

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

40-7580

In re: : Civil Action No.: 02-44 (JJF)  
: :  
FANSTEEL INC., et al., : (Bankruptcy #02-10109)  
: :  
Debtors. : **Objection Deadline: February 27, 2002 at 4:00 p.m.**  
: **Hearing Date: February 28, 2002 at 2:00 p.m.**  
:

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on February 19, 2002, Klett, Rooney, Lieber & Schorling, P.C., proposed co-counsel to the Official Committee of Unsecured Creditors, filed the attached Motion Pursuant to Local Bankruptcy Rule 9013.2 and Bankruptcy Rule 9024(b) for Reconsideration of Order Authorizing Debtors to Pay Prepetition Claims of Critical Vendors (the "Motion") with the United States District Court for the District of Delaware, 844 North King Street, Wilmington, Delaware 19801 (the "District Court").

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be filed with the District Court, and served upon (i) Office of the United States Trustee, 844 King Street, Suite 2313, Lockbox 35, Wilmington, DE 19801 (Attn: David L. Buchbinder, Esquire); (ii) co-counsel to the Debtors: Pachulski, Stang, Ziel, Young & Jones, P.C., (Attn: Laura Davis Jones, Esquire) and Schulte, Roth & Zabel LLP, (Attn: Jeffrey S. Sabin, Esquire); (iii) Freeborn & Peters, 311 South Wacker Drive, Suite 3000, Chicago, IL 60606 (Attn: Frances Gecker, Esquire); and (iii) Klett Rooney Lieber & Schorling, P.C., 1000 West Street, Suite 1410, Wilmington, DE 19801 (Attn: Adam G. Landis, Esquire) so as to be received by February 27, 2002 at 4:00 p.m. prevailing Eastern Time.

Wm5501

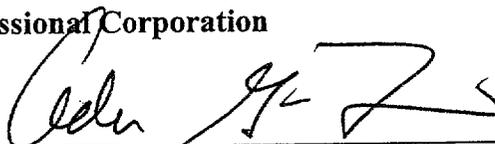
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PLEASE TAKE FURTHER NOTICE that a hearing on the Motion has been scheduled before The Honorable Joseph J. Farnan, United States District Court, 844 King Street, Courtroom No. 2A, Wilmington, Delaware on February 28, 2002 at 2:00 p.m. prevailing Eastern Time.

Dated: February 19, 2002  
Wilmington, Delaware

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

In re: : Civil Action No.: 02-44 (JJF)  
: :  
FANSTEEL INC., et al., : (Bankruptcy #02-10109)  
: :  
Debtors. : :

**MOTION PURSUANT TO LOCAL BANKRUPTCY RULE 9013-2  
AND BANKRUPTCY RULE 9024(b) FOR RECONSIDERATION OF  
ORDER AUTHORIZING DEBTORS TO PAY  
PREPETITION CLAIMS OF CRITICAL VENDORS**

The Official Committee of Unsecured Creditors of Fansteel, Inc., *et al.* (the “Committee”), by its attorneys, pursuant to Del.Bankr.LR 9013-2 and Fed.R.Bank.P. 9024(b), respectfully requests that this Court reconsider the Order Authorizing Debtors To Pay Prepetition Claims of Critical Trade Vendors (the “Critical Vendor Order”) entered by the Bankruptcy Court, which authorized the Debtors to pay up to \$6,000,000 in respect of prepetition claims of unidentified “critical vendors.”

**Background**

1. On January 15, 2002, (the “Petition Date”) Fansteel, Inc., and its direct and indirect subsidiaries, Fansteel Holdings, Inc., Custom Technologies Corp., Escast, Inc., Washington Mfg., Co., Phoenix Aerospace Corp., American /Sintered Technologies, Inc., Wellman Dynamics Corp., and Fansteel Schulz Products, Inc. (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Subsequently, the reference of the Debtors’ reorganization cases was withdrawn to this Court.

2. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. On January 28, 2002, the United States Trustee appointed the Committee.

### **The Critical Vendor Motion**

4. On the Petition Date, the Debtors filed 22 “First-Day Motions.” Among the First-Day Motions was the Motion for Order Authorizing Payment of Pre-Petition Critical Vendor Claims (the “Critical Vendor Motion”).

5. The Critical Vendor Motion sought authorization to pay the prepetition, unsecured trade claims of those vendors who agree to provide acceptable postpetition credit and supply terms to the Debtors. The Critical Vendor Motion proposed payment of critical vendor claims aggregating up to \$6 million. Upon information and belief, the total amount of trade debt in these cases is no more than \$15 million in the aggregate.

6. The Critical Vendor Motion did not identify the “Critical Vendors” either individually or in categories. Nor did the Critical Vendor Motion identify when or how the “Critical Vendors” would be paid. Upon information and belief, at the time the Debtors filed the Critical Vendor Motion, they did not have – and they do not have today – funds sufficient to pay their “Critical Vendors” the \$6 million for which they sought and obtained authorization.

7. The Critical Vendor Motion rested on the court’s equitable powers under Section 105(a) of the Bankruptcy Code and the doctrine of necessity. However, rather than making any specific allegations as to why a particular vendor or group of vendors is critical, the Critical Vendor Motion only generally alleged that, “The Critical Vendors represent Debtors’ only viable sources of certain essential equipment and services. Debtors might not be able to obtain such equipment and services if they fail to satisfy the prepetition unsecured claims of the Critical Vendors.” Critical Vendor Motion at ¶ 16. Left unanswered were the questions of what were “essential equipment and services,” which among the Debtors various vendors provide this

essential equipment and services, and whether the essential equipment and services might be available elsewhere.

8. On January 17, 2002, two days after the Petition Date and more than ten days before the Committee was formed, the Bankruptcy Court entered the Critical Vendor Order.

**The Debtors Have Failed To Justify Their Need For Blanket Authority To Pay Up To \$6 Million In Prepetition Claims**

9. Local Bankruptcy Rule 9013-2(e) provides that any party in interest “may file a motion to reconsider any order entered pursuant to [Local Bankruptcy Rule 9013-2, governing motions for relief filed with or shortly after the petition in Chapter 11 cases] within thirty (30) days of the entry of such order, unless otherwise ordered by the Court.” Del.Bankr.LR 9013-2. Pursuant to this rule “[t]he burden of proof with respect to the appropriateness of the order subject to the motion for reconsideration shall remain with the debtor notwithstanding the entry of such order.” *Id.* Consequently, the Committee, formed nearly two weeks after the entry of the Critical Vendor Order, seeks reconsideration of that order pursuant to Local Bankruptcy Rule 9013-2(e).<sup>1</sup>

10. Despite the Bankruptcy Code’s mandate of equal treatment of all claims of the same class, *see* 11 U.S.C. §§ 1122 and 1129(b)(1), debtors increasingly have sought authorization to give special treatment to certain prepetition, unsecured creditors and to pay those claims in full outside a confirmed plan. *See, e.g., In re Coserv, L.L.C.*, 2002 Bankr. LEXIS 6 (Bankr. N.D. Tex., January 4, 2002); *In re Payless Cashways, Inc.*, 268 B.R. 543 (Bankr. W.D.Mo. 2001); *In re Just For Feet, Inc.*, 242 B.R. 821 (Bankr. D.Del. 1999).

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<sup>1</sup> To the extent Local Bankruptcy Rule 9013-2 would not apply to a case for which the reference has been withdrawn, the Committee seeks relief from the Critical Vendor Order pursuant to Bankruptcy Rule 9024 and Fed.R.Civ.P. 60 (incorporated in Bankruptcy Rule 9024), both of which provide that, for a variety of reasons, “[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . .”

11. In allowing debtors to stray from the dictates of the Bankruptcy Code, courts primarily have relied upon Section 105(a) of the Bankruptcy Code and the doctrine of necessity. Section 105(a) allows a court to issue any order that is necessary to carry out the provisions of the Bankruptcy Code. The doctrine of necessity is an outgrowth of railroad reorganization cases, where courts could authorize the trustee to pay certain prepetition debts if non-payment threatened the continued operation of the railroad. See *In re Conserv, L.L.C.*, 2002 Bankr. LEXIS 6 at 9-12 *citing* Russell A. Eisenberg and Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 *MARQ. L. REV.* 1 (1989). Neither Section 105(a) nor the doctrine of necessity, however, are a basis for giving a debtor carte blanche to pay prepetition claims without making the requisite showing of “necessity.” See, e.g., *In the Matter of The Columbia Gas System, Inc.*, 171 B.R. 189, 192 (Bankr. D. Del. 1994)(“In the Third Circuit the law is clear that to justify payment of one class of pre-petition creditors in advance of a confirmed plan, the debtor must show the payment is essential to the continued operation of the business.”).

12. In this case, however, the Critical Vendor Order was entered without any showing of “necessity” by the Debtors and absent any identification or showing as to which vendors are “critical.” In the first instance, it is difficult to understand the “necessity” of payment to vendors who are supposed to be “critical” when funds are not readily available to make such payments. Moreover, absent basic information about the identity of the vendors and the amounts the Debtors propose to pay, the Court and the Committee cannot be expected to evaluate the true necessity and critical nature of the payments.

13. Thus, absent additional information, the Committee can only conclude that it was the creation of the \$6 million “unfunded fund” that was critical on the first day of the case, not the payment of specific amounts to actual vendors. In these circumstances, the Committee

submits that the Debtors have failed to meet their burden under section 105 of the Bankruptcy Code and the necessity of payment doctrine.

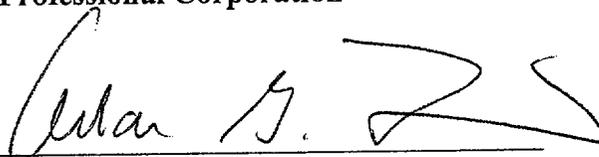
14. Accordingly, the Committee requests that prior to any payments are made under the Critical Vendor Order, the Debtors identify to the Committee (a) their list of proposed critical vendors, along with the basis for treatment as such; and (b) the amount(s) the Debtors would propose to pay to each critical vendor, along with the timing of any such payments. The Committee would further request a reasonable opportunity to be heard if it were to disagree with the Debtors' proposed critical vendors and payment amounts. Absent the institution of such a process, the Debtors will have done little more than dangle an illusory carrot before all their creditors and vendors, when what is needed is the implementation of a reasoned approach to avoiding additional damage to the Debtors' business and important relationships with their vendors, suppliers and creditors.

WHEREFORE, the Committee respectfully requests that this Court reconsider the Critical Vendor Order, direct the Debtors to provide the Committee with a list of all vendors and amounts designated "critical" within a date certain (and prior to the payment of any "critical vendor"), and justify each vendor's treatment as critical, and grant such further relief as is equitable and just.

Dated: February 19, 2002

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In re: : Civil Action No.: 02-44 (JJF)  
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FANSTEEL INC., et al., : (Bankruptcy #02-10109)  
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Debtors. : :

AFFIDAVIT OF  
PATRICIA A. JACKSON, PARALEGAL

STATE OF DELAWARE:

SS:

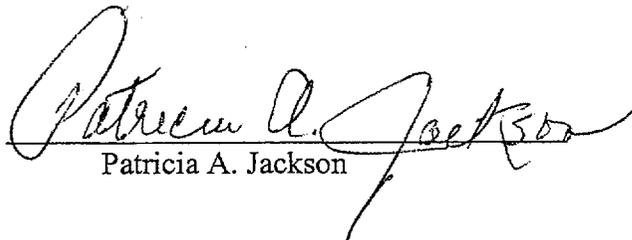
NEW CASTLE COUNTY:

I, Patricia A. Jackson, certify that I am, and at all times during the service of process, have been, an employee of Klett, Rooney, Lieber and Schorling, P.C., not less than 18 years of age and not a party to the matter concerning which service of process was made. I certify further that the service of the attached:

NOTICE OF MOTION

MOTION PURSUANT TO LOCAL BANKRUPTCY RULE 9013.2 AND  
BANKRUPTCY RULE 9024(b) FOR RECONSIDERATION OF ORDER  
AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS OF  
CRITICAL VENDORS

was made on the following parties on the attached list by Hand Delivery (City of Wilmington addresses only) and First Class Mail on all others.

  
Patricia A. Jackson

SWORN AND SUBSCRIBED before me this 19th day of February 2002.

  
NOTARY

BARBARA J. ROST  
NOTARY PUBLIC  
STATE OF DELAWARE  
MY COMMISSION EXPIRES  
JUNE 14, 2002

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