

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

In re:)	Chapter 11
)	Case No. 09-10560 (KJC)
FOAMEX INTERNATIONAL, INC., <i>et al.</i> ,)	
)	(Jointly Administration Pending)
Debtors.)	
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**OBJECTION OF LAW DEBENTURE TRUST COMPANY OF NEW YORK, AS
ADMINISTRATIVE AGENT UNDER THE SECOND LIEN CREDIT AGREEMENT,
TO DEBTORS’ MOTION FOR AN ORDER AUTHORIZING THE DEBTORS TO
HONOR PREPETITION OBLIGATIONS TO, AND CONTINUE PREPETITION
PRACTICES WITH, CERTAIN CRITICAL VENDORS MOTION**

Law Debenture Trust Company of New York (“Law Debenture”) in its capacity as Administrative Agent under that certain Second Lien Credit Agreement dated as of February 12, 2007, by and among Foamex L.P., as Borrower, Foamex International, Inc. (“Foamex” and together with its debtor subsidiaries, the “Debtors”), as Parent Guarantor, Law Debenture, as Administrative Agent and Collateral Agent, and the Lenders thereto (the “Second Lien Lenders”), by and through its undersigned counsel, hereby objects to the Debtors’ Motion for an Order Authorizing the Debtors to Honor Prepetition Obligations to, and Continue Prepetition Practices with, Certain Critical Vendors (the “Motion”) [Docket No. 15]. In support of this Objection, Law Debenture respectfully states as follows:

BACKGROUND

1. On February 18, 2009 each of the Debtors filed a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”).
2. The Debtors 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 have filed the Motion to pay the prepetition obligations of entities pursuant to the “doctrine of necessity.” The requested amount of “doctrine of necessity” authority exceeds \$29 million and enables the Debtors to satisfy approximately 71% of the Debtors’ trade debt which is approximately \$41 million as of the Petition Date. *See Declaration of John G. Johnson, JR.* at ¶ 15, dated February 18, 2009.

4. By the Motion, the Debtors have requested authority to pay critical vendors the Debtors have identified into three categories – specialty chemical providers, cloth producers, and maintenance, repair, and operations suppliers. *See* Motion at ¶ 31.

5. The so-called “Doctrine of Necessity” is inapplicable in this case.

6. Further, the Debtors have not proven in the Motion, nor given sufficient opportunity to enable Law Debenture to conduct adequate discovery, that immediate and discriminatory payment of the prepetition claims of critical vendors the Debtors intend to pay are critical to the success of the reorganization of the Debtors.

ARGUMENT

I. The Doctrine of Necessity is Inapplicable

7. The Doctrine of Necessity was spawned from early railroad reorganization cases, and was justified by the critical role rail service played in the country’s economy at the time. *See In re Boston and Maine Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980); *In re Penn Central Transportation Co.*, 458 F. Supp. 1234, 1326 (E.D. Pa. 1978), *aff’d in part remanded in part*, 596 F.2d 1102 (3rd Cir. 1979); *In re B & W Enterprises, Inc.*, 713 F.2d 534, 537 (9th Cir. 1983). Unlike the “six months rule” (another outgrowth of railroad restructurings in the late 19th Century), the necessity of payment doctrine was not codified by Congress in the Bankruptcy Code. *See In re B&W Enterprises, Inc.*, 713 F.2d at 537.

8. While use of the Doctrine of Necessity has, nonetheless, persisted at the trial court level, all Circuit level appellate courts to which the issue has been raised have confirmed that the Doctrine of Necessity does not actually exist in non-railroad Chapter 11 proceedings. See, e.g., In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) (stating that doctrine of necessity is “just a fancy name for a power to depart from the Code.”); Chiasson v. J. Louis Matherne and Assocs. (In re Oxford Mgmt., Inc.), 4 F.3d 1329, 1334 (5th Cir. 1993) (postpetition payment of prepetition claims outside a plan “deviated from the pro rata scheme of distribution envisioned by the Code”); Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) (“The Bankruptcy Code does not permit a distribution to unsecured creditors in a Chapter 11 proceeding except under and pursuant to a plan of reorganization that has been properly presented and approved.”); In re B&W Enterprises, Inc., 713 F.2d at 537 (“no indication that Congress intended the [C]ourts to fashion their own rules of super-priorities within any given priority class”). Bankruptcy Courts do not have “discretion to set aside the Code’s rules about priority and distribution” and, further, “pre-filing debts are not administrative expenses; they are the antithesis of administrative expenses.” Kmart, 359 F.3d at 871-72. Consistent with the above, the Third Circuit Court of Appeals has never upheld use of the Doctrine of Necessity outside the context of railroad reorganizations. See, e.g., In re Lehigh & N.E.R. Co., 657 F.2d 570, 581 (3d Cir. 1981); In re Penn Cent. Transp. Co., 467 F.2d 100 (3d Cir. 1972).

9. The foregoing decisions are consistent with the Bankruptcy Code and general tenets of statutory interpretation. It is well settled that, where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion. See Duncan v. Walker, 533 U.S. 167, 173 (2001); see also Gordon v.

Novastar Mortg., Inc. (In re Hedrick), 524 F.3d 1175, 1187 (11th Cir. Ga. 2008); Delgado v. United States AG, 487 F.3d 855, 862 (11th Cir. 2007) (“[W]here Congress knows how to say something but chooses not to, its silence is controlling.”) (internal quotation marks and citation omitted); DIRECTV, Inc. v. Brown, 371 F.3d 814, 818 (11th Cir. 2004) (“As we have previously stated, when Congress uses different language in similar sections, it intends different meanings.” (internal quotation marks omitted)). Congress has shown itself capable of including in the Bankruptcy Code provisions that allow a debtor to satisfy prepetition claims outside the context of a confirmed Chapter 11 plan. For instance, Bankruptcy Code Section 1171(b), which applies only in railroad reorganizations, did codify the “six month” rule allowing railroad trustee’s to pay claims arising in the six month period preceding the bankruptcy. Moreover, in the 2005 Amendments to the Bankruptcy Code, Congress added Bankruptcy Code Section 503(b)(9), which provides administrative expense status for the value of certain goods delivered to a debtor within the 20 days prior to the bankruptcy. But, since Congress did not choose to make a general Doctrine of Necessity a part of the Bankruptcy Code or to allow administrative expense treatment for all prepetition unsecured claims subjectively determined by the Debtors to be “critical,” it is clear that the Bankruptcy Code was not intended to allow Bankruptcy Courts the discretion to authorize extra-plan payments outside of these contexts. See also Alan N. Resnick, “The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases,” 47 B.C.L. Rev. 183, 209 (2005).

10. Doctrine of Necessity also finds no statutory basis in Bankruptcy Code Section 105(a). Indeed, Bankruptcy Code Section 105(a) does not provide a basis for engrafting onto the Bankruptcy Code a new priority or payment scheme. See In re Combustion Eng’g, Inc., 391 F.3d 190, 236 (3d Cir. 2004) (“[a]lthough the Bankruptcy Court has broad equitable authority to craft remedies necessary to facilitate the reorganization of a debtor, this power is

cabined by the Code.”). It is well established that bankruptcy courts cannot use their equitable powers to alter or evade the Bankruptcy Code. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (“[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.”).

11. Presuming, solely for the sake of argument, that a bankruptcy court has authority to allow Doctrine of Necessity payments under Bankruptcy Code Section 363(b) (as some trial courts have done since the Seventh Circuit’s Kmart decision), such authority would be limited to the allowance of payments that have been demonstrated to be necessary and that benefit all unsecured creditors. See Kmart, 359 F.3d at 872.

12. In sum, a fair reading of the Bankruptcy Code and relevant case law indicates that the Debtors may be afforded discretion to choose which of their unsecured creditors receive preferred treatment. But, even with such discretion, the Debtors provide no evidence to support their claims that the “critical vendors” are critical to the Debtors’ ability to successfully reorganize.

II. The Agent Should Be Afforded Opportunity For Discovery

13. As noted above, the Debtors seek authority to pay the “critical vendors” in excess of \$29 million, which enables the Debtors to satisfy approximately 71% of the Debtors’ prepetition trade debt. Notwithstanding that such relief enables the Debtors to violate the absolute priority rule by making priority cash payments to certain unsecured creditors ahead of the senior Second Lien Lenders (as well as other prepetition secured lenders), the Debtors do not provide any specific details or evidentiary support for the basis for which vendors it considers to be “critical” to its reorganization. Moreover, the criteria the Debtors outline in the Motion is too broad for any objective assessment of which vendors are truly “critical.”

14. Without the opportunity to conduct any discovery and to ascertain which of the vendors are in fact “critical,” it is impossible to fully evaluate which of the vendors the Debtors intend to pay is critical to the success of the Debtors’ reorganization efforts, and thus, may be permissible under the Doctrine of Necessity.

CONCLUSION

WHEREFORE, for the reasons discussed herein, Law Debenture respectfully requests that this Court enter an Order: (a) denying the Motion; and (b) authorizing Law Debenture to conduct discovery to ascertain which vendors are critical to the reorganization efforts of the Debtors.

Dated: February 20, 2009
Wilmington, Delaware

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