

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

IN RE:	§	
	§	
INTROGEN THERAPEUTICS, INC.,	§	CASE NO. 08-12442-FRM
INTROGEN TECHNICAL SERVICES, INC.,	§	CASE NO. 08-12443-FRM
TMX REALTY CORPORATION,	§	CASE NO. 08-12444-CAG
	§	CHAPTER 11
DEBTORS	§	<i>JOINT ADMINISTRATION REQUESTED</i>
	§	
301 CONGRESS AVENUE, SUITE 1850	§	
AUSTIN, TEXAS 78701	§	
	§	
TAXPAYER IDENTIFICATION NOS.:	§	
74-2704230, 35-2340711, 74-2896565	§	

**MOTION FOR ORDER APPROVING
PAYMENT OF PRE-PETITION WAGE CLAIMS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COME NOW Introgen Therapeutics, Inc. (“ITI”), Introgen Technical Services, Inc. (“ITS”), and TMX Realty Corporation (“TMX”), the above-captioned debtors and debtors-in possession (collectively, the “Debtors”), and file this their Motion for Order Approving Payment of Pre-petition Wage Claims, pursuant to Bankruptcy Code §§ 105 and 507, for authorization to honor and pay certain employees wages accrued pre-petition. In support thereof, the Debtors would respectfully show the Court as follows:

**I.
Jurisdiction**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of the Debtors’ Chapter 11 case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Court has the authority to enter the requested relief under Bankruptcy Code §§ 105

and 507(a)(4). Additionally, this Court has the authority to enter the requested relief under Rule 6003(b) of the Federal Rules of Bankruptcy Procedure.

II. Background

2. On December 3, 2008, (the “Petition Date”), each of the Debtors filed with the Clerk of this Court a petition for relief under Chapter 11 of the United State Bankruptcy Code (the “Bankruptcy Code”). The Debtors are operating their businesses and managing their property as Debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. No official committee has been established in this case.

3. Together, Debtors employ approximately twenty-seven full time employees. ITI employs approximately eight employees and four independent contractors. ITS employs approximately thirteen employees and three independent contractors. TMX does not have any full time employees. The Debtors’ employees are paid on a bi-monthly basis. Each of the independent contractors subject to this motion meet the definition of 11 U.S.C. § 507(a)(4)(B). As of the Petition Date, certain of the Debtors’ employees and independent contractors had accrued, but had not yet been paid, a portion of their wages for the period of November 23, 2008 through the Petition Date. The Debtors believe that it is crucial to maintain the employees’ and contractors’ morale and stability by insuring that the distribution of each employee’s and contractor’s paychecks is maintained.

4. ITI’s anticipated pre-petition payroll due to employees as of the Petition Date is approximately \$23,390.00. Additionally, ITI’s anticipated pre-petition payroll due to independent contractors is \$16,086.65. ITI has not yet received invoices for the pay period of November 13, 2008 through the Petition Date from Valorie Foster, an independent contractor. Similarly, ITI has not yet received invoices for the pay period October 27, 2008 through the

Petition Date from Kerstin Menander-Huber, an independent contractor. Susan Poulter, an independent contractor, has not submitted yet invoices to ITI for the pay period December 1, 2008 through the Petition Date. Holtzman, Moellenberg, Panozzo, LLP, an accounting and audit firm employed by ITI, and Kerstin Menander-Huber have not yet submitted invoices to ITI for the pay period November 18, 2008 through the Petition Date. Thus, additional pre-petition amounts may be owed to the aforementioned independent contractors if services were provided.

5. ITS' anticipated pre-petition payroll due to employees as of the Petition Date is approximately \$25,170.88. Additionally, ITS' anticipated pre-petition payroll due to independent contractors is \$6,304.00. ITS has not yet received invoices for the pay period of November 24, 2008 through the Petition Date from the following independent contractors: Laine Linden and Jennifer Matheson. ITS has not received invoices for the pay period October 27, 2008 through the Petition Date from Kerstin Menander-Huber, an independent contractor. Thus, additional pre-petition amounts may be owed to the aforementioned independent contractors if services were provided.

6. Together, Debtors' anticipated pre-petition payroll amount due to employees and independent contractors as of the Petition Date is approximately \$70,951.38. None of Debtors' employees or independent contractors are owed more than the priority amount found in Bankruptcy Code § 507(a)(4).

III.

Payment and Continuance of Employee Obligations is Appropriate and Necessary

7. Pursuant to Section 504(a)(4) of the Bankruptcy Code, the employee's claims for "wages, salaries, or commissions, including vacation, severance, and sick leave pay" earned within 180 days before the petition date are afforded priority status to the extent of \$10,950.00 per employee. 11 U.S.C. § 507(a)(4).

8. Furthermore, Section 105(a) of the Bankruptcy Code provides that 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. § 105(a). Accordingly, payment of employee wages at this time is appropriate and necessary.

9. Debtors anticipate that all employee wage claims will fall under the limit established by Section 504(a)(4) of the Bankruptcy Code. It is essential that the Debtors immediately establish the standard of treatment for the employee wage claims. Any delay in paying the employee wage claims will adversely affect the Debtors’ relationship with the employees and could irreparably impair employee morale at the very time when the dedication, confidence, and cooperation of the employees is most crucial. The Debtors face the imminent risk that their operations may be severely impaired if they are not immediately granted authority to make payments described in this Motion. Employee support for Debtors’ reorganization effort is crucial, particularly given the importance of employee morale and initiative in that effort. At this critical early stage, Debtors simply cannot risk the substantial disruption to their business operations that will result if the Debtors are not permitted to pay the employee wage claims in the ordinary course of business.

10. Not paying their employees in the ordinary course of business would work severe hardship on them and their families. Additionally, if the Debtors are unable to assure their employees that they will be paid in a timely manner, or if the employees are not immediately assured of the uninterrupted, critical benefit payments to which they are entitled, the Debtors’ operations could suffer immediate and irreparable harm due to employee resentment, resignations, loss of good will, and disruption of employee morale.

11. Courts in the Fifth Circuit have authorized payment of prepetition amounts owed to Employees in other Chapter 11 cases. *See In re CEIL Roofing, Inc.*, 315 B.R. 50, 60

(Bankr. N.D. Tex. 2004) (“what is equally clear ... is that the payment of prepetition wage claims of employees that qualify as priority wage claims under [now § 507(a)(4)] does not” upset priorities under the code or discriminate unfairly among general unsecured creditors); *See, e.g., In re CoServ, L.L.C.*, 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002) (noting that “wage claims typically are payable out of necessity as well as by virtue of their priority”); *In re Equalnet Comm. Corp.*, 258 B.R. 368,370 (Bankr. S.D. Tex. 2001) (“Employees are more likely to stay in place and to refrain from actions which could be detrimental to the case and/or the estate if their pay and benefits remain intact and uninterrupted.”). The Debtors submit that the present circumstances warrant similar relief in this case.

12. The Bankruptcy Court’s equitable powers under Section 105(a) are well established. *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939). Section 105 grants the courts broad authority to enforce the Bankruptcy Code’s provisions either under the specific statutory language of the Bankruptcy Code or under equitable or common law doctrines. In a long line of well-established cases, beginning with railroad reorganization cases dating back to the turn of the century, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport Ry.*, 106 U.S. 286, 311-12 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent “stoppage of [crucial] business relations ... “); *In re Chateaugay Corp.*, 80 B.R. 279, 280 (S.D.N.Y. 1987) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits). The ability of this Court to use the equitable powers available under Section 105(a) to support the provision of a debtor’s payment of prepetition employee benefits has been generally recognized in *In re CEI Roofing, Inc.* *See generally In re CEI Roofing, Inc.*, 315 B.R. at 50.

13. To the extent applicable, the Doctrine of Necessity functions in a Chapter 11 case as a mechanism by which the Court can exercise its equitable power to allow payment of critical prepetition claims that are not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359,1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtor’s continued operation). The doctrine is frequently invoked early in a Chapter 11 case, particularly in connection with those Chapter 11 sections that relate to payment of prepetition claims. The Court in *In re Structurelite Plastics Corp.*, 6 B.R. 922 (Bankr. S.D. Ohio 1988), indicated its accord with “the principle that a bankruptcy court may exercise its equity powers under Section 105(a) to authorize payment of prepetition claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.’” *Id.* at 931 (citing *In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N. Y. 1987)). The court stated that “a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932.

14. As recognized by the *In re CEI Roofing, Inc.* court, “if employees are not paid, they will leave ... if they leave the Debtor’s business, the bankruptcy case fails shortly after the filing ... no one will benefit from the process.” *In re CEI Roofing, Inc.*, 315 B.R. at 61. Debtors want to avoid any such occurrence. Therefore, the Debtors submit that payment of the Employee Obligations in accordance with the Debtors’ prepetition business practices and the continuation of such practices on a post-petition basis is in the best interests of the Debtors, their estates, and will enable the Debtors to continue to operate their businesses in an economic manner without disruption. Indeed, the Employees are central to the Debtors’ operations and are vital to maintaining and maximizing the Debtors’ estates.

15. A significant deterioration in the employees' morale at this critical time undoubtedly would have a substantial adverse impact on the Debtors and the value of their assets and businesses. The Debtors submit that the total amount to be paid if the authorization sought herein is granted is relatively modest compared with the size of the Debtors' estates, and the importance of these individuals to the Debtors and their estates. Moreover, the continuation of the employee obligations after the Petition Date is integrally a part of the Debtors' Budget for post-filing operations.

IV. Immediate And Irreparable Harm

16. New Rule 6003 to the Federal Rules of Bankruptcy Procedure, which became effective December 1, 2007, generally precludes the Court from authorizing certain relief until 20 days after the petition is filed, except to the extent necessary to prevent "immediate and irreparable harm." Specifically, Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

- (a) an application under Rule 2014
- (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and
- (c) a motion to assume, assign, or reject an executory contract or unexpired lease in accordance with Rule § 365.

17. The Debtors believe that the relief sought in this Motion is critical to achieving a smooth transition to operation as a Chapter 11 debtor and will help preserve its going concern value. Accordingly, the Debtors seek first day approval of this Motion, with a final hearing to be set as soon as practicable. Notably, at least one court which has

reviewed similar requests for relief under new Rule 6003 has determined that interim relief is appropriate. *First NLC Fin. SVGs., L.L.C.*, 382 B.R. 547 (S.D. Fl. 2008).

18. The relief sought herein is essential to the Debtors' reorganization, and without such relief, the Debtors will suffer immediate and irreparable harm. Indeed, without such relief, the Debtors feel certain that many, if not most of the Employees will cease working, and attempt to find other employment. As recognized by Judge Hale in the *CEI* case, if that occurs, "[n]o one will benefit from the process," because the value of Debtors' estates and businesses will diminish rapidly. *In re CEI Roofing, Inc.*, 315 B.R. 50,61 (Bankr. N.D. Tex. 2004). The Debtors seek the relief requested in this Motion because if such relief is not granted all creditors and parties-in- interest will be harmed by the rapid diminution of Debtors' bankruptcy estates and going- concern value. In short, the Debtors face the risk that their operations may be severely impaired if authority is not granted immediately.

19. In light of the foregoing, the Debtors respectfully submit that the relief requested is essential for the Debtors' reorganization, represents an exercise of the Debtors' sound business judgment, is in the best interests of the Debtors' estates and creditors, and is necessary to prevent immediate and irreparable harm to these estates.

20. Prior to the adoption of Rule 6003, relief similar to the relief requested herein has been granted by courts in this District and elsewhere in other chapter 11 cases. *See, e.g., In re Nexpak Corp.*, No. 04-63816 (RK) (Bankr. N.D. Ohio July 19, 2004) (authorizing the debtors to pay prepetition employee obligations); *In re Am. Way Invs. Corp.*, No. 04-42629 (RB) (Bankr. N.D. Ohio June 9, 2004) (same); *In re Summitville Tiles, Inc.*, No. 03-46341 (WTB) (Bankr. N.D. Ohio Dec. 12, 2003) (same); *In re Waving Leaves, Inc.*, No. 03-66524 (RK) (Bankr. N.D. Ohio Dec. 5, 2003) (same); *In re Republic Engineered Prods. LLC.*,

No. 03-55118 (MSS) (Bankr. N.D. Ohio Oct. 8, 2003); *In re Harry London, Inc.*, No. 03-60137 (RK) (Bankr. N.D. Ohio Jan. 15, 2003) (same); *In re LTV Steel Co.*, No. 00-43866 (WTB) (Bankr. N.D. Ohio Dec. 29, 2000) (same); accord *In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006) (same); *In re Musicland Holding Corp.*, No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006) (same); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) (same). Debtors submit that because they meet the standards required by Rule 6003, the above- listed cases serve as persuasive authority in this instance.

WHEREFORE, Introgen Therapeutics, Inc., Introgen Technology Services, Inc., and TMX Realty, the Debtors and Debtors-in-Possession in this case, move the Court for an order authorizing the Debtors to pay the Debtors' employees and independent contractors their accrued prepetition wages due postpetition, and granting such other relief to which the Debtors may show themselves entitled.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(512) 472-5456
(512) 479-1101 (fax)

By: /s/ Patricia B. Tomasco

Patricia B. Tomasco
State Bar No. 01797600
Kell C. Mercer
State Bar No. 24007668

ATTORNEYS FOR DEBTORS

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2008, a true and correct copy of the foregoing pleading was served, via the Court's CM/ECF notification system and/or regular first class mail, on the parties set forth on the attached Service List.

/s/ Patricia B. Tomasco

Patricia Baron Tomasco