

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

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In re:

Chapter 11

TRANS WORLD AIRLINES, INC., et al.,
Debtors.
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Case No. 01-00056(PJW)

Jointly Administered

Objection Deadline: May 14, 2002 at 4:00 p.m.

Hearing Date: May 21, 2002 at 3:30 p.m.

**APPLICATION OF CVS/PHARMACY, INC. FOR AN ORDER ALLOWING
ADMINISTRATIVE EXPENSES PURSUANT TO 11 U.S.C. § 503(b) and 507(a)**

CVS/Pharmacy, Inc. ("CVS"), by its undersigned attorneys, hereby submits this application for payment of administrative expenses pursuant to sections 503(b) and 507(a) of the Bankruptcy Code, 11 U.S.C. 101 et seq. In support hereof, CVS respectfully represents as follows:

BACKGROUND

1. On January 10, 2001 (the "Petition Date"), Trans World Airlines, Inc. and its affiliated debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the Bankruptcy Code.

2. Pursuant to an order of the Court, June 15, 2001 was established as the deadline for filing administrative expense claims arising during the period January 10, 2001 to May 30, 2001. The appropriate CVS entity was not served with notice of the deadline for filing administrative expense claims.

3. CVS provided services to the Debtors through certain employee prescription benefit plans (the "Plans"). According to the Plans, when CVS honored the prescriptions of

the Debtors' employees, the Debtors were liable to CVS for the selling price of the prescriptions minus the employee's co-pay obligation.

4. During the period January 10, 2001 – December 31, 2001, the Debtors incurred liability to CVS pursuant to the Plans in the amount of \$15,984.21.

5. There can be no genuine dispute that the Plans provided the Debtors' employees and in turn, the Debtors benefits that were necessary and beneficial to Debtors' operations.

6. If the Plans were not in place during the post-petition period, the Debtors would have been unable to provide their employees with certain prescription benefits and may have faced disruptions in their workforce.

7. CVS has received partial, but not full, payment for certain post-petition benefits provided to the Debtors pursuant to the Plans since the Petition Date. Tables of the amounts due to CVS are attached hereto and incorporated by reference hereto as Exhibit A.

ARGUMENT AND RELIEF REQUESTED

8. Under Section 503(b)(1)(A) of the Bankruptcy Code, “[a]fter notice and a hearing, there shall be allowed, administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. §503(b)(1)(A) (1994). Section 507 grants “administrative expenses allowed under section 503(b)” priority over other unsecured claims. 11 U.S.C. §507(a)(1) (1994). Courts have set out a two-part test to determine whether a creditor is entitled to an administrative expense. See **In re Santa Monica Beach Hotel, Ltd.**, 209 B.R. 722, 725 (B.A.P. 9th Cir. 1997); **In re Molnar Brothers**, 200 B.R. 555, 558 (Bankr. D.N.J. 1996). First, an administrative expense must arise from a post-petition service or transaction between the administrative expense claimant and the debtor.

Second, the expense must substantially and directly benefit the estate. CVS' administrative expense claim for post-petition prescription benefits meets both requirements.

9. A creditor must supply a service after the petition date for the creditor's claim to obtain priority as an administrative expense. See **In re Roth Amn., Inc.**, 975 F.2d 949, 957 (3^d Cir. 1992). This requirement is met if "(1) the debtor-in-possession induces the creditor to perform postpetition, or (2) the creditor performs under an executory contract prior to rejection." **In re Patient Educ. Media, Inc.**, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998). A claim arises post-petition if the creditor's right to payment does not exist until that time, even if the initial contract between the parties was executed before the petition date. See **In re Lease-A-Fleet, Inc.**, 140 B.R. 840, 845 (Bankr. E.D. Pa. 1992). There can be no genuine dispute that CVS performed pursuant to the terms of the Plans after the Petition Date, and its right to payment arose after that date when the Debtors' employees purchased prescriptions pursuant to the Plans after January 10, 2001. The tables attached as Exhibit A evidence CVS' post-petition performance by virtue of the "DOS" or date of service when the employees actually obtained the individual prescriptions.

10. CVS' claim meets the second requirement for an administrative claim because the Debtor derived an actual benefit from CVS' performance. CVS' performance was essential to Debtors' workforce and therefore, to the continued operation of the Debtors' business.

11. A product or service benefits the bankruptcy estate if it "is necessary to the operation or rehabilitation of the estate." **Commonwealth Dep't of Env'tl. Resources v. Tri-State Clinical Lab., Inc.**, 178 F.3d 685, 690 (3^d Cir. 1999), cert. den. sub nom.

Commonwealth Dep't of Env'tl. Protection v. Nigro, 528 U.S. 1075 (2000); **In re Lease-A-Fleet, Inc.**, 140 B.R. 840, 845 (Bankr. E.D. Pa. 1992). The benefit to the debtor justifying classification of a claim as an administrative expense may consist of the bargained-for consideration under the contract. See **In re Beverage Canners Int'l Corp.**, 255 B.R. 89, 94 (Bankr. S.D. Fla. 2000).

12. The post-petition performance that CVS provided to the Debtors and their workforces under the Plans allowed the Debtors to continue their operations, and ultimately, to propose a Chapter 11 Plan. When a product or service is necessary to keep the debtor operative or to implement the reorganization plan, the cost of the product or service is entitled to treatment as an administrative expense. See **In re Molnar Bros.**, 200 B.R. 555, 558 (Bankr. D.N.J. 1996); **In re Old Electralloy Corp.**, 167 B.R. 786, 795 (Bankr. W.D. Pa. 1994).

13. As the holder of an administrative claim, CVS is entitled to “the reasonable value of the material or services supplied.” **In re Continental Energy Assoc. Ltd. P'ship**, 178 B.R. 405, 408 (Bankr. M.D. Pa. 1995). Courts recognize a presumption that a contract price to which parties agree before the petition date represents the reasonable value of the goods or services that are the subject of the contract. See **National Labor Relations Bd. v. Bildisco and Bildisco**, 465 U.S. 513, 531 (1984); **In re Santa Monica Beach Hotel, Ltd.**, 209 B.R. 722, 727 (B.A.P. 9th Cir. 1997); **In re Beverage Canners Int'l Corp.**, 255 B.R. 89, 92 (Bankr. S.D. Fla. 2000); **In re Funding Sys. Asset Mgmt. Corp.**, 72 B.R. 87, 89 (W.D. Pa. 1987). Because the contract price represents an arms-length contractual arrangement at fair market value for the services at issue, CVS is entitled to an administrative expense for the

selling price of the prescriptions filled pursuant to the Plans minus the employee's co-pay in the total amount of \$15,984.21 during the Chapter 11 case.

14. In addition, the fact that a portion of CVS' administrative claim accrued prior to the administrative claims bar date for filing claims previously set in this cases does not preclude CVS' assertion and entitlement to an administrative claim for the full amount owed by the Debtors. This Court has previously held that where a creditor is known to the debtor, that due process and requirements of the Fifth Amendment of the Constitution mandate that a creditor must have actual knowledge of the bar date for filing claims before its claim can be disallowed as a late filed claim. **In re Grand Union Co.**, 204 B.R. 864, 871 (Bankr. D.Del. 1997). CVS submits that it did not have notice of the administrative claims bar date and therefore, the bar date should not operate to precluded its claim.

WHEREFORE, CVS respectfully requests that this Court approve this Application and enter an order allowing CVS \$15,984.21 as an administrative expense in the Chapter 11 case for the reasonable value of the actual and necessary prescription benefits provided by CVS to the Debtors during the post-petition period.

/s/ Tara L. Lattomus

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