

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE	§	Chapter 11
ABC DENTISTRY, P.A., et al.¹	§	Case No. 16-34221
DEBTORS.	§	Jointly Administered

**DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING
PAYMENT OF CERTAIN SECTION 503(B)(9) CLAIMS AND
(II) GRANTING RELATED RELIEF**

**NOTICE UNDER ORDER GRANTING COMPLEX CHAPTER 11 BANKRUPTCY
CASE TREATMENT**

A HEARING WILL BE CONDUCTED ON THIS MATTER ON OCTOBER 4TH, 2016 AT 2:00 PM IN COURTROOM 404, 4th FLOOR, UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, 515 RUSK AVENUE, HOUSTON, TEXAS 77002. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-ONE DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

ABC DENTISTRY, P.A. and its debtor affiliates, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), file this *Debtors' Emergency Motion For Entry Of An Order (I) Authorizing Payment Of Certain Section 503(B)(9) Claims*

¹ The Debtors in these chapter 11 cases are: ABC Dentistry, P.A.; ABC Dentistry West Orem, P.L.L.C.; and ABC Dentistry Old Spanish Trail, P.L.L.C.

and (II) Granting Related Relief. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. The Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On August 26, 2016 (the “Petition Date”), the Debtors filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

3. The Debtors remain in possession of their property and are operating their business as debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee has been requested or appointed in this chapter 11 case.

4. Additional detail about the Debtors’ businesses and the events leading to the chapter 11 filings can be found in the Debtors’ motions for joint administration.

RELIEF REQUESTED²

5. By this Motion, the Debtors request entry of an order (a) authorizing, but not directing, them to pay, in their sole discretion, an aggregate of approximately \$14,500 for Section 503(b)(9) claims and (b) approving certain conditions on the Debtors’ payment of prepetition obligations.

² Capitalized terms used but not otherwise defined in this section shall have the meanings ascribed to them elsewhere in this Motion.

OVERVIEW OF DEBTORS OPERATIONS

6. As described in the Motion for Joint Administration, two of the Debtors³ are part of a family of clinics doing business as ABC Dental in the Houston area.

7. The ABC Dental family of clinics rely on a single vendor, Benco Dental (“Benco”), for the continuous supply of essential goods and services (the “Critical Vendor”). Any failure of the Critical Vendor to provide goods and services would likely hinder the Debtors’ operations, impacting cash flow and profitability. Such failure could also damage Benco’s relationship with the non-debtor ABC Dental clinics. Further, replacing this Critical Vendor would be time consuming and cost prohibitive; would place further strain the Debtors’ employees and morale; and could possibly interrupt patient services. Finally, establishing a new vendor relationship would require establishing new payment terms and could require the Debtors to provide additional security, on account of their ongoing bankruptcies.

8. Conversely, maintaining normal trade credit terms with the Critical Vendor will improve the Debtors’ chances of successfully reorganizing. Purchasing goods on the Critical Vendor’s existing credit terms helps to preserve the Debtors’ working capital and liquidity – enabling the Debtors to maintain their competitiveness and to maximize the value of their businesses. The Critical Vendor has already changed its payment terms with the Debtors, requiring them to purchase post-petition goods with credit cards. Absent the relief requested herein, the Critical Vendor may attempt to keep the Debtors on these alternative payments terms or require cash-in-advance or on delivery, which could divert funds away from the Debtors’ funding needs during the critical first weeks of the Debtors’ bankruptcy.

9. In preparing this motion, the Debtors and their advisors reviewed their accounts payable and prepetition vendor lists and consulted with employees most familiar with the

³ ABC Dentistry, P.A. is not an operating clinic.

Debtors' supply chain. At this time, the Debtors identified Benco as the only critical vendor with material prepetition outstanding amounts. Based on their books and records, the Debtors estimate that they owe Benco approximately \$27,000 on account of goods and services provided prior to the petition date. Of the approximately \$27,000 owed, the Debtors are seeking the authority to pay approximately \$15,000 on account of goods delivered within 20 days prior to the Debtors bankruptcy filing (the "Prepetition Critical Vendor Claims").

APPLICABLE AUTHORITY

The Court May Authorize the Payment of Claims Entitled to Administrative Expense Priority Under Section 503(b)(9) of the Bankruptcy Code.

10. Section 503(b)(9) of the Bankruptcy Code provides administrative priority 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 goods have been sold to the debtor in the ordinary course of such debtor's business." As claims entitled to administrative priority, Section 503(b)(9) claims must be paid in full as a condition to confirmation of a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A). Consequently, immediate payment of Section 503(b)(9) claims will only accelerate relief to which the Critical Vendor is already entitled.

11. The Bankruptcy Code does not prohibit a debtor from paying Section 503(b)(9) claims prior to confirmation. The timing of 503(b)(9) payments lies squarely within the discretion of the Court. *See In re Global Home Prods., LLC*, No. 06-10340, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006).

12. Courts generally acknowledge that it is appropriate to authorize the payment of prepetition obligations where necessary to protect and preserve the estate, including an operating business' going-concern value. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex.

2002). In so doing, courts rely on several legal theories rooted in sections 105(a), 363(b), 1107(a) and 1108 of the Bankruptcy Code.

13. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *CoServ*, 273 B.R. at 497. Implicit in the fiduciary duties of any debtor in possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” *Id.* Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.*

14. Consistent with the debtor’s fiduciary duties, courts have also authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See In re James A. Phillips, Inc.*, 29 B.R. 391, 398 (S.D.N.Y. 1983) (relying on section 363 of the Bankruptcy Code to allow contractor to pay prepetition claims of suppliers).

15. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code. Section 105(a) codifies the inherent equitable powers of the bankruptcy court, empowering 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). Specifically, the Court may use its power under section 105(a) to authorize payment of prepetition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”). *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992).

16. The rationale for the necessity of payment rule—the rehabilitation of a debtor in reorganization cases—is “the paramount policy and goal of Chapter 11.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-176 (Bankr. S.D.N.Y. 1989)). To that end, courts have permitted postpetition payment of prepetition claims pursuant to section 105(a) in situations such as where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. *See Ionosphere*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

17. Further, courts in this district and elsewhere authorize Chapter 11 debtors to pay prepetition claims of general unsecured creditors when necessary to preserve or enhance the value of the debtor’s estate to the benefit of all creditors. *See In re Equalnet Commc’ns Corp.*, 258 B.R. 368, 369-70 (Bankr. S.D. Tex. 2000) (transactions critical to debtor’s survival are excepted from the general rule of nonpayment of prepetition claims prior to plan confirmation); *see also In re Mirant Corp.*, 296 B.R. 427, 429 (Bankr. N.D. Tex. 2003) (motion to pay critical vendors granted because payment of prepetition claims outside a plan is commonplace and a vendor might condition future dealings with a debtor on payment of its prepetition claim); *In re ATP Oil & Gas Corp.*, Case No. 12-36187 (Bankr. S.D. Tex. Aug. 22, 2012) (docket 139).

18. Creditors holding Section 503(b)(9) claims typically are required to file a motion or wait until a plan has been approved to receive payment of their administrative claim. However, the Debtors believe that, given the ultimate administrative priority nature of these claims and the vital role that the Critical Vendor will likely have in the Debtors’ successful restructuring, it is in the best interest of their estates to pay the Prepetition Critical Vendor Claims now.

19. The Debtors require a steady stream of supplies and services from the Critical Vendor to ensure the continued operation of their business. Because the Debtors' trade relationships with the Critical Vendor is not governed by long term contracts, the Debtors believe that their trade relationship may materially deteriorate, causing disruption to the Debtors' operations if the Debtors are unable to pay Prepetition Critical Vendor Claims. Failure to pay the Prepetition Critical Vendor Claims could prolong the Debtors' inability to obtain necessary supplies or services, prevent the Debtors from preserving favorable trade terms, and increase the likelihood for significant disruptions to the Debtors' supply chain. This failure could, in turn, jeopardize numerous customer relationships and could significantly impair the value of the Debtors' business, as well as relationships between the Critical Vendor and non-debtor entities within the ABC Dental family of clinics.

20. In this case, the Debtors' ongoing ability to obtain goods from Benco is critical to their survival, necessary to preserve the value of their estates, and justifies the Debtors' decision to pay the Prepetition Critical Vendor Claims prior to confirmation. Absent payment of the Prepetition Critical Vendor Claims—which merely accelerates the timing of payment and not the ultimate treatment of such claims—the Critical Vendor could lose faith in Debtors' prospects as a going concern and Debtors could be denied access to goods critical to their businesses. Failure to honor these claims in the ordinary course of business may also cause the Critical Vendor to withhold support for the Debtors during the chapter 11 process or to accelerate or eliminate favorable trade terms.

21. As of the Petition Date, the Debtors estimate that they owe a total aggregate amount of approximately \$15,000 on account of goods delivered within the 20 days prior to the Petition Date. By this Motion, the Debtors seek authority to pay, in their sole discretion, based

on their business judgment, up to \$15,500 on account of the Critical Vendor's Prepetition Critical Vendor Claims.

22. Further, the Debtors propose (unless otherwise waived by the Debtors in their discretion) that they be authorized, but not directed, in their sole discretion, to require that the Critical Vendor provide favorable trade terms for the postpetition delivery of goods and services. Specifically, the Debtors propose to condition the payment of Prepetition Critical Vendor Claims upon the Critical Vendor's agreement to continue supplying goods and services on the Debtors' normal and customary trade terms and practices, as were in effect between the Critical Vendor and the Debtors for the period within 120 days before the Petition Date, or such other trade terms that are acceptable to the Debtors (the "Standard Trade Terms").

23. In addition, the Debtors request that if the Critical Vendor accepts full or partial payment of its Prepetition Critical Vendor Claims pursuant to an order granting the relief requested in this Motion, and thereafter does not continue to provide goods or services on Standard Trade Terms, that: (a) any payment on account of a Prepetition Critical Vendor Claims may be deemed to be an improper postpetition transfer, and, therefore, recoverable by the Debtors in cash upon written request, and (b) upon recovery of the payment by the Debtors, the Prepetition Critical Vendor Claims shall be reinstated as if the payment had not been made. If there exists an outstanding postpetition balance due from the Debtors to the Critical Vendor, the Debtors may elect to recharacterize and apply any payment made pursuant to an order granting the relief requested in this Motion to such outstanding postpetition balance and the Critical Vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding, without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

WAIVER OF BANKRUPTCY RULE 6004(A) AND 6004(H)

24. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale or lease of a property under Bankruptcy Rule 6004(h).

EMERGENCY CONSIDERATION REQUESTED

25. The Debtors respectfully request emergency consideration of this Motion. The Debtors already have a hearing set on October 4, 2016. A regular twenty-one day notice period following the filing of this motion would expire on October 5, 2016. In the interest of judicial economy and in an effort to minimize unnecessary expense, the Debtors respectfully request that the Court consider this motion on an emergency basis on October 4, 2016. The Debtors believe that such emergency consideration of this motion will not substantially prejudice any creditor's right to object.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, granting the relief requested herein and granting such other relief as is just and proper.

Date: September 14, 2016

Respectfully submitted,

BAKER BOTTS L.L.P.

/s/ Omar J. Alaniz

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PROPOSED COUNSEL TO DEBTORS-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE ABC DENTISTRY, P.A., <i>et al.</i>¹ DEBTORS.	§ § § § § § §	Chapter 11 Case No. 16-34221 Jointly Administered
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**ORDER (I) AUTHORIZING PAYMENT OF CERTAIN SECTION 503(B)(9) CLAIMS
AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for the entry of an order (this “Order”) (a) authorizing the Debtors to pay, in their sole discretion, in the ordinary course of business prepetition claims entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code and (b) approving certain conditions on the Debtors’ payment of prepetition obligations, all as more fully set forth in the Motion; and the Court having jurisdiction to consider this Motion and the relief requested therein in accordance with 28 U.S.C. § 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(1)–(2); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion being adequate and appropriate under the particular circumstances; and a hearing having been held to consider the relief requested in the Motion (the “Hearing”); and upon the record of the Hearing, and all proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest, and that the legal and factual bases

¹ The Debtors in these chapter 11 cases are: ABC Dentistry, P.A.; ABC Dentistry West Orem, P.L.L.C.; and ABC Dentistry Old Spanish Trail, P.L.L.C.

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Debtors are authorized, but not directed, in their sole discretion, to pay the Prepetition Critical Vendor Claims to Benco; *provided that* such payments shall not exceed \$15,500 in the aggregate.

2. The Debtors are authorized, in their sole discretion, to pay such Prepetition Critical Vendor Claims, in whole or in part, upon such terms and in the manner provided in this Order, provided, however, that if Benco accepts any payment pursuant to the authority granted in this Order, it agrees to supply goods and services on the Standard Trade Terms.

3. Should Benco accept payment from the Debtors on account of all or a portion of a prepetition claim pursuant to this Order, Benco shall be deemed to (a) agree to the terms and provisions of this Order and (b) have waived, to the extent so paid, any and all prepetition claims, of any type, kind, or priority (including any reclamation claim), against the Debtors, their assets, and properties.

4. Nothing herein shall impair or prejudice the Debtors' ability to contest, in their sole discretion, the extent, perfection, priority, validity, or amounts of any claims held by Benco.

5. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks, or fund transfer requests in respect of the obligations described in the Motion that are dishonored or rejected.

6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry to avoid immediate and irreparable harm as that phrase is used in Rule 6003.

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

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

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

Dated:

The Honorable Marvin Isgur
United States Bankruptcy Judge