

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11
: :
DVI, INC., :
DVI FINANCIAL SERVICES, INC. and :
DVI BUSINESS CREDIT CORPORATION :
: :
: :
Debtors : Case No. 03-12656
: through Case No. 03-12658

**MOTION FOR ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND
363(b) AUTHORIZING (I) PAYMENT OF PRE-PETITION WAGES,
SALARIES, COMMISSIONS, VACATION PAY AND EMPLOYEE BENEFITS,
AND (II) REIMBURSEMENT OF EMPLOYEE BUSINESS EXPENSES**

TO THE HONORABLE MARY F. WALRATH, UNITED STATES BANKRUPTCY
JUDGE:

DVI, Inc., DVI Financial Services, Inc. and DVI Business Credit Corporation,
debtors and debtors-in-possession herein (the "Debtors"), hereby move this Court for the
entry of an order authorizing the payment of pre-petition wages, salaries, commissions,
vacation pay and employee benefits, and reimbursement of employee business expenses
(the "Motion"). In support of this Motion, the Debtors respectfully represent as follows:

Background

1. On this date (the "Petition Date"), the Debtors each filed voluntary
petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11
U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code"), together with various motions
and applications seeking certain typical "first day" orders.

2. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been appointed in these cases.

3. Since the Petition Date, the Debtors have continued in possession of their property and have continued to operate and manage their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are sections 105(a) and 363(b) of the Bankruptcy Code.

5. The Debtors primarily operate as premier independent specialty finance companies that extend loans or leases to various healthcare providers to fund such providers' operations and facilitate the purchase of diagnostic medical equipment and leasehold improvements. DVI, Inc. is the parent company of Debtors DVI Financial Services, Inc. and DVI Business Credit Corporation. Debtor DVI Financial Services, Inc. provides lease or loan financing to healthcare providers for the acquisition or lease of sophisticated medical equipment such as MRI units, CT scanners and other diagnostic equipment. DVI Business Credit Corporation extends revolving lines of credit to healthcare providers based upon accounts receivable generated from such provider's facilities to provide them with, among other things, working capital. Debtor DVI, Inc. owns 100% of the equity in Debtors DVI Financial Services, Inc. and DVI Business Credit Corporation in addition to equity interests that it holds in other non-debtor subsidiaries.

6. As of the date hereof, the Debtors collectively employ approximately 221 people in their domestic and foreign operations. As of June 30, 2003, the Debtors' consolidated, unaudited financial statements reflected assets of approximately \$1.9 billion and liabilities of approximately \$1.6 billion.

Relief Requested

7. In the ordinary course of their businesses, the Debtors incur payroll obligations to their employees for the performance of their services. The Debtors currently employ approximately 221 employees (collectively, the "Employees"). Of these, approximately 94% of the Employees are salaried employees, with the balance accruing wages on an hourly basis.

8. The Debtors are participants in or are obligated under various salary and wage policies, benefit plans, insurance plans and other programs designed to provide benefits for their Employees.

9. Continued payment when due of pre-petition wages, salaries and commissions and the continuation, without interruption, of all benefit plans, insurance plans and other compensation policies is necessary to ensure the ongoing services of the Debtors' Employees. The Employees are vital to the Debtors' continuing operations and to the ultimate ability of the Debtors to reorganize in these chapter 11 proceedings.

10. As of the Petition Date, Employees had earned or had accrued in their favor various sums or credit for (i) wages, salaries, commissions and vacation pay, (ii) employee business expenses, including, without limitation, expenses for travel, meals and lodging, and (iii) other employee benefits, including, without limitation, those due to or

for the benefit of Employees under various health, life and savings plans and severance¹ and vacation plans (collectively, the "Compensation"). Compensation is due and owing to the Debtors' Employees as of the Petition Date by reason of, inter alia:

- (a) the filing of the chapter 11 petitions in the middle of the Debtors' regular and customary payroll periods, as well as in the middle of the Debtors' regular reimbursement cycle for Employee business expenses;
- (b) the possible failure of payroll and expense reimbursement checks issued to Employees prior to the commencement of these cases to have been presented or to have cleared the banking systems as of the Petition Date;
- (c) the fact that Employees have not yet been paid all of their salaries, wages and commissions earned for services previously rendered to the Debtors or have not been reimbursed for business expenses previously paid by such Employees on behalf of the Debtors; and/or
- (d) the fact that certain Employee benefits related to pre-petition services have not yet been paid or advanced to or for the benefit of the Employees.

11. Salaried Employees of Debtors DVI Business Credit Corporation and DVI Financial Services, Inc. are paid on a bi-weekly basis through the date the respective payrolls are made, while hourly Employees of those two Debtors are paid on a bi-weekly basis, one week in arrears. Specifically, on August 22, 2003, all salaried Employees were paid their wages for the period August 9, 2003 through August 22, 2003. The next payrolls for salaried Employees of Debtors DVI Business Credit Corporation and DVI Financial Services, Inc. are scheduled to be released on September 5, 2003 for the period August 23, 2003 through September 5, 2003. Those gross payrolls for all salaried Employees are expected to be approximately \$662,953.00 in the aggregate; the net

¹ As of this writing, the Debtors are not seeking authority to continue to pay severance to employees who were terminated prior to the bankruptcy filings.

payrolls are estimated at \$458,979.00 in the aggregate. On August 22, 2003, hourly Employees of Debtors DVI Business Credit Corporation and DVI Financial Services, Inc. were paid their wages for the period August 4, 2003 through August 17, 2003. The next payrolls for hourly Employees are scheduled to be released on September 5, 2003 for the period August 18, 2003 through August 31, 2003. Those gross payrolls for all hourly Employees are expected to be approximately \$77,172.00 in the aggregate; the net payrolls are estimated at \$56,062.00 in the aggregate

12. Certain Employees are entitled to receive commissions, in addition to base compensation, based on loan or lease transactions that they enlist and close in respect of the Debtors' services. It is difficult to know precisely how much in commissions may be owed for services rendered by the Employees in the pre-petition period. However, based on an analysis of the past year's commission figures, the average amount of commissions paid by the Debtors during each pay period was approximately \$85,064.32² in the aggregate.

13. The Debtors also currently utilize the services of approximately four (4) independent contractors who provide necessary services relating to the operation of the Debtors' businesses. Included among these independent contractors are individuals who assist with various functions, including collections, accounting, and legal liaison services. Payment to each of the independent contractors varies according to the terms of each independent contractor's contract with the Debtors. The Debtors estimate that their total accrued and unpaid pre-petition obligations to independent contractors do not exceed \$58,000.00.

² This average is calculated using twenty-six pay periods per annum. In actuality, commissions are typically paid monthly (for a prior month's sales activity) or in the month after a closing takes place.

14. The Debtors sponsor several benefit plans for eligible Employees such as insurance plans, including medical, health, life, death, dental, vision care, 401(k), tuition reimbursement, and short-term and long-term disability. The Debtors estimate that their aggregate annual expenditures under such benefit plans for eligible Employees is approximately \$4.5million. Because of the manner in which expenses are incurred and claims are processed under the benefit plans, it is difficult for the Debtors to determine the accrued obligations under such plans which are outstanding at any particular time. The Debtors estimate that, as of the Petition Date, the obligations that may have accrued but have not been paid to or on behalf of the Employees under such benefit plans and programs aggregate approximately \$41,000.00.

15. Any delay in paying the Compensation could severely disrupt the Debtors' relationships with their Employees and irreparably impair the Employees' morale at the very time that their dedication, confidence and cooperation are most critical. The Debtors must also continue their corporate policy of permitting certain of their Employees to incur business-related expenses and seek repayment thereof by submitting appropriate invoices or vouchers evidencing such out-of-pocket disbursements.³ If the relief requested herein is not granted, the Debtors' Employees may suffer great hardship and, in many instances, financial difficulties, given that these monies are needed to enable them to meet their own personal obligations.

16. Therefore, the Debtors seek authorization to pay the following pre-petition amounts as and when they become payable:

³ Because the Employees do not always submit claims for reimbursement promptly, it is difficult for the Debtors to determine the exact amount of reimbursement obligations. Nevertheless, reimbursement of Employee business expenses generally averages \$76,880.00 in the aggregate per pay period.

- (a) wages, salaries, commissions and vacation pay (including contributions to savings plans and all federal, state, and local payroll-related taxes, deductions and withholdings pertaining to such payments) that arose or accrued prior to the Petition Date;
- (b) out-of-pocket business-related expenses incurred by Employees prior to the Petition Date;
- (c) workers' compensation and related benefits and claims of Employees that arose or accrued prior to the Petition Date; and
- (d) health, medical, and disability claims for Employees, and any and all premiums on insurance policies pertaining thereto, together with all costs and expenses incurred in connection with the servicing and processing of such claims that arose or accrued prior to the Petition Date.

17. In conjunction with their Employee payroll and expense reimbursement systems, Debtors DVI Financial Services, Inc. and DVI Business Credit Corporation each maintain bank accounts to manage and control wage, salary, commission, benefit, and expense reimbursement disbursements (the "Payroll and Benefit Accounts"). Payment of these disbursements is routinely made via check, wire transfer or ACH transfer into Employees' designated accounts from the Payroll and Benefit Accounts. By separate motion, the Debtors are seeking authority to maintain, among others, the Payroll and Benefit Accounts as debtor-in-possession bank accounts.

18. In order to ensure that their Employees are paid in the ordinary course as and when Compensation payments become due, the Debtors specifically request that the order approving this Motion also provide that those financial institutions at which the Payroll and Benefit Accounts are maintained, be authorized and directed to service and administer the Payroll and Benefit Accounts as described above without interruption, and, in the usual and ordinary course, to receive, process, honor and pay any and all ACH transfers, checks and drafts drawn on the Payroll and Benefit Accounts, whether

presented for payment before or after the commencement of these chapter 11 cases by the holder thereof, provided sufficient funds are in the Payroll and Benefit Accounts to cover them.

19. The Debtors are not by this Motion seeking to assume any executory contracts.⁴ Also, the Debtors seek only the authority to make the Compensation payments described herein to their Employees and are not assuming any obligation to make such payments, nor are they assuming any pre-petition or post-petition liability with respect thereto.

Authorities

20. Sections 507(a)(3) and (a)(4) of the Bankruptcy Code give priority up to \$4,650.00 per individual for pre-petition claims for wages, salaries, commissions, vacation and sick leave and claims for contributions to employee benefit plans. The Debtors estimate that all, or substantially all, of their pre-petition obligations to their Employees are entitled to priority under sections 507(a)(3) and (a)(4) and, on average, such Employees are owed less than \$4,650.00.

21. By this Motion, and pursuant to sections 363(b) and 105(a) of the Bankruptcy Code and the “necessity of payment” doctrine, the Debtors seek authority to pay their outstanding pre-petition obligations to their Employees in full, even if they exceed \$4,650.00 for certain of the Employees.

22. Section 363(b)(1) of the Bankruptcy Code provides:

The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.

⁴ The Debtors are currently reviewing these matters and reserve their rights with respect to future cessation or continuation of these programs and the assumption or rejection of any executory contracts.

11 U.S.C. section 363(b).

23. Section 105(a) of the Bankruptcy Code further provides, in pertinent part:

The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. section 105(a).

24. Accordingly, this Court is authorized to grant the relief requested herein under the provisions of the Bankruptcy Code as well as the “necessity of payment doctrine”.⁵

25. Other courts have recognized the applicability of the “necessity of payment” doctrine with respect to the payment of pre-petition employee compensation and benefits. See, e.g., Disability Compensation and Michigan Self-Insurers’ Security Fund v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279 (S.D.N.Y. 1987) (under “necessity of payment” doctrine, it is appropriate for bankruptcy court to defer to debtor’s business judgment in permitting payment of certain workers’ compensation claims); In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (“This rule recognized the existence of judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.”). The Debtors submit that application of the “necessity of payment” doctrine is wholly warranted in these cases.

26. The relief requested in this Motion is necessary and should be authorized under section 105(a) of the Bankruptcy Code. The Employees are vital to the continued

⁵ The necessity of payment doctrine recognizes the existence of judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the debtor’s continued operations. This doctrine is consistent with the paramount goal of Chapter 11 – facilitating the continued operation and rehabilitation of the debtor. See, e.g., In re Chateaugay Corp., 80 B.R. 279 (S.D.N.Y. 1987).

operation of the Debtors' businesses and to their successful reorganization.

Authorization to pay the Debtors' pre-petition obligations to their Employees is necessary to maintain morale and prevent many of the Employees from suffering extreme personal hardship or from seeking other employment. Accordingly, the Debtors submit that the relief sought herein is consistent with section 105(a) of the Bankruptcy Code.

27. Moreover, the Debtors' payment of their pre-petition obligations to their Employees in the ordinary course of business should neither unduly prejudice general unsecured creditors nor materially affect the Debtors' estates, because pursuant to sections 507(a)(3) and (a)(4) of the Bankruptcy Code, priority claims are entitled to payment in full under a reorganization plan. See 11 U.S.C. § 1129(a)(9)(B).

No Previous Relief Requested

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

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, authorizing (i) the payment of pre-petition wages, salaries, commissions, vacation pay, and employee benefits, and (ii) reimbursement of pre-petition employee business expenses, and granting such other and further relief as is just and proper.

Respectfully submitted,

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