant to the Purchase Agreement, among other things: (a) Chrysler will transfer the majority of its operating assets to New CarCo Acquisition LLC ("New Chrysler"), a newly established Delaware limited liability company that currently is an indirect wholly-owned subsidiary of Fiat; and (b) in exchange for those assets, New Chrysler will assume certain liabilities of Chrysler and pay to Chrysler $2 billion in cash (collectively with the other transactions contemplated by the Purchase Agreement, the "Fiat Transaction").

11. With the support of the U.S. government, Fiat, the UAW, dealers, suppliers and other stakeholders, the Debtors commenced these cases to implement an expeditious sale process to implement the Fiat Transaction, or a similar transaction with a competing bidder, designed to maximize the value of the Debtors' operations and businesses for the benefit of their stakeholders. Pending the proposed sale, the Debtors will idle most operations as they conserve their resources, while at the same time ensuring that (a) the facilities are prepared to resume normal production schedules quickly upon the completion of a sale and (b) consumers are not impacted by the filing.

12. Time is of the essence. Given the continuing stress on all aspects of the automotive industry and the idling of the Debtors' manufacturing facilities, key relationships

with suppliers, dealers and other business partners simply cannot be preserved if the sale process is not concluded quickly. Absent a prompt sale, approved and consummated in the coming weeks, the value of the Debtors' assets will rapidly decline and the ability to achieve a going concern sale will be irretrievably lost. By contrast, the proposed sale transaction, if it can be promptly consummated, will maximize the value available for stakeholders, will save hundreds of thousands of jobs and will strengthen the U.S. automotive sector and the economy generally.

Jurisdiction

13. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

14. Pursuant to sections 105(a) and 503 of the Bankruptcy Code and Rules 3002 and 3003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors hereby seek the entry of an order establishing an orderly process for the assertion of any claims ("Twenty-Day Claims") entitled to priority under section 503(b)(9) of the Bankruptcy Code relating to goods received by the Debtors within 20 days immediately prior to the Petition Date (the "Twenty-Day Period").

15. Prior to the Petition Date, and in the ordinary course of their businesses, the Debtors purchased a variety of goods used in their automobile manufacturing and assembly operations. Goods were received by the Debtors on a regular basis, and substantial amounts of goods were received within the Twenty-Day Period. The Debtors estimate that within the Twenty-Day Period, the Debtors received goods from suppliers worth approximately $800 million. Most of these suppliers have not yet been paid for these goods.

16. Although section 503(b)(9) of the Bankruptcy Code provides a priority status for prepetition claims for the value of goods received within the Twenty-Day Period, these Twenty-Day Claims in all other respects are identical to other prepetition claims. As such, there is no reason to differentiate between the procedures by which Twenty-Day Claims and other prepetition claims are filed, objected to and adjudicated. To eliminate any uncertainty regarding the procedures to be used by claimants asserting Twenty-Day Claims (the "Twenty-Day Claimants"), and to avoid piecemeal litigation by Twenty-Day Claimants, the Debtors seek to establish, at the outset of these cases, procedures for the assertion (and determination) of Twenty-Day Claims (the "503(b)(9) Procedures").[3]

17. The Debtors have not yet filed their schedules of assets and liabilities and statements of financial affairs (collectively, the "Schedules"), and, in fact, have requested an extension to file the Schedules until July 14, 2009. The Debtors anticipate that after the Schedules have been filed, they would ask the Court to set a bar date for the filing of prepetition claims at an appropriate time. To maintain uniformity and consistency, the Debtors now seek entry of an order establishing the 503(b)(9) Procedures for the assertion (and determination) of Twenty-Day Claims pursuant to the normal prepetition claims process in these cases and subject to the general bar date to be set by the Court in these cases for the filing of all prepetition claims (the "General Bar Date"), as follows:

(a) All Twenty-Day Claims shall be filed by the General Bar Date, which will be set for all prepetition claims in these cases

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[3] Prior to the Petition Date, on April 7, 2009, Chrysler entered into an automotive supplier support program (the "Supplier Support Program") in which the United States Department of the Treasury provided a loan facility, with a maximum total commitment of approximately $1.5 billion, to a bankruptcy-remote special purpose vehicle, Chrysler Receivables SPV LLC (the "SPV"), a wholly-owned subsidiary of Chrysler. As part of the Supplier Support Program, the SPV purchased certain eligible automotive receivables of Chrysler suppliers (the "Receivables"). The Debtors anticipate that some of the Receivables will contain Twenty-Day Claims. Nothing in this motion shall be deemed as a request to limit the ability of the SPV to assert Twenty-Day Claims pursuant to the 503(b)(9) Procedures.

by a subsequent order of the Court, and in accordance with Bankruptcy Rules 3002 and 3003 and Local Bankruptcy Rule 3003-1.

(b) Twenty-Day Claimants shall utilize the proof of claim form to be developed by the Debtors in connection with the general bar date process, which form will permit all parties to assert the amount and priority of their claims (including priority under section 503(b)(9) of the Bankruptcy Code) in one standardized form.

(c) The Twenty-Day Claimants shall not file motions to compel allowance or payment of administrative expenses for their Twenty-Day Claims or schedule a hearing to consider such claims. Consistent with section 502(a) of the Bankruptcy Code, all timely filed Twenty-Day Claims shall be deemed accepted and allowed unless objected to by the Debtors or any other party in interest pursuant to section 502 of the Bankruptcy Code, Bankruptcy Rule 3007 or in accordance with further procedures for addressing claims as may be established by the Court ("Claims Procedures"). If such an objection to a Twenty-Day Claim is filed, such claim shall be adjudicated and allowed in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and any Claims Procedures established by the Court.

(d) To the extent that a Twenty-Day Claim is allowed, the claim shall be paid pursuant to, and as set forth in, the applicable chapter 11 plan confirmed by the Court.

(e) Nothing in these 503(b)(9) Procedures shall affect the rights and remedies of the Debtors, any official committee appointed in these cases or any other party in interest with regard to avoidance actions, and nothing in these 503(b)(9) Procedures shall provide a Twenty-Day Claimant a *prima facie* defense to any avoidance actions.

18. The Debtors request that the 503(b)(9) Procedures be the sole and exclusive method for creditors to assert, seek determination of and obtain payment of the Twenty-Day Claims. The Debtors further request that all Twenty-Day Claimants be prohibited from seeking any other means for the allowance or treatment of their Twenty-Day Claims, unless leave is specifically granted by the Court.

19. Additionally, the Debtors request that all motions or other proceedings initiated by Twenty-Day Claimants to assert rights related to Twenty-Day Claims, whether currently pending or initiated in the future, except those proceedings initiated by the Debtors in accordance with the 503(b)(9) Procedures or those the Debtors already have consensually resolved, be stayed and the Twenty-Day Claims asserted therein be resolved exclusively by the 503(b)(9) Procedures.

Argument

20. The proposed 503(b)(9) Procedures will provide clear guidance to all parties as to how Twenty-Day Claims shall be filed in these cases and will streamline the process for consideration of such claims. Requiring Twenty-Day Claimants to participate in the normal claims adjudication process will provide the Debtors the opportunity to address the allowance of claims in an orderly and efficient way, will not impair in any way the substantive rights of any parties and will ensure that similarly situated creditors receive equal treatment.

21. Under section 101(10)(A) of the Bankruptcy Code, a "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief . . . ." Accordingly, entities holding prepetition claims, including prepetition claims under section 503(b)(9) of the Bankruptcy Code, are plainly "creditors" under the Bankruptcy Code and Bankruptcy Rules.[4]

[4] There is some case law addressing the issue of whether an entity holding a *postpetition* administrative expense claim *also* is a "creditor" under the Bankruptcy Code. See, e.g., In re CM Holdings, Inc., 264 B.R. 141, 157-59 (Bankr. D. Del. 2000) (discussing whether administrative claimants are "creditors" for purposes of application of section 502(d) of the Bankruptcy Code and concluding they are not). In light of the *prepetition* nature of claims under section 503(b)(9) of the Bankruptcy Code — relating to goods received by the Debtors in the ordinary course of business in the Twenty-Day Period — case law discussing whether postpetition administrative claimants are creditors is irrelevant here.

22. The status of entities holding Twenty-Day Claims as "creditors" has important consequences, including that such entities are permitted to file proofs of claim. See 11 U.S.C. § 501(a) ("[a] creditor . . . may file a proof of claim"). In fact, under Bankruptcy Rules 3002(a) and 3003(c)(2), Twenty-Day Claimants *must* file claims if they want their Twenty-Day Claims to be allowed. Fed. R. Bankr. P. 3002(a) (a "creditor . . . *must* file a proof of claim or interest for the claim or interest to be allowed . . .") (emphasis added); Fed. R. Bankr. P. 3003(c)(2) ("Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.").

23. Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, *proof of which is filed under section 501 of this title*, is deemed allowed, unless a party in interest . . . objects." (emphasis added). Indeed, without discussing all potentially applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, it is clear that by classifying holders of prepetition claims under section 503(b)(9) as "creditors," Congress desired that such claimants be subjected to the entire claim filing and objection process established by sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rules 3001 through 3007. Importantly, this means that section 502 of the Bankruptcy Code, which provides that litigation in respect of a claim is initiated through a *debtor's* objection, thus placing the control over the timing of objecting to a Twenty-Day Claim with a debtor, not with creditors. As such, the proper order of events for Twenty-Day Claims is for (a) the Debtors to file their Schedules, (b) the Court to establish a General Bar Date for the filing of proofs of claim, (c) Twenty-Day Claimants to file their

Twenty-Day Claims on a proof of claim form by the General Bar Date and (d) the Debtors to file any objections to such claims that are necessary.

24. It is common practice for a debtor to defer claims litigation to later in a chapter 11 case. In doing so, the Debtors here will avoid burdening themselves with ad hoc claims litigation initiated by creditors during the early stages of a case, when there are a host of pressing issues to address. Moreover, by deferring claims litigation issues at the early stages of these cases, the Debtors will be able to structure the claims review process to maximize efficiency. For example, the Debtors will be able to analyze all claims of various categories in one coordinated process, and will be able to structure contested litigation so that multiple claims can be addressed at the same hearing, such that witnesses will not be required to come to Court time and time again, instead of conducting one uncoordinated process for Twenty-Day Claims and a separate process for other prepetition claims.

25. No part of the proposed process is inconsistent with section 503 of the Bankruptcy Code, which grants the underlying priority status to the Twenty-Day Claims. Section 503(a) of the Bankruptcy Code provides that an entity may timely file a *request* for payment of an administrative expense . . . ." 11 U.S.C. § 503(a) (emphasis added). Unlike postpetition administrative claims, this "request" can be made with respect to Twenty-Day Claims by the entities filing a proof of claim (just as proofs of claim are filed for other prepetition claims entitled to priority status). Once an entity files such a request on a proof of claim form, "after notice and hearing, there shall be allowed administrative expenses, including — the value of any goods received by the debtor within 20 days before the date of commencement of a [chapter 11 case, but only if such] goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(1), (b)(9). The filing of the proof

of claim will provide an opportunity for review by the debtors and, if necessary, an objection with a related notice and the scheduling of a hearing. Thus, addressing Twenty-Day Claims through the proof of claim process, as proposed by the Debtors, is entirely consistent with the Bankruptcy Code and the Bankruptcy Rules.[5]

26. Section 503(b)(9) was added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23 ("BAPCPA") and, thus, the process of establishing procedures for such claims is still relatively new. Nevertheless, the process of having Twenty-Day Claims asserted in a proof of claim form and governed by an order as part of the Debtors' motion to establish a bar date, and including such claims as part of the normal proof of claims and bar date process, is consistent with the process established in several other large post-BAPCPA cases. See, e.g., In re Quebecor World (USA) Inc., No. 08-10152 (JMP) (Bankr. S.D.N.Y. Apr. 21, 2008) (providing for procedures, including a bar date, to assert Twenty-Day Claims and prohibiting the Twenty-Day Claimants from filing motions to seek payment of their claims outside the procedures established by the Court); In re Dana Corp., No. 06-10354 (BRL) (Bankr. S.D.N.Y. Jul. 19, 2006) (providing for procedures to file Twenty-Day Claims through the normal proof of claim process); see also In re

[5] The proposed 503(b)(9) Procedures also do not impede any creditor's right to payment, because there is no immediate right to payment of Twenty Day Claims. Section 503(b)(9) of the Bankruptcy Code makes no mention of the timing by which any claim allowed thereunder must be paid. Indeed, there is nothing in the text of section 503(b)(9) that even suggests that a claimant has a right to immediate payment. See In re Bookbinders' Restaurant, Inc., No. 06-12302, 2006 WL 3858020, at *4 (Bankr. E.D. Pa. Dec. 28, 2006) (finding that "[t]he text of § 503(b)(9) neither states nor even implies that allowance of the expense encompasses an unqualified right to immediate payment . . . [n]or does the text of the provision suggest that an administrative expense allowed under § 503(b)(9) is to be treated in a more favorable manner than any other allowed § 503(b) administrative expense"); In re Global Home Prods. LLC, No. 06-10340, 2006 WL 3791955 *5 (Bankr. D. Del. Dec. 21, 2006) (finding that a 503(b)(9) claimant was not due immediate payment of his claim) (unreported opinions are attached hereto collectively as Exhibit A).

Aegis Mortgage Corp., No. 07-11119 (BLS) (Bankr. D. Del. Nov. 26, 2007) (same); In re Radnor Holdings Corp., No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006) (same).[6]

Notice

27. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been given to: (a) the Office of the United States Trustee for the Southern District of New York; (b) the creditors holding the 50 largest unsecured claims against the Debtors' estates, as identified in the Debtors' chapter 11 petitions; (c) counsel to the administrative agent for the Debtors' prepetition senior secured lenders; (d) counsel to Cerberus; (e) counsel to Daimler; (f) counsel to the UAW; and (g) counsel to the U.S. Treasury. The Debtors submit that no other or further notice need be provided.

No Prior Request

28. No prior request for the relief sought in this Motion has been made to this or any other Court.

[6] Because of the voluminous nature of these unreported orders, they are not attached to this Motion. Copies of these unreported orders will be made available to the Court at or prior to the hearing on this Motion and are available to other parties upon request from counsel to the Debtors.

WHEREFORE, the Debtors respectfully request that the Court: (i) enter an order substantially in the form attached hereto as Exhibit B, granting the relief requested herein; and (ii) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: April 30, 2009
New York, New York

Respectfully submitted,

/s/ Corinne Ball

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PROPOSED ATTORNEYS FOR DEBTORS AND DEBTORS IN POSSESSION

EXHIBIT A

10 of 13 DOCUMENTS

IN RE: BOOKBINDERS' RESTAURANT, INC., Debtor(s)

Chapter 11, Bky. No. 06-12302ELF

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 Bankr. LEXIS 3749*; *Bankr. L. Rep. (CCH) P80,923*; *47 Bankr. Ct. Dec. 187

December 28, 2006, Decided

COUNSEL: [*1] For Bookbinder's Restaurant, Inc., aka, Old Original Bookbinders, Debtor: ALBERT A. CIARDI, III, DIMITRI L. KARAPELOU, Ciardi & Ciardi, P.C., Philadelphia, PA.

For United States Trustee, U.S. Trustee: DAVID M KLAUDER, U.S. Trustee Office, PHILADELPHIA, PA; FREDERIC JAY BAKER, United States Trustee, Philadelphia, PA.

For Official Committee of Unsecured Creditors, Creditor Committee: BRADFORD J. SANDLER, JENNIFER R. HOOVER, Adelman Lavine Gold & Levin, P.C., Philadelphia, PA.

JUDGES: ERIC L. FRANK, U.S. BANKRUPTCY JUDGE.

OPINION BY: ERIC L. FRANK

OPINION

MEMORANDUM OPINION

BY: ERIC L. FRANK, U.S. BANKRUPTCY JUDGE

I. *INTRODUCTION*

In this chapter 11 case, I must decide whether a trade creditor who holds an allowed administrative expense by virtue of *11 U.S.C. § 503(b)(9)*, one of the new provisions added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), [1] is entitled to immediate payment of the allowed expense.

1 Pub. L. No. 109-8, § 1227(b), 119 Stat. 23 (2005).

[*2] I hold that the timing of the payment of an administrative expense allowed under *§ 503(b)(9)* is within the discretion of the bankruptcy court and that before compelling a chapter 11 debtor to pay the allowed administrative expense I may consider potential "prejudice to the debtor, hardship to the claimant, and . . . detriment to other creditors." *In re Garden Ridge Corp., 323 B.R. 136, 143 (Bankr. D. Del. 2005)*. I reject the creditor's argument that it is entitled to immediate payment as a matter of law because the Debtor in this case has been paying other administrative expenses, specifically, the Debtor's postpetition trade debt, which has been paid in the ordinary course pursuant to *11 U.S.C. § 363(c)(1)*.

I will hold an evidentiary hearing to permit the parties to develop the record further before I determine whether to compel payment of the allowed *§ 503(b)(9)* or defer payment to a later stage in the case.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

Bookbinder's Restaurant Inc. commenced this bankruptcy case by filing a voluntary petition under chapter 11 of the Bankruptcy Code on June 5, 2006. Since then, it has continued [*3] its business operations as a restaurant in Center City, Philadelphia. [2] On June 26, 2006, the U.S. Trustee appointed a Committee of Unsecured Creditors ("the Committee").

2 The restaurant known as "Old Original Bookbinders" is well known in the region as a

> "landmark" restaurant. According to the information provided on the website of the Philadelphia Industrial Development Corporation, a not-for-profit corporation founded by the City of Philadelphia and the Greater Philadelphia Chamber of Commerce to promote economic development in the City, the restaurant began operated continuously from 1865 to 2001. It reopened in February 2005. *See http://www.pidc-pa.org/newslist.asp* (link to "Historic Bookbinders Reopens With Updated Look"). This historical background plays no part in my decision, but may of general interest.

Five creditors have requested the allowance of an administrative expense under *11 U.S.C. § 503(b)(9)*. Each creditor has asserted that it supplied goods to the Debtor [*4] within twenty (20) days before the commencement of the case.

Section 503(b)(9) of the Bankruptcy Code provides for the allowance of an administrative expense for:

> the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9).

The Debtor has agreed that all five creditors are entitled to the allowance of an administrative expense. The Debtor has reached an agreement with each creditor as to the amount of the allowed expense. The table below identifies the five creditors and sets forth the amount of the allowed administrative expense that I have approved:

Name of Creditor	Amount of Allowed Administrative Expense
Killian's Harvest Green	$ 5,914.90
U.S. Food Service, Inc.	$ 14,446.06
Fichera Foods, Inc.	$ 9,954.40
Blue Crab Plus, Sfd	$ 33,021.74
OceanPro Industries, Ltd.	$ 23,228.79
TOTAL	$ 86,565.89

The five creditors differ in their positions with respect to the timing of the payment of their respective allowed administrative [*5] expenses. One of the five creditors agreed that its expense should be paid when the Debtor pays other administrative expenses in the case. [3] Three of the five creditors agreed to defer the actual payment of the allowed administrative expense for the time being, while reserving the right to request immediate payment at a later time. [4] The fifth creditor, Blue Crab Plus Sfd ("Blue Crab"), insists that it is entitled to immediate payment of its allowed expense.

3 U.S. Food Service, Inc.

4 Killian's Harvest Green, Fichera Foods, Inc. and OceanPro Industries, Ltd.

Blue Crab makes two arguments in support of its request for immediate payment of its allowed *§ 503(b)(9)* expense, *see 11 U.S.C. § 503(a)* ("[a]n entity may timely file a request for payment of an administrative expense").

First, Blue Crab reasons as follows: an inherent part of the reorganization process for a business continuing to operate under chapter 11 is the payment of its postpetition operating expenses in the [*6] ordinary course; the Debtor's monthly operating reports ("MOR") suggest that it is actually paying those expenses; *§ 503(b)(9)* requires that a chapter 11 debtor treat "20 day" administrative expenses in the same manner as administrative expenses arising from the postpetition delivery of goods and services; it follows that Blue Crab's *§ 503(b)(9)* allowed expense should be paid immediately.

5 At the last hearing, Blue Crab was blunt, suggesting that if the Debtor was paying its utility bills on an ongoing basis, it was equally obliged to pay its *§ 503(b)(9)* administrative expenses.

Second, Blue Crab argues that in any event, the Debtor can afford to make the payment. Blue Crab points to the Debtor's most recently MOR for October 2006 which, on its face, appears to state that the Debtor's cash on hand (as of October 31, 2006) exceeded $ 200,000. With that amount of cash available, Blue Crab argues that there is no reason to delay payment of its $ 33,021.74 allowed administrative expense.

In response, the [*7] Debtor contends that the timing of the payment of administrative expenses is within the discretion of the bankruptcy court and that the discretion should be exercised to permit the Debtor to continue paying its postpetition payables while deferring, for now, payment of the *§ 503(b)(9)* allowed administrative expenses. As for its financial condition, the Debtor argues that the October 2006 MOR, while accurate, does not fully reflect certain operational realities which render the Debtor's financial condition less liquid than it might appear to be from a superficial review of its MOR's. The Debtor contends that requiring immediate payment of Blue Crab's administrative expense (with the possible consequence that other *§ 503(b)(9)* creditors might then make the same demand for immediate payment) could impair its cash position to the point of jeopardizing its reorganization. [6] To fully develop the record on that issue, the Debtor requests that another hearing be scheduled since the Debtor's witnesses on the subject were not available to testify at the December 13, 2006 hearing.

6 In making this argument, the Debtor seems aware that it is "walking a thin line." Its argument that there may be a serious financial impediment to the payment of an allowed administrative expense, implicates the feasibility of a successful reorganization. *See 11 U.S.C. § 1129(a)(9)(A)* and *§ 1129(a)(11)*. Of course, it is also possible that the financial issues alluded to by the Debtor are temporary and can be resolved by the time this case reaches confirmation.

[*8] At the conclusion of the December 13, 2006 hearing, I agreed to decide the merits of Blue Crab's first argument -- that it has an unfettered right to immediate payment -- because the resolution of that issue would determine whether a further hearing is required in this matter. After the December 13, 2006 hearing, Debtor and Blue Crab filed short submissions in support of their positions.

III. *DISCUSSION*

The allowance and treatment of administrative expenses is governed by *11 U.S.C. § 503*. *Section 503(a)* provides that a party may request payment of an allowed expense. *11 U.S.C. § 503(a)*. *Section 503(b) of the Bankruptcy Code* addresses the allowance of administrative expenses.

Prior to the effective date of BAPCPA, *§ 503(b)* set forth six (6) categories of expenses allowable as administrative expenses. *11 U.S.C. § 503(b)*. In the context of a chapter 11 case in which the debtor-in-possession continues its business operations, one might divide the six (6) categories into two types: (1) the operational expenses of a reorganizing debtor [7] and (2) the expenses associated with the bankruptcy [*9] reorganization process itself. [8]

7 *See 11 U.S.C. § 503(b)(1)* ("actual, necessary costs and expenses of preserving the estate").

8 *See 11 U.S.C. §§ 503(b)(2) - (6)* (compensation allowed to, *inter alia*, attorneys, other appointed professionals, members of official committees).

When a debtor-in-possession continues to operate its business during a chapter 11 case, the debtor may pay its expenses incurred in the ordinary course "without notice and hearing" as permitted by *11 U.S.C. § 363(c)(1)*. Typically, post-petition "trade debt"is incurred by an operating chapter 11 debtor in the ordinary course of business operations. Therefore, the formal administrative expense allowance process provided in *§ 503(b)(1)*, which includes "notice and hearing," need not be invoked before a debtor may pay for goods and services received postpetition in the ordinary course of business.

BAPCPA added several additional categories of allowable administrative [*10] expenses. *See 11 U.S.C. §§ 503(b)(7) - (9)*. One of the new categories is *§ 503(b)(9)*, colloquially referred to as "the 20 day" expense provision.

Section 503(b)(9) effectively converted what previously was a prepetition "claim" into an allowable

administrative expense. [9] This new status provides at least two benefits to holder of an administrative expense allowed under *§ 503(b)(9)*. First, the allowed expense must be paid in full as a condition of confirmation of a chapter 11 plan. *See 11 U.S.C. § 1129(a)(9)(A)* (requiring full payment of allowed administrative expenses [10] on effective date of the plan as a condition of confirmation, unless the holder has agreed to different treatment). Previously, the same liability was treated as a prepetition claim that could be classified in a plan of reorganization, was subject to plan voting and was susceptible to being paid only partially in a plan confirmed over the creditor's dissent. *See 11 U.S.C. § 1123(a)(1)* (requiring that a plan designate classes of "claims"); *id. § 1126(c)* (defining "acceptance" of a plan by a class of claims). [11] The second possible [*11] benefit to the creditor is that there is a potential for a more prompt payment of "the 20 day" liability. Since the liability is an administrative expense and not a prepetition claim, a chapter 11 debtor with adequate resources can pay the allowed administrative expense prior to confirmation.

9 Pre-BAPCPA, in certain circumstances, creditors who provided goods to the Debtor retained a right to reclaim the goods pursuant to *11 U.S.C. § 546(c)*. *Section 546(c)* also was amended by BAPCPA. *See* Pub. L. No. 109-8, § 1227(a), 119 Stat. 23.

10 *Section 1129(a)(9)(A)* refers to payment of claims of a kind specified in *11 U.S.C. § 507(a)(2)*. *Section 507(a)(2)* refers to "administrative expenses allowed under *section 503(b)*."

11 Obviously, the more favorable treatment accorded to "the 20 day" liabilities has the potential of impacting adversely a debtor's prospects for reorganization.

Neither *§ 503(a)* nor *§ 503(b)* provides explicit guidance to the bankruptcy [*12] court as to when an allowed administrative expenses should be paid. As one commentator has observed, there are at least four possible points in the life of a chapter 11 reorganization case when a *§ 503(b)(9)* "20 day" expense may be payable: (1) immediately upon the commencement of the case; (2) immediately upon allowance; (3) prior to confirmation, in the discretion of the debtor; and (4) on the effective date of the plan, along with other allowed administrative expenses (such as allowed professional fees) pursuant to *11 U.S.C. § 1129(a)(9)(A)*. [12] Ryan T. Routh, *"Twenty-day Claims:" The Anticipated and Unanticipated Consequences of Code § 503(b)(9)*, 25-9 Am. Bankr. Inst. J. 24, * 78-79 (November 25, 2006).

12 One court has referred to *§ 1129(a)* as setting "the outside date by which administrative expenses must be paid in a Chapter 11 case." *In re The Korea Chosun Daily Times, 337 B.R. 773, 784 (Bankr. E.D.N.Y. 2005)*

Prior to the enactment of *11 U.S.C. § 503(b)(9)* [*13] , it was black letter law that the question whether the bankruptcy estate should be ordered to pay an allowed administrative expense is within the bankruptcy court's discretion. *E.g., In re Colortex Industries, 19 F.3d 1371, 1384 (11th Cir. 1994)*; *In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002)*; *In re Dieckhaus Stationers of King of Prussia, Inc., 73 B.R. 969, 972 (Bankr. E.D. Pa. 1987)*. *See also* 4 *Collier on Bankruptcy* P503.3, at 503-13 (15<th> rev. ed. 2006) ("[t]he time at which a particular administrative expense can or must be paid will vary from case to case depending upon the chapter under which the case was filed and the circumstances of the case").

The considerations which guide a court's decision whether to order immediate payment of an allowed administrative expense have been described in different ways. In *Dieckhaus Stationers*, the court stated its discretion should be exercised "with reference to other provisions and policies of the Code." *73 B.R. at 972*. Other courts have been more specific. In *HQ Global Holdings*, the court stated that the court should consider [*14] "bankruptcy's goal of an orderly and equal distribution among creditors and the need to prevent a race to a debtor's assets." *282 B.R. at 173*. And, as stated above in the Introduction, in *In re Garden Ridge Corporation*, the court stated that it would consider "prejudice to the debtor, hardship to the claimant, and the potential detriment to other creditors." *323 B.R. at 143*.

It is against this legal backdrop that Congress enacted the new provision, *§ 503(b)(9)*, creating a new category of allowable administrative expenses. The question in this case is whether *§ 503(b)(9)* was intended to alter existing practice that the timing of the payment of an allowed administrative expenses is left to the discretion of the bankruptcy court. I conclude that in enacting *§ 503(b)(9)*, Congress did not intend to alter existing practice under *11 U.S.C. § 503(b)*.

The Supreme Court has instructed that the Bankruptcy Code should not be read "to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L. Ed. 2d 588 (1990)*; [*15] *accord, Cohen v. De La Cruz, 523 U.S. 213, 221-222, 118 S.Ct. 1212,1218, 140 L. Ed. 2d 341 (1998)*; *Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 571-572 (3d Cir.2003)* (en banc), *cert. dismissed, 540 U.S. 1001-02, 124 S.Ct. 530, 157 L. Ed. 2d 406 (2003).* [13]

> 13 I am cognizant that this principle was enunciated in the context of construing the Bankruptcy Code in light of practice under the 1898 Bankruptcy Act, as amended. However, at this point in time, after twenty seven (27) years of practice under the Bankruptcy Code, I see no reason that it should not apply with equal force before the Code is construed to mandate the modification of practices that have become well established under existing caselaw. Certainly, there are provisions of BAPCPA which, without question, were intended to alter existing practice. *See, e.g. 11 U.S.C. § 707(b).*

There is nothing in the language of *§ 503(b)(9)* to support [*16] Blue Crab's suggestion that it is entitled to immediate payment of its allowed expense in derogation of the accepted principle that the timing of payment of an allowed administrative expense is within the court's discretion. *Section 503(b)(9)* does nothing more than define a type of liability, previously treated as a prepetition claim, which is now accorded administrative expense status. The text of *§ 503(b)(9)* neither states nor even implies that allowance of the expense encompasses an unqualified right to immediate payment. Nor does the text of the provision suggest that an administrative expense allowed under *§ 503(b)(9)* is to be treated in a more favorable manner than any other allowed *§ 503(b)* administrative expense. [14]

> 14 Also, I am unaware of the existence of any legislative history that supports Blue Crab's argument. *See* H.R. Rep. No. 109-31 (2005) at 146.

Distilled to its essence, Blue Crab's argument is a kind of "equal protection" argument -- *i.e.*, since the Debtor is paying what Blue Crab [*17] posits are other administrative expenses (the liabilities incurred by the Debtor for goods and services and services received postpetition), Blue Crab's allowed *§ 503(b)(9)* administrative expense must also be paid. I am not convinced by this argument for three reasons.

First, Blue Crab has presented no authority supporting the proposition that a holder of an administrative expense allowed under *§ 503(b)* has an unqualified legal entitlement to be paid at the same time as post-petition creditors who are being paid in the ordinary course pursuant to *11 U.S.C. § 363(c)(1)*. Indeed, such a holding would be contrary to the cases discussed above which treat the subject of actual payment of allowed administrative expenses as a discretionary matter for the court. And, as I have previously observed, there is nothing in the text of *§ 503(b)(9)* or the legislative history which suggests that a *§ 503(b)(9)* allowed administrative expense is entitled to more favorable treatment than other allowed administrative expenses so as to justify an exception to the general rule. That said, there may be circumstances in which it would be inequitable or inappropriate to permit a debtor [*18] to pay certain administrative expenses but not others. In such a case, the court can order the bankruptcy estate representative to pay the unpaid allowed administrative expense. It is possible that this case is such a case. However, before I can make that determination, a hearing is necessary so that the Debtor's reasons for the disparate treatment can be aired.

Second, Blue Crab's argument overlooks the fact that the Debtor's payments to postpetition trade creditors are being made pursuant to *11 U.S.C. § 363(c)(1)*, not *11 U.S.C. § 503(b)(1)*. In other words, the expenses are being paid without the formality of court allowance under *§ 503(b)*. I recognize that if the Debtor were not actually paying its post-petition payables in the ordinary course, those same liabilities might also be allowable under *§ 503(b)(1)*. However, if unpaid postpetition creditors invoke their rights under *§ 503(a)* and *(b)*, the same issues would be presented as are raised by Blue Crab's request for payment: What are the Debtor's reasons for not paying the expense? Are there sufficient funds in the estate to make the payment? What effect would payment have on the [*19] Debtor, the other creditors and prospects for a successful conclusion to the bankruptcy case? What impact would non-payment have on the creditor? These are the issues that must be considered

when any holder of a *§ 503(b)* allowed administrative expense seeks to compel payment from the bankruptcy estate. Thus, in a technical sense, Blue Crab's *§ 503(b)(9)* administrative expense is being treated the same as any unpaid, allowed *§ 503(b)* administrative expense. There is no disparate treatment between different types of *§ 503(b)* expenses. To the extent there is different treatment, it is between administrative expenses allowed under *§ 503(b)* and post-petition liabilities being paid pursuant to *11 U.S.C. § 363(c)(1)*. Whether this discrimination is justified remains to be determined.

Finally, I find support for my rejection of Blue Crab's argument by comparing *11 U.S.C. § 503(b)(9)* to *11 U.S.C. § 365(d)(3)*, a Code provision that addresses more directly than *§ 503(b)(9)* the obligation of the bankruptcy estate to pay a certain type of postpetition obligation. *Section 365(d)(3)* provides, in pertinent part, that

> [t]he [*20] trustee shall timely perform all the obligations of the debtor, except those specified in *section 365(b)(2)*, arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected notwithstanding *section 503(b)(1)* of this title.

11 U.S.C. § 365(d)(3). *Section 365(d)(3)* gives the court discretion to extend the "time for performance" of any obligation arising within the first 60 days after the order for relief, but restricts the exercise of that discretion by providing that "the time for performance shall not be extended beyond such 60-day period." *Id.*

Section 365(d)(3) was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984). As the court stated in *Dieckhaus*, the effect of the addition of this provision to the Code was to render rent payments "falling due during the sixty day period [as] an allowable administrative expense without the necessity of notice and hearing, as is ordinarily required by *section 503(b)*." *73 B.R. at 972*; *accord*, *In re Granada, Inc., 88 B.R. 369, 371 (Bankr. D. Utah 1988)*. [*21] Further, the enactment of *§ 365(d)(3)* was accompanied by explicit "legislative history indicating that, due to the unique demands made by debtors upon their landlords, landlords are entitled to assurance that rent will be timely paid from the time that an order for relief is entered until a lease is assumed or rejected." *In re Orient River Investments, Inc., 112 B.R. 126, 133 (Bankr. E.D. Pa. 1990)*.

Considering the text of *§ 365(d)(3)* and its legislative history, it is not surprising that some courts have held that landlords have a right to immediate payment for rent obligations within the purview of the provision. However, even in the face of the statutory text and accompanying legislative history, which can be read easily to require the immediate payment of *§ 365(d)(3)* rent, some courts have concluded that there are circumstances in which the court may exercise its discretion to withhold immediate payment to a *§ 365(d)(3)* landlord. In particular, some courts have held that a landlord asserting a right to payment under *§ 365(d)(3)* will not be paid unless the court is satisfied that the estate is administratively solvent. [15] *See In re Orient River Investments, Inc., 112 B.R. at 132-34* [*22] (discussing the caselaw); *see also In re Pudgie's Dev. of N.Y., 223 B.R. 421, 426-427 (Bankr. S.D.N.Y. 1998)* (same).

> 15 Within the latter line of cases, the courts have differed as to whether the burden of showing solvency is on the landlord or whether the burden of establishing insolvency is on the trustee. *In re Orient River Investments, Inc., 112 B.R. at 132-34*

I refer to *§ 365(d)(3)* and the caselaw thereunder without taking a position as to the proper construction of that section. My purpose is to contrast *§ 365(d)(3)* with *§ 503(b)(9)*. Based on its text and the sparse legislative history, the case for construing *§ 503(b)(9)* as deviating from the accepted principle that the bankruptcy court has discretion concerning the timing of the payment of an allowed administrative expense is much weaker than such an argument under *§ 365(d)(3)*. Given the division in the caselaw under *§ 365(d)(3)*, had Congress intended to provide *§ 503(b)(9)* claimants with some type of enhanced [*23] right to payment after allowance of the expense, I am convinced that it would have made its intent express in the statute and it has not done so.

For all of these reasons, I reject Blue Crab's argument that it is entitled to immediate payment of its *§ 503(b)(9)* administrative expense without a further hearing Given the opposition of the Debtor and the Creditors' Committee to Blue Crab's request for immediate payment, I will hold the evidentiary hearing

requested by the Debtor to permit the parties to make an evidentiary record to guide the exercise of my discretion. [16]

16 It is unnecessary for me to determine at this time which party has the burden of proof on the issue of immediate payment when the holder of an administrative expense allowed under *§ 503(b)(9)* seeks to compel payment from the bankruptcy estate.

Date: December 28, 2006

ERIC L. FRANK

U.S. BANKRUPTCY JUDGE

ORDER

AND NOW, upon consideration of the Motion of Blue Crab Plus Sfd for Immediate Payment of [*24] Administrative Expense Claim Pursuant to *11 U.S.C. § 503(b)(9)* ("the Motion"), the response thereto of the Debtor and the Official Committee of Unsecured Creditors, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that an evidentiary hearing on the Motion is scheduled for **January 17, 2007**, at 11 a.m., in Bankruptcy Courtroom No. 1, U.S. Courthouse, 900 Market Street, 2d Floor, Philadelphia, PA 19107.

Date: December 28, 2006

ERIC L. FRANK

U.S. BANKRUPTCY JUDGE

11 of 13 DOCUMENTS

In re: GLOBAL HOME PRODUCTS, LLC, et al., Debtors.

Chapter 11, Case No. 06-10340 (KG) (Jointly Administered), Related Docket: 365

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

2006 Bankr. LEXIS 3608*; *57 Collier Bankr. Cas. 2d (MB) 475

December 21, 2006, Decided

COUNSEL: [*1] For Global Home Products LLC, Debtor: Bruce Grohsgal, James E. O'Neill, Laura Davis Jones, Sandra G.M. Selzer, Pachulski, Stang, Ziel, Young, Jones & Wein, Wilmington, DE.

For Burnes Operating Company LLC, Intercraft Company, Picture LLC, Burnes Puerto Rico Inc., Burnes Acquisition Inc., Anchor Hocking Acquisition Inc., Anchor Hocking Consumer Glass Corporation, Mirro Acquisition Inc., Anchor Hocking Inc., GHP Operating Company LLC, AH Acquisition Puerto Rico, Inc., Anchor Hocking CG Operating Company LLC, Anchor Hocking Operating Company LLC, Mirro Puerto Rico, Inc., Mirro Operating Company, Debtors: Bruce Grohsgal, Pachulski, Stang, Ziehl, Young, Jones, Wilmington, DE.

For GHP Holding Company LLC, Debtor: Bruce Grohsgal, Sandra G.M. Selzer, Pachulski, Stang, Ziehl, Young, Jones, Wilmington, DE.

For Official Committee Of Unsecured Creditors, Creditor Committee: Bruce Grohsgal, Lowenstein Sandier P.C., Rose-land, NJ, USA; David M. Fournier, Evelyn J. Meltzer, Pepper Hamilton LLP, Wilmington, DE.

JUDGES: KEVIN GROSS, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: KEVIN GROSS

OPINION

MEMORANDUM OPINION

[1]

[1] This Memorandum Opinion constitutes the findings of fact and conclusions of law required by *Federal Rule of Bankruptcy Procedure 7052*, made applicable to contested matters by Bankruptcy *Rule 9014*.

[*2] The matter before the Court is the Motion of Industria Mexicana del Aluminio, S.A. de C.V. for Allowance and Immediate Payment of Its *Section 503(b)(9)* Administrative Expense Claim ("the Motion") [D.I. 365]. The Court will deny the Motion, as set forth below.

I. Background

On April 10, 2006, the debtors, Global Home Products, LLC, *et al.* ("Debtors"), [2] filed individual voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. [3] The Court ordered the cases to be jointly administered [D.I. 39]. Debtors are currently operating and managing their businesses as Debtors in Possession pursuant to *§§ 1107* and *1108*. On April 27, 2006, the Official Committee of Unsecured Creditors was appointed by the United States Trustee.

[2] Debtors comprise the following entities: Global Home Products LLC; GHP Holding Company LLC; GHP Operating Company LLC; Anchor Hocking Acquisition Inc.; AH Acquisition Puerto Rico, Inc.; Anchor Hocking Consumer Glass Corporation; Anchor Hocking CG Operating Company LLC; Anchor Hocking Operating Company LLC; Burnes Acquisition Inc.; Intercraft Company; Burnes Puerto Rico,

Inc.; Picture LLC; Burnes Operating Company LLC; Mirro Acquisition Inc.; Mirro Puerto Rico, Inc.; and Mirro Operating Company LLC.

[*3]

3 *11 U.S.C. §§ 101 et seq.* Hereinafter, references to statutory provisions by section number only are to provisions of the Bankruptcy Code, unless the context requires otherwise.

Debtors are a leading designer, marketer and manufacturer of well known, branded consumer and speciality products sold to retail and hospitality customers and to original equipment manufacturers. As of the Petition Date, Debtors operated three primary business divisions through its Anchor Hocking businesses ("Anchor Hocking"), WearEver businesses ("WearEver"), and Burnes Group businesses (the "Burnes Group"). Anchor Hocking produces beverageware, cookware, bakeware, home decor items, and glass components for commercial customers. Anchor Hocking's glassware products cross all price points through retail, specialty, business-to business, and hospitality channels. WearEver produces metal bakeware, cookware and accessories and is recognized as a leading marketer and manufacturer of multi-branded metal cookware and bakeware products and accessories. Wearever sold metal cookware, bakeware and related [*4] accessories throughout North America, principally in the opening and mid-tier price points through retail channels. The Burnes Group designed and sold ready-made picture frames, photo albums, scrapbooks and related home accessories.

In the course of these cases, Debtors conducted separate auctions to effectuate the sales of the Burnes Group and the WearEver businesses. The Court entered orders approving the sales of the businesses on May 23, 2006 and August 14, 2006, respectively [D.1. 353 and D.I. 664].

Both before and after the Petition Date, Debtors held a senior secured revolving line of credit with Wachovia Bank, N.A. ("Wachovia") pursuant to the June 22, 2004 Loan Agreement. At the commencement of these cases, Debtors owed Wachovia approximately $ 115 million which was secured by a lien on substantially all of Debtors' assets, including all of Debtors' stock in their domestic subsidiaries, and 65% of Debtors' stock in their foreign subsidiaries. Additionally, Debtors maintained a junior secured term loan and revolving line of credit with Madeline, LLC ("Madeline") pursuant to executing a Financing Agreement on April 13, 2004. Debtors owed Madeline approximately $ 200 million [*5] and the loan was secured by a lien on substantially all of Debtors' assets. The Court entered both interim and final orders authorizing Debtors to obtain post-petition financing from Wachovia, as the DIP Lender, and to use Madeline's cash collateral. On May 4, 2006, the Court entered the final order on the DIP Loan Motion (the "Final Financing Order") [D.I. 184], and a final order authorizing Debtors to use cash collateral [D.I. 185]. The Final Financing Order approved a ratification and Amendment Agreement dated April 1, 2006, by and among Debtors, Wachovia and others. Subsequently, and after the Court took the Motion under submission, the Court extended the DIP financing and use of cash collateral through approving an amendment to the Ratification Agreement. (Order (A) Authorizing Debtors to Obtain Interim Post-Petition Financing and Grant Security Interests' and Superpriority Administrative Expense Status (B) Modifying the Automatic Stay Authorizing Debtors to Enter Into Agreements with Wachovia Bank, National Association, as Agent and Lenders and (D) Scheduling a Final Hearing [D.I. 45])

Industria Mexicana del Aluminio, S.A. de C.V. ("IMASA") is a creditor and a party in [*6] interest in Debtors' bankruptcy. In the twenty days immediately preceding the Petition Date, Debtors purchased approximately 122,986 pounds of aluminum from IMASA in the ordinary course of Debtors' business.

IMASA filed its Motion for Allowance and Immediate Payment of Its *Section 503(b)(9)* Administrative Expense Claim (the "Motion") on May 25, 2006. IMASA has requested allowance of its claims for the aluminum as an administrative expense claim in the amount of the full value of the goods and that Debtors make payment within three business days of the Court's entry of an order granting the Motion. Debtors filed an objection to the Motion on May 23, 2006, on the grounds that IMASA did not carry its burden of proving the value of such goods or that it is entitled to allowance or payment of such claim [D.I. 452]. Wachovia filed a limited objection to the Motion on June 23, 2006 [D.I. 457], alleging that without Wachovia's consent, Debtors are not authorized to make payments under the Final Financing Order or the Financing Agreement. Wachovia has not consented to such payments.

The Motion was set for hearing on August 8, 2006. At the hearing, the parties announced that they had resolved [*7] the issue regarding the value of the aluminum. The Court subsequently entered an agreed upon order allowing IMASA's claim as an administrative expense in the amount of $ 206,322.07 [D.I. 704]. The issue that remains for decision is the timing of payment of the allowed administrative expense.

II. Jurisdiction

This is a core proceeding which invests the Court with jurisdiction pursuant to *28 U.S.C. § 157(b)(2)(A), (B),* and *(O)*.

III. Parties Contentions

According to IMASA, Debtors used the aluminum to manufacture their line of cookware, bakeware, and accessories, which generated significant post-petition revenues for Debtors. IMASA argues in support of its Motion that it would be inequitable to delay the payment of the administrative expense claim in light of the administrative expense priority afforded to it by the recent amendments to the Bankruptcy Code. [4] Additionally, IMASA asserts that it is entitled to adequate protection of its interest in cash collateral.

> 4 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, Pub.L.No. 109-8, 119 Stat. 23 (2005) (the "2005 Act") became law on October 17, 2005. The 2005 Act governs these cases.

[*8] In opposition to the Motion, Debtors contend that the Final Financing Order prohibits the payment of the claims or expenses not otherwise authorized under the DIP financing agreements or the DIP budget. Paragraph 1.2 of the Final Financing Order prohibits Debtors' use of loan proceeds for payment of claims not provided for in the financing agreements and budget without the Court's approval. Section 5.2 of the Ratification Agreement also restricts Debtors' use of DIP Financing proceeds to pay administrative claims. Debtors are authorized to pay only administrative claims that are directly attributable to the operation of the business of any of Debtors in the ordinary course of business and in accordance with the Financing Agreements, unless otherwise authorized by the Court and approved in writing by the DIP Lender. Payment of IMASA's administrative claim could therefore constitute a default under the Financing Agreements and violate the provisions of the Final Financing Order.

Debtors also argue that requiring immediate payment of *§ 503(b)(9)* claims would expose Debtors to financial risk by adversely affecting Debtors' borrowing availability. Debtors assert that every creditor with [*9] a potential administrative claim could also request immediate allowance and payment of its claims. These payments could potentially affect Debtors ability to obtain the necessary cash to continue their day-to-day operations.

Debtors assert that there is no need to deviate from the general rule that administrative claims are not payable until the effective date of a confirmed plan of reorganization. Debtors contend that the statute does not require immediate payment and that it is silent on the issue of timing.

IV. Discussion

IMASA filed its Motion pursuant to *§ 503(b)(9)*, which provides:

> After notice and a hearing, there shall be allowed administrative expenses ... including - (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9). *Section 503(b)(9)* is newly created by the 2005 Act. Creditor claims of this type are now given a second priority pursuant to *§ 507(a)(2)* of the Code. *Section 503* does not specify a time for payment of these expenses [*10] but administrative expenses must be paid in full on the effective date of the plan as provided in *§ 1129(a)(9)*. [5]

> 5 *Section 1129(a)(9)* mandates that a court shall confirm a plan of reorganization only if "... the plan provides that--
>
> > (A) with respect to a claim of a kind specified in section 507 (a)(1) or 507 (a)(2) of this title, on the effective date of the plan, the holder of such claim will receive

> on account of such claim cash equal to the allowed amount of such claim ...."

The parties agree that when a claimant timely files a request for payment of an administrative expense under *§ 503(a)*, the timing of the payment of that administrative expense claim is left to the discretion of the Court. *In re Garden Ridge Corp., 323 B.R. 136 (Bankr. D. Del. 2005)*; *Varsity Carpet Servs. v. Richardson (In re Colortex Indus.), 19 F.3d 1371, 1384 (11th Cir. 1994)*; *In re Continental Airlines, Inc., 146 B.R. 520, 531 (Bankr. D. Del. 1992)*. "In making this determination, one of [*11] the chief factors courts consider is bankruptcy's goal of an orderly and equal distribution among creditors and the need to prevent a race to a debtor's assets." *In re HQ Global Holdings, Inc., 282 B.R. 169 (Bankr. D. Del. 2002)*. Distributions to administrative claimants are generally disallowed prior to confirmation if there is a showing that the bankruptcy estate may not be able to pay all of the administrative expenses in full. *Id.* Courts will also consider the particular needs of each administrative claimant and the length and expense of the case's administration. *Id.* "To qualify for exceptional immediate payment, a creditor must show that 'there is a necessity to pay and not merely that the Debtor has the ability to pay.'" *In re Continental Airlines, Inc., 146 B.R. at 531* (quoting *In re Ionosphere Clubs, Inc., 98 B.R. 174, 179-79 (Bankr. S.D.N.Y. 1989)*; *See also* Alan N. Resnick, *The Future of Chapter 11: A Symposium Cosponsored by the American College of Bankruptcy: The Future of the Doctrine of Necessity and Critical Vendor Payments in Chapter 11 Cases, 47 B.C.L. Rev 183, 204-205 (2005)* (*Section 503 (b)(9)* "is [*12] a rule of priority, rather than payment." The new section does not specify when payment will be made. "Arguably, prepetition vendor claims are never payable in the ordinary course of business because of the intervening bankruptcy and the automatic stay, even if afforded administrative expense priority.").

In *In re Garden Ridge Corp.*, this Court considered three factors in determining how to exercise its discretion on the timing of payment of an administrative expense claim, *viz.*, (1) the prejudice to the debtors, (2) hardship to claimant, and (3) potential detriment to other creditors. *In re Garden Ridge Corp., 323 B.R. at 143*.

a. Prejudice to Debtors

During the course of the August 8th hearing, Debtors presented the testimony of Mr. Ronald F. Stengel, the Chief Restructuring Officer of Debtors. Mr. Stengel testified that: (1) the payment of *§ 503(b)(9)* claims would adversely effect Debtors' borrowing ability under the DIP Financing Agreement because the aggregate *§ 503(b)(9)* claims far exceed the company's availability to borrow, (2) that Debtors did not then have funds available to make payments for administrative claims, (3) Debtors' availability [*13] under the current financing arrangement was approximately $ 1.7 million and those funds were needed to provide for continuing operations, including current operating costs, payroll, purchase of inventory, etc., and (4) as of the hearing date there were nine other *§ 503(b)(9)* claims seeking in the aggregate approximately $ 2.1 million in Debtors' bankruptcy cases, and others were expected to be filed in the future. [6] Mr. Stengel opined that if Debtors had to pay the administrative claims immediately and in full, their reorganization efforts would collapse. Furthermore, Mr. Stengel testified that under Section 1.2 of the DIP Financing Order, Debtors are precluded from using any proceeds of any loans to pay claims or expenses that are not included in Debtors' budget without the consent of Wachovia. Mr. Stengel testified that he did not know whether or not Wachovia had given its consent to such expenditures and *§ 502(b)(9)* administrative claims were not included in Debtors' budget. Therefore, the uncontroverted testimony is that Debtors would be prejudiced if the Court were to grant the motions for administrative expense claims.

> 6 The docket reflects that more than twenty creditors have filed motions seeking immediate payment of administrative claims.

[*14] **b. Hardship to Claimant**

IMASA claims that the prejudice or hardship to them from non-payment of the administrative expense claim is self-evident. IMASA contends that it has been singled out of a class of claimants that have been given priority under the Code because Debtors are denying payment to IMASA until confirmation of a plan. IMASA did not present testimony to support its claim of prejudice, instead relying on various documents filed in Debtors' bankruptcy cases of which this Court took judicial notice. At the hearing on the Motion, the Court asked IMASA what evidence was before the Court of hardship to IMASA of later payment. IMASA responded:

> The only evidence I would submit, Your Honor, is sort of the self- evident hardship. That we're discriminating between five-o -- between 503(b) claimants. That is to say, some of them are going to be paid now, and others are being deferred.

(Hearing Transcript, 26, August 8, 2006).

The discrimination in payment to which IMASA refers is Debtors' payment of the pre- petition claims of certain critical vendors, which Debtors were entitled to make pursuant to the Order Authorizing, But Not Requiring the Payment of [*15] Prepetition Claims of Critical Trade Vendors ("Critical Vendor Order") [D.I. 42]. The Critical Vendor Order enabled Debtors to obtain favorable trade terms from those vendors whose products Debtors needed to be able to reorganize. The decision on which vendors are critical to Debtors' reorganized was left to Debtors' business judgment.

Debtors argue however, that the case law in this area does not focus on the alleged discrimination between post-petition trade creditors and pre-petition creditors, rather, it focuses on the individual hardship to the individual claimant. Debtors point out that there is no evidence that immediate payment is necessary to keep IMASA in business. According to IMASA's web site, they produce in excess of 70 million pounds of aluminum each year with company sales in excess of $ 400 million.

V. Decision

Debtors presented the testimony of Mr. Stengel which the Court found to be credible and decisively relevant to the issue of the relative hardships to the parties. In balancing these hardships, the Court finds that IMASA will suffer little prejudice or hardship if payment of its allowed administrative claim is deferred until after confirmation [*16] of a plan. Conversely, given the tenuous financial position of Debtors and the requirements of the DIP Financing Agreement, Debtors will suffer a substantial hardship if immediate payment on IMASA's *§ 503(b)(9)* claim is allowed at this time in Debtors' reorganization efforts. Accordingly, the Court has determined that the proper exercise of discretion requires the Court to deny the motion. The prejudice to Debtors of requiring immediate payment far outweighs the prejudice, if any, to IMASA and Debtors' other creditors are benefitted by the ruling to the extent that by denying immediate payment, the Court preserves a later equitable distribution to other administrative claimants.

VI. Conclusion

Based upon the forgoing, the Motion of Industria Mexicana del Aluminio, S.A. de C.V. for Allowance and Immediate Payment of Its *Section 503(b)(9)* Administrative Expense Claim will be **DENIED** to the extent that the Motion seeks immediate payment of the administrative expense claim.

An appropriate order follows.

DATED: December 21, 2006

Wilmington, Delaware

KEVIN GROSS

UNITED STATES BANKRUPTCY JUDGE

ORDER DENYING THE MOTION OF INDUSTRIA MEXICANA DEL ALUMINIO, [*17] **S.A. DE C.V. FOR ALLOWANCE AND IMMEDIATE PAYMENT OF ITS SECTION 503(B)(9) ADMINISTRATIVE EXPENSE CLAIM**

For the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby **ORDERED** that the Motion of Industria Mexicana del Aluminio, S.A. de C.V. for Allowance and Immediate Payment of Its *Section 503(b)(9)* Administrative Expense Claim is **DENIED** to the extent that the Motion seeks immediate payment of the administrative expense claim.

DATED: December 21, 2006

Wilmington, Delaware

KEVIN GROSS

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Chrysler LLC, *et al.*,	:	Case No. 09-50002 (AJG)
Debtors.	:	(Jointly Administered)

ORDER, PURSUANT TO SECTIONS 105(a) AND 503 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 3002 AND 3003, ESTABLISHING PROCEDURES FOR THE ASSERTION OF SECTION 503(b)(9) CLAIMS RELATING TO GOODS RECEIVED BY THE DEBTORS WITHIN TWENTY DAYS BEFORE THE PETITION DATE

This matter coming before the Court on the Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 503 of the Bankruptcy Code and Bankruptcy Rules 3002 and 3003, for an Order Establishing Procedures for the Assertion of Section 503(b)(9) Claims Relating to Goods Received by the Debtors Within Twenty Days Before the Petition Date (the "Motion"),[1] filed by the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"); the Court having reviewed the Motion and the Affidavit of Ronald E. Kolka filed in support of the Debtors' first day papers (the "Affidavit") and having considered the statements of counsel with respect to the Motion at a hearing before the Court on the Motion (the "Hearing"); and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (c) notice of the Motion and the Hearing was sufficient under the circumstances, and (d) the procedures set forth in the Motion will allow the Debtors the

[1] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

opportunity to address the allowance of claims in an orderly and efficient way, are consistent with the Bankruptcy Code, the Bankruptcy Rules and Local Rules, will not impair in any way the substantive rights of any parties and will ensure that similarly situated creditors receive equal treatment; and the Court having determined that the legal and factual bases set forth in the Motion and the Affidavit and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. All claims under section 503(b)(9) of the Bankruptcy Code (the "Twenty Day-Claims"), shall be asserted and determined in accordance with the following procedures (the "503(b)(9) Procedures"):

(a) All Twenty-Day Claims shall be filed by the General Bar Date, which will be set for all prepetition claims in these cases by a subsequent order of the Court, and in accordance with Bankruptcy Rules 3002 and 3003 and Local Bankruptcy Rule 3003-1.

(b) Twenty-Day Claimants shall utilize the proof of claim form to be developed by the Debtors in connection with the general bar date process, which form will permit all parties to assert the amount and priority of their claims (including priority under section 503(b)(9) of the Bankruptcy Code) in one standardized form.

(c) The Twenty-Day Claimants shall not file motions to compel allowance or payment of administrative expenses for their Twenty-Day Claims or schedule a hearing to consider such claims. Consistent with section 502(a) of the Bankruptcy Code, all timely filed Twenty-Day Claims shall be deemed accepted and allowed unless objected to by the Debtors or any other party in interest pursuant to section 502(c) of the Bankruptcy Code, Bankruptcy Rule 3007 or in accordance with further procedures for addressing claims as may be established by the Court ("Claims Procedures"). If such an objection to a Twenty-Day Claim is filed, such claim shall be adjudicated and allowed in accordance with the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and any Claims Procedures established by the Court.

(d) To the extent that a Twenty-Day Claim is allowed, the claim shall be paid pursuant to, and as set forth in, the applicable plan of reorganization confirmed by the Court.

(e) Nothing in these 503(b)(9) Procedures shall affect the rights and remedies of the Debtors, any official committee appointed in these cases or any other party in interest with regard to avoidance actions, and nothing in these 503(b)(9) Procedures shall provide a Twenty-Day Claimant a *prima facie* defense to any avoidance actions.

3. The Procedures are the sole and exclusive method for creditors to assert, seek determination of and obtain payment of the Twenty-Day Claims, provided however, that nothing herein shall limit any rights that creditors may have pursuant to the Supplier Support Program. Except as otherwise provided herein, all Twenty-Day Claimants are prohibited from seeking any other means for the allowance or treatment of their Twenty-Day Claims, unless leave is specifically granted by the Court.

4. All motions or other proceedings initiated by Twenty-Day Claimants to assert rights related to Twenty-Day Claims, whether currently pending or initiated in the future, except those proceedings initiated by the Debtors in accordance with the 503(b)(9) Procedures or those the Debtors already have consensually resolved, are stayed and the Twenty-Day Claims asserted therein shall be resolved exclusively by the 503(b)(9) Procedures.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
_____, 2009

_____
UNITED STATES BANKRUPTCY JUDGE