

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
ALSET OWNERS, LLC, *et al.*,¹ : Case No. 09-____ (____)
: (Joint Administration Requested)
Debtors. :

**MOTION OF THE DEBTORS FOR AN ORDER AUTHORIZING THE
PAYMENT OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS**

Alset Owners, LLC, a Delaware limited liability company, and certain of its direct and indirect subsidiaries, the debtors and debtors in possession in the above cases (collectively, the “Debtors”), by and through their undersigned counsel, hereby move this Court (the “Motion”), pursuant to section 105(a), 363, 364, and 503(b) of title 11 of the United States Code (the “Bankruptcy Code”), for entry of an order authorizing (i) authorizing the Debtors to pay, in their discretion, certain prepetition claims of critical vendors and (ii) authorizing banks and other financial institutions to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under any order granting the relief requested in this Motion. In support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The Debtors and the last four digits of their respective tax identification numbers are: Alset Owners, LLC, a Delaware limited liability company (7520); Altes, LLC, a Delaware limited liability company (6927); Setla, LLC, a Delaware limited liability company (6752); and Checkers Michigan, LLC, a Delaware limited liability company (8016).

2. The predicates for the relief requested herein are sections 105(a), 363, 364, and 503(b) of the Bankruptcy Code.

BACKGROUND

3. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. On the Petition Date, the Debtors jointly filed this Motion along with other motions or applications seeking certain typical “first day” relief, including a request to have these cases jointly administered.

4. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. No trustee or examiner has been appointed in these chapter 11 cases, and no official committee of unsecured creditors has been established to date.

6. The events leading up to the Petition Date and additional facts and circumstances supporting the relief requested herein are set forth in the Declaration of Leonard Levitsky in Support of Chapter 11 Petitions and First Day Relief (the “Levitsky Declaration”), which is fully incorporated herein by reference.²

RELIEF REQUESTED

7. By this Motion, the Debtors seek entry of an order pursuant to sections 105(a), 363, 364, and 503(b) of the Bankruptcy Code and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing the Debtors, in their discretion, to pay the prepetition claims of critical vendors that delivered goods or provided services to the Debtors before the Petition Date.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Levitsky Declaration.

8. The Motion further seeks authorization for all applicable banks and other financial institutions asked to process, honor and pay any and all checks and transfer requests with respect to Critical Vendor Claims (defined below) to rely on the representations of the Debtors as to which checks are issued or authorized to be paid in accordance with this Motion without any further duty of inquiry and without liability for following the Debtors' instructions.

BASIS FOR RELIEF

I. CRITICAL VENDOR PAYMENTS

9. Certain vendors (the "Critical Vendors") have claims for providing (i) essential goods to the Debtors that were received by the Debtors before the Petition Date and/or (ii) essential services that were rendered to, or on behalf of the Debtors before the Petition Date (collectively, the "Critical Vendor Claims"). By this Motion, the Debtors seek entry of an order authorizing the Debtors, in their discretion, to pay the prepetition claims of such Critical Vendors in an aggregate amount not to exceed \$1.05 million (the "Critical Vendor Cap"). Given the paramount importance of the goods and services provided by the Critical Vendors, and in order to ensure the Debtors continue to receive such goods and services, it is imperative that the Debtors be authorized to pay the Critical Vendor Claims on an emergency basis.

10. The Debtors believe that payment of the Critical Vendor Claims is vital to the Debtors' ongoing business operations because, in several instances, the Critical Vendors are the only source from which the Debtors can procure certain goods and services within a timeframe and at a price that will permit the Debtors to continue their businesses. A failure to pay the Critical Vendor Claims would likely result in many of the Critical Vendors refusing to provide goods and services to the Debtors postpetition, and may force the Debtors to obtain such goods

and services elsewhere at a higher price or not of the quantity or quality required by the Debtors or within the time frame necessary.³

11. The Debtors have examined whether the payment of Critical Vendor Claims is necessary and will ensure that the Debtors have access to adequate amounts of trade credit on a postpetition basis. Specifically, the Debtors have reviewed their accounts payable and have undertaken a process to identify those vendors who are essential to the Debtors' operations. The Debtors have further developed certain procedures (for which they seek this Court's approval) that, when implemented, will ensure that vendors receiving payment of Critical Vendor Claims will continue to supply trade credit necessary to the Debtors' operations on a postpetition basis and in accordance with the terms of the parties' prepetition dealings.

12. The Debtors consulted with appropriate members of their management team to identify those vendors that are most likely essential to the Debtors' operations using the following criteria: (a) whether the vendor or service provider in question is a "sole-source" provider, (b) whether, even if the vendor or service provider in question is not a "sole-source" provider, quality requirements, other specifications, familiarity or knowledge prevent the Debtors from obtaining a vendor's products or services from alternative sources cost effectively and within a reasonable timeframe, and (c) whether a vendor meeting the standards of (a) and (b) is likely to refuse to continue providing goods or services to the Debtors postpetition if its prepetition outstanding balances are not paid.

13. After carefully assessing the universe of vendors against the foregoing criteria, the Debtors estimated the total payments that would be necessary to ensure the continued supply of

³ Nothing in this Motion should be construed as a waiver of the Debtors' right to compel performance of any non-debtor under any agreement between the Debtor and a Critical Vendor.

critical goods and services to the Debtors following the Petition Date in calculating the Critical Vendor Cap.

14. The Debtors propose to condition the payment of Critical Vendor Claims on the agreement of the individual Critical Vendor to continue supplying goods and services to the Debtors on terms that are as or more favorable to the Debtors as the most favorable trade terms, practices, and programs in effect between the Critical Vendor and the Debtor in the six months prior to the Petition Date (the “Customary Trade Terms”), or such other trade terms as are agreed to by the Debtors and the Critical Vendor. To the extent that a Critical Vendor provided goods to the Debtors prepetition, the Debtors further propose that all payments of Critical Vendor Claims shall be applied first to such Critical Vendor’s claims for goods received by the Debtors within the twenty days prior to the Petition Date and the remainder, if any, to the Critical Vendor’s claims for goods received by the Debtors prior to the twenty day period before the Petition Date. The Debtors reserve the right to negotiate new trade terms with any Critical Vendor as a condition to payment of any Critical Vendor Claim.

15. The Debtors further propose to take appropriate efforts, in their discretion, to cause each Critical Vendor to enter into an agreement (the “Trade Agreement”) that includes, without limitation, the following terms:

- (a) The amount of such Critical Vendor’s estimated prepetition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount and timing of any agreed payment be paid in satisfaction of such estimated prepetition claim by the Debtors, subject to the terms and conditions as set forth in this Court’s Order;

- (c) The Critical Vendor's agreement to provide goods and/or services to the Debtors based upon the Customary Trade Terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability and other applicable terms and programs), or such other favorable trade terms as mutually agreed to by the Debtors and such Critical Vendor, and the Debtors' agreement to pay the Critical Vendor in accordance with such terms;
- (d) The Critical Vendor's agreement not to file or otherwise assert against the Debtors, their estates or any of their assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to release such Lien;
- (e) The Critical Vendor's acknowledgment that it has reviewed the terms and provisions of the Order and consents to be bound thereby;
- (f) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims or section 503(b)(9) claims; and
- (g) If a Critical Vendor who has received payment of a prepetition claim subsequently refuses to supply goods to the Debtors on Customary Trade Terms or other favorable trade terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceeds the postpetition obligations then outstanding, without the right of setoff or reclamation.

16. Such Trade Agreements may be in addition to any other agreements between the parties.

17. For those Critical Vendors who have agreed to provide goods or services to the Debtors on terms different from their Customary Trade Terms, the Debtors reserve the right to seek written acknowledgment of such terms on a case-by-case basis. Nothing in this Motion or

any order of this Court approving this Motion should be construed as a waiver by any of the Debtors of their rights to contest any invoice of a Critical Vendor under applicable non-bankruptcy law.

18. If a Critical Vendor refuses to supply goods or services to the Debtors on Customary Trade Terms following payment of any portion of its Critical Vendor Claim, or fails to comply with any Trade Agreement it entered into with the Debtors, the Debtors hereby seek authority to, in their discretion and without further order of the Court, (i) terminate any Trade Agreement between the Debtors and such Critical Vendor (if applicable), and (ii) deem any payments made to such Critical Vendor on account of its Critical Vendor Claim, whether pursuant to a Trade Agreement or otherwise, to have been in payment of then-outstanding postpetition claims of such Critical Vendor (the “Terminated Critical Vendor”) without further order of the Court. If, however, the Debtors choose not to terminate a Trade Agreement immediately upon a refusal by the participating Critical Vendor party to provide goods and/or services in accordance with such Trade Agreement, they shall not be deemed to have waived the ability to terminate such Trade Agreement.

19. In the event the Debtors exercise either of the rights set forth in the preceding paragraph, the Debtors request that the Terminated Critical Vendor be required to immediately return any payments made on account of its Critical Vendor Claim to the extent that such payments exceed the postpetition amounts then owed to such Terminated Critical Vendor, without giving effect to any rights of setoff or reclamation. In the event that a Terminated Critical Vendor refuses to acknowledge such recharacterization and to issue the repayment, the Debtors propose that they be authorized to compel such recharacterization and repayment by a

motion (on such notice as is required by this Court or by the Local Rules for the United States Bankruptcy Court for the District of Delaware).

B. PAYMENT OF THE CRITICAL VENDOR CLAIMS IS CRITICAL TO THE DEBTORS' REORGANIZATION EFFORTS

20. The Debtors believe that authority to pay the Critical Vendor Claims is vital to their reorganization efforts. If this Motion is not granted, the Debtors believe that their access to trade credit on a postpetition basis will be severely limited and that many of the Critical Vendors will stop providing goods and services to the Debtors altogether. Such results would cause immediate and irreparable damage to the Debtors and their estates.

21. The continued availability of trade credit in amounts and on terms consistent with the Debtors' prepetition trade terms is advantageous to the Debtors because it allows the Debtors to preserve working capital while maintaining optimal production levels. The retention or reinstatement of Customary Trade Terms will therefore enable the Debtors to maximize the value of their businesses as a going concern. Conversely, a deterioration of postpetition trade credit available to the Debtors and a disruption or cancellation of deliveries of goods or the provision of services – many of which are not readily replaceable, if at all – would cripple the Debtors' business operations, increase the amount of funding needed by the Debtors postpetition, and ultimately impede the Debtors' ability to service their customers, thereby placing their customer base, as well as their successful reorganization at risk.

22. The Debtors rely upon various Critical Vendors that are vital to the Debtors' ongoing businesses. The Critical Vendors are generally food suppliers or service providers relating to the operations of the Debtors' business.

C. CASE LAW AND STATUTORY SUPPORT FOR AUTHORIZATION TO PAY CRITICAL VENDOR CLAIMS

i This Court May Authorize Payment of the Critical Vendor Claims Pursuant to Sections 363 and 364 of the Bankruptcy Code

23. The Court may grant the relief requested herein pursuant to sections 363 and 364 of the Bankruptcy Code. See, e.g., In re UAL Corporation, et al., (Bankr. N.D. Ill. 2002) (an essential trade motion generated by section 363 is “completely consistent with the Bankruptcy Code” and such payments have further support where the Debtor seeks “the extension of credit under section 364 on different than usual terms, terms that might include payment of a prepetition obligation”); In re James A. Phillips, Inc., 29 B.R. 391, 397 (S.D.N.Y. 1983) (authorizing, pursuant to section 363, a contractor to pay prepetition claims of some suppliers who were potential lien claimants, because the payments were necessary for the general contractors to release funds owed to the debtors).

24. The relief requested in this Motion contemplates the payment of Critical Vendor Claims of those Critical Vendors who agree to provide postpetition goods to the Debtors on Customary Trade Terms or other terms acceptable to the Debtors. As a result, the payment of such Critical Vendor Claims is consistent with and appropriate under sections 363 and 364 of the Bankruptcy Code.

25. As detailed above, maintaining the goods and services provided by the Critical Vendors is vital to the Debtors’ continuing business operations and the success of these chapter 11 cases. In addition, and as also detailed above, the Debtors have conducted an extensive analysis and review of the Debtors’ immediate trade needs and supplier base and have concluded that there is a significant risk that the Critical Vendors will cease doing business with the Debtors unless their Critical Vendor Claims are paid. Should any Critical Vendor stop supplying goods or services to the Debtors, or choose to significantly downgrade the Debtors’ trade terms, their

businesses would be adversely affected as a result of, among other things, an adverse impact on the Debtors' cash flow. As such, the Debtors submit that the amount of the Critical Vendor Cap pales in comparison to the likely damage to the Debtors' businesses and estates should the relief requested herein not be granted. Accordingly, not only will the Debtors' other creditors not be impaired by payment of the Critical Vendor Claims, such creditors will in fact benefit by this Court's empowering the Debtors to negotiate payment to Critical Vendors to achieve a smooth transition into bankruptcy with minimal disruption to its operations. In light of the foregoing, the Debtors submit that payment of the Critical Vendor Claims is plainly in the best interests of their estates and creditors.

ii The Court May Also Grant the Motion Pursuant to Its General Equitable Powers under Section 105(a) of the Bankruptcy Code and the Necessity of Payment Doctrine

26. The Court's general equitable powers are codified in section 105(a) of the Bankruptcy Code. Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "[T]o invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is critical to the debtor's reorganization." In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999).

27. Numerous courts have used their section 105(a) equitable powers under the necessity of payment doctrine⁴ to authorize payment of a debtor's prepetition obligations where,

⁴ This doctrine, first articulated by the United States Supreme Court in Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286, 311-12 (1882), recognizes the existence of judicial power to authorize a debtor

as here, such payment is necessary to effectuate the “paramount purpose” of chapter 11 reorganization, which is to prevent the debtor from going into liquidation and preserve the debtor’s potential for rehabilitation. See In re Lehigh Co. & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (holding that “if payment of a claim which arose prior to reorganization is essential to the continued operation of the... [business] during reorganization, payment may be authorized even if it is made out of [the] corpus”); In re Ionosphere Clubs, Inc., 98 B.R. 174,176-77 (Bankr. S.D.N.Y. 1989) (necessity of payment doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor”); see also In re James A. Phillips, Inc., 29 B.R. 391, 394-95 (S.D.N.Y. 1983) (upholding the bankruptcy court’s order authorizing the debtor to make postpetition payment of prepetition claims in the ordinary course without notice and a hearing). The “necessity of payment” doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” Ionosphere Clubs, 98 B.R. at 176; In re Chateaugay Corp., 80 B.R. 279 (S.D.N.Y. 1987). This rule is consistent with the paramount goal of chapter 11, *i.e.*, “facilitating the continued operation and rehabilitation of the debtor” Ionosphere Clubs, 98 B.R. at 176.

28. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay the prepetition claims of certain critical vendors. See In re Columbia Gas Sys.. Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a prepetition claim ‘is essential to the continued operation of [the debtor], payment may be authorized”).

in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.

29. Indeed, it is not uncommon for courts in this District to authorize the payment of critical trade claims where the payment of such claims is essential to the debtor's continued operations. See, e.g., In re Midway Games, Case No. 09-10465 (KG) (Bankr. D. Del. Feb. 13, 2009) (final order); In re Smurfit-Stone Container Corporation, Case No. 09-10235 (Bankr. D. Del. Jan. 27, 2009) (interim order); In re Tribune Company, Case No. 08-13141 (KJC) (Bankr. D. Del. December 10, 2008) (final order as to critical vendors); In re Buffets Holding, Inc., Case No. 08-10141 (BLS) (Bankr. D. Del. Jan. 24, 2008) (interim order) (Bankr. D. Del. Feb. 13, 2008) (final order); In re American Home Mortgage Holdings, Inc., Case No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); In re Tweeter Home Entertainment Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 12, 2007); In re Holliston Mills, Inc., Case No. 07-10687 (MFW) (Bankr. D. Del. May 23, 2007) (emergency order), (Bankr. D. Del. June 20, 2007) (final order); In re Meridian Automotive Systems-Composite Operations, et al., Case No. 05-11168 (MFW) (Bank. D. Del. April 27, 2005) (emergency order), (Bankr. D. Del. May 27, 2005) (final order); In re Glass Group, Inc., Case No. 05-10532 (PJW) (Bankr. D. Del. Mar. 2, 2005). This Court has also upheld the relief requested by the Debtors concerning their remedies for breach of a Trade Agreement. See In re Maxxim Medical Group, Inc., Case No. 03-10438 (PJW) (Bankr. D. Del. Feb. 19, 2003). The Debtors respectfully submit that similar relief is warranted in these chapter 11 cases.

iii The Court May Also Authorize the Relief Requested as a Valid Exercise of the Debtors' Fiduciary Duties

30. The Debtors, operating their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries "holding the bankruptcy estate[s] and operating the business for the benefit of. . . [their] creditors and (if the value justifies) equity owners." In re CoServ, 273 BR. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in

the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including operating business’s going-concern value.” Id.

31. It has been noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only. . . by the preplan satisfaction of a prepetition claim.” Id. The CoServ court specifically noted that satisfaction of prepetition claims prior to a plan of reorganization would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate” and also when the payment was to “sole suppliers of a given product.” Id. at 497-98. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant.
Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim.
Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

32. Payment of the Critical Vendor Claims meets the test set forth in CoServ. As described above, the Debtors have narrowly tailored the Critical Vendor Cap to encompass only those Critical Vendors which are essential to the business and operation of each of the Debtors’ businesses. Any interruption of the Debtors’ operations could cause substantial harm to the Debtors’ estates in lost sales and market share. Accordingly, the harm that would stem from the failure to pay of any of the Critical Vendors is disproportionate to the amount of the prepetition claims that the Debtors are seeking to pay hereunder. Moreover, with respect to each Critical Vendor, the Debtors have examined other options short of payment of such Critical Vendor Claims and have determined that to avoid significant disruption of the Debtors’ business

operations, there exists no practical or legal alternative to payment of the Critical Vendor Claims. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of the Critical Vendor Claims. Accordingly, the Court should grant the relief requested herein.

iv The Court Should Authorize the Debtors to Satisfy the Critical Vendor Claims In the Normal Course of Business Within Twenty Days After the Petition Date as Requested

33. Pursuant to the recent revisions to Bankruptcy Rule 6003, the Court may authorize payment of a prepetition claim in the normal course of business within twenty days after the Petition Date if such relief is necessary to avoid immediate and irreparable harm. As explained above, satisfying the Critical Vendor Claims is essential to the continued, uninterrupted operation of the Debtors' businesses. Without satisfaction of these claims, the Debtors believe that the Critical Vendors will significantly downgrade trade terms and may stop supplying them with critical goods and services necessary in their operations, thereby hampering the Debtors' ability to achieve a successful result in these chapter 11 cases.

34. For the foregoing reasons and the reasons set forth in the Levitsky Declaration, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 and accordingly, the Court should grant the relief requested herein.

35. To the extent Bankruptcy Rule 6004(h) is applicable to this Motion, the Debtors also seek a waiver of the ten-day stay under Bankruptcy Rule 6004(h).

NOTICE

36. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) the United States Securities and Exchange Commission; (c) the Office of the United States Attorney for the District of Delaware; (d) the Internal Revenue Service; (e) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; (f) Textron Financial Corporation;

and (g) counsel to Checkers Drive-In Restaurants, Inc. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary or required.

NO PRIOR REQUEST

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

WHEREFORE, the Debtors respectfully request that the Court enter an order, in substantially the form attached hereto, (i) authorizing, on an emergency basis, the Debtors to satisfy, in their discretion, the Critical Vendor Claims; and (ii) granting such other and further relief as the Court deems just and proper.

Dated: June 5, 2009

BLANK ROME LLP

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PROPOSED ATTORNEYS FOR
DEBTORS AND DEBTORS IN
POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
ALSET OWNERS, LLC, *et al.*,¹ : Case No. 09 _____ (____)
: (Joint Administration Requested)
Debtors. :

**ORDER GRANTING MOTION OF THE DEBTORS FOR AN ORDER
AUTHORIZING, ON AN EMERGENCY BASIS, THE PAYMENT
OF PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS**

Upon consideration of the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order authorizing, on an emergency basis, the Debtors to pay, in their discretion, certain prepetition claims of critical vendors; and upon consideration of the Declaration of Leonard Levitsky in Support of Chapter 11 Petitions and First Day Relief; and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and (c) notice of the Motion was due and proper under the circumstances; and upon the record herein; and it appearing that the relief requested by the Motion is in the best interest of the Debtors, their estates and creditors; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

¹ The Debtors and the last four digits of their respective tax identification numbers are: Alset Owners, LLC, a Delaware limited liability company (7520); Altes, LLC, a Delaware limited liability company (6927); Setla, LLC, a Delaware limited liability company (6752); and Checkers Michigan, LLC, a Delaware limited liability company (8016).

² All capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

2. The Debtors are authorized, in their discretion and in the exercise of their business judgment, to pay and/or effect a Cancellation of the prepetition claims of Critical Vendors (the “Critical Vendor Claims”) subject to the conditions set forth in this Order.

3. The Debtors’ payment of Critical Vendor Claims shall not exceed \$1.05 million in the aggregate unless otherwise ordered by the Court.

4. After the date hereof, the Debtors shall determine who is a Critical Vendor by considering, among other things, whether failure to pay such creditor’s prepetition claims will have a material impact on the Debtors’ operations.

5. The Debtors shall undertake all appropriate efforts to cause each Critical Vendor to enter into an agreement with the Debtors (the “Trade Agreement”), including, but not limited to, the following terms:

- (a) The amount of such Critical Vendor’s estimated prepetition claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors (but such amount shall be used only for purposes of the Trade Agreement and this Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully preserved until further order of the Court);
- (b) The amount and timing of any payment agreed to be paid in satisfaction of such estimated prepetition claim by the Debtors, subject to the terms and conditions as set forth in this Order;
- (c) The Critical Vendor’s agreement to provide goods and/or services to the Debtors based upon the Customary Trade Terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability and other applicable terms and programs), or such other favorable trade terms as mutually agreed to by the Debtors and such Critical Vendor, and the Debtors’ agreement to pay the Critical Vendor in accordance with such terms;
- (d) The Critical Vendor’s agreement not to file or otherwise assert against the Debtors, their estates or any of their assets or property (real or personal) any lien (a “Lien”) (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining

prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary actions to release such Lien;

- (e) The Critical Vendor's acknowledgment that it has reviewed the terms and provisions of this Order and consents to be bound thereby;
- (f) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation claims and section 503(b)(9) claims; and
- (g) If a Critical Vendor who has received payment of a prepetition claim subsequently refuses to supply goods to the Debtors on Customary Trade Terms or other favorable trade terms, any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor, and that such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

6. The Debtors may, in their discretion, enter into a Trade Agreement with an individual Critical Vendor and the terms of any such Trade Agreement are hereby incorporated by reference and approved.

7. The Debtors shall condition the payment of Critical Vendor Claims on the agreement of the individual Critical Vendor to continue supplying goods and services to the Debtors on terms that are as or more favorable to the Debtors as the most favorable trade terms, practices, and programs in effect between the Critical Vendors and the Debtors in the six months prior to the Petition Date (the "Customary Trade Terms), or such other trade terms as are agreed to by the Debtors and the Critical Vendor.

8. To the extent applicable, unless otherwise agreed to by the Debtors, in their sole discretion, any payment of Critical Vendor Claims under this Order shall be applied first to the Critical Vendor's claims for goods received by the Debtors within twenty days of the Petition

Date with the remainder, if any, being applied to the Critical Vendor's claims for goods received by the Debtors prior to the twenty days before the Petition Date.

9. Any such Trade Agreement entered into by the Debtors with an individual Critical Vendor and hereby incorporated by reference and approved shall not automatically terminate upon confirmation of a chapter 11 plan (the "Confirmation Date").

10. The Debtors may, in their discretion, terminate a Trade Agreement with an individual Critical Vendor (a "Terminated Critical Vendor"), together with the other benefits to the Terminated Critical Vendor as contained in this Order, provided, however, that in the event the Debtors terminate a Trade Agreement with a Critical Vendor they shall provide notice of such termination to the Office of the United States Trustee and any official committee of unsecured creditors appointed in these cases.

11. If the Debtors choose not to immediately terminate a Trade Agreement upon a refusal by the participating Critical Vendor party to provide goods in accordance with such Trade Agreement, the Debtors shall not be deemed to have waived their right to terminate such Trade Agreement.

12. If a Trade Agreement is terminated as set forth above, or a Critical Vendor who has received payment of a prepetition claim later refuses to continue to supply goods or services to the Debtors on Customary Trade Terms (or such other terms agreed to by the Debtors) during the pendency of these chapter 11 cases, the Debtors may, in their discretion, deem provisional payments made to the Critical Vendor on account of prepetition Critical Vendor Claims to have been in payment of then outstanding postpetition amounts owed to such Terminated Critical Vendor without further order of the Court or action by any person or entity. Such Terminated Critical Vendor shall then immediately repay to the Debtors any payments made to it on account

of its Critical Vendor Claim to the extent that such payments exceed the postpetition amounts then owing to such Critical Vendor, without the right of setoff or reclamation.

13. Upon termination of a Trade Agreement by the Debtors, and any related recovery by the Debtors from the Terminated Critical Vendor of amounts paid by the Debtors to the Terminated Critical Vendor, the claim for which such payment initially was made shall be reinstated as a prepetition claim in the amount disgorged as a result of the termination, subject to objection by the Debtors and other parties-in-interest and the claims allowance process.

14. The execution of a Trade Agreement by the Debtors shall not be declared a waiver of any other causes of action, including avoidance actions, that may be held by the Debtors.

15. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

16. All applicable banks and other financial institutions are hereby authorized to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order to the extent the Debtors have good funds standing to their credit with such bank or other financial institution without any duty of further inquiry and without liability for following the Debtors' instructions.

17. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained herein shall constitute, nor is it intended to constitute, the assumption or adoption of any contract or agreement under 11 U.S.C. § 365.

18. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

19. The ten-day stay under Bankruptcy Rule 6004(h) is hereby waived with respect to this Order and the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

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

Dated: June __, 2009

United States Bankruptcy Judge