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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re : Chapter 11  
: :  
Doral Financial Corporation,<sup>1</sup> : Case No. 15- \_\_\_\_\_ ( )  
: :  
Debtor. :  
-----X

**DEBTOR’S MOTION FOR AN ORDER (I) AUTHORIZING, BUT NOT DIRECTING, PAYMENT OF PREPETITION WAGES, SALARIES, BUSINESS EXPENSES, AND RELATED ITEMS, AND (II) DIRECTING ALL FINANCIAL INSTITUTIONS TO HONOR CHECKS FOR PAYMENT OF SUCH OBLIGATIONS**

The debtor in the above-captioned case (the “Debtor”) submits this motion (the “Motion”) for entry of an order (i) authorizing, but not directing, the Debtor to pay or otherwise honor the Debtor’s employee-related obligations to or for the benefit of Employees (as defined below) earned and accrued prior to the Petition Date (as defined below) that, but for the commencement of this case, would have otherwise been due and payable in the ordinary course

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<sup>1</sup> The last four digits of the taxpayer identification number of the Debtor are 2162.

of business and (ii) directing all Financial Institutions (as defined below) to honor checks for payment on account of such employee-related obligations. In support of the Motion, the Debtor, by and through its undersigned proposed counsel, respectfully represents:

### **Jurisdiction**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are sections 105, 363(b), and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

### **Background**

2. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition with this Court for relief under chapter 11 of the Bankruptcy Code. Sections 1107(a) and 1108 of the Bankruptcy Code authorize the Debtor to continue to operate its businesses and manage its properties as a debtor in possession. No request for the appointment of a trustee or examiner has been made in this chapter 11 case, and no committee has been appointed or designated.

3. A summary of the Debtor’s business, the Debtor’s capital structure, and the events leading to this chapter 11 case, as well as the facts and circumstances supporting this Motion, are set forth in the *Declaration of Carol Flaton in Support of First Day Motions* (the “Flaton Declaration”)<sup>2</sup>, filed contemporaneously herewith.

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Flaton Declaration.

## **Relief Requested**

4. By the Motion, the Debtor requests entry of an order authorizing, but not directing, the Debtor to pay (i) all prepetition wages, salaries, and other accrued compensation to employees, (ii) all reimbursable prepetition employee business expenses, (iii) all payments for which prepetition payroll deductions, withholdings, or matching employer contributions were made, and (iv) all prepetition processing costs and administrative expenses relating to the foregoing payment and contributions, including any payments to third-party administrators or other administrative service providers.

5. To assist in implementing the relief requested, the Debtor further requests that the Court authorize and direct the Debtor's banks and other financial institutions (the "Financial Institutions") to receive, honor, process, and pay, at the Debtor's request and to the extent of funds on deposit: (i) prepetition payroll checks or electronic transfers and (ii) all other checks or electronic transfers issued for payments approved by this Motion, regardless of whether such checks or electronic transfers were drawn or issued prior to the Petition Date. The Debtor also seeks authorization to reissue prepetition checks or electronic transfers for payments approved by this Motion that are dishonored notwithstanding the foregoing direction.

### **I. Prepetition Employee Obligations**

#### **a. Wages, Salaries, and Commissions**

6. The Debtor in this chapter 11 case is of a holding company with limited operations. As of the Petition Date, the Debtor has a staff of twelve (12) employees (the "Employees"). The Debtor has retained these Employees to help facilitate transition to operations under the Bankruptcy Code and to complete several complicated transactions necessary to wind down and monetize assets. The Debtor needs these Employees' specialized

skills, institutional knowledge, and understanding of the Debtor's business to wind down its estate efficiently and effectively. The Debtor expects to adjust its workforce as necessary during the case.

7. The Employees are paid weekly, and the average weekly payroll for the Employees is \$6,375.64. The Debtor's last payroll was Friday, March 6, 2015. The Debtor therefore owes the Employees compensation for wages and salaries accrued from March 6, 2015 until the Petition Date ("Prepetition Employee Obligations"). The Debtor seeks authorization to pay such Prepetition Employee Obligations and to continue to pay all Prepetition Employee Obligations as they become due in the ordinary course of business; provided, that the Debtor does not seek authority to pay any amounts beyond \$12,475 per person.

8. The Debtor uses ADP, a payroll service, to, among other things, process payroll checks and remit appropriate withholding taxes for the Employees (collectively, the "Payroll Services"). The Debtor pays a *de minimis* amount to ADP for payroll administration and other payroll-related services. The Debtor requests authority to pay any prepetition amounts that may be due on account of the Payroll Services, and continue to use the Payroll Services postpetition in the ordinary course of business.

**b. Reimbursement of Prepetition Employee Expenses**

9. In the ordinary course of business, the Debtor reimburses Employees for certain expenses incurred in the scope of their employment on the Debtor's behalf (the "Reimbursable Expenses"). To be reimbursed, Employees must comply with the Debtor's reimbursement policy and submit an expense report for approval and reimbursement.

10. Because the Employees incur the Reimbursable Expenses while performing duties on the Debtor's behalf, the Debtor considers the Reimbursable Expenses to be ordinary business

expenses, and not compensation. As of the Petition Date, the Debtor estimates that there is no amount unpaid for Reimbursable Expenses. To the extent prepetition Reimbursable Expenses exist, the Debtor seeks authorization, but not direction, to continue to pay all Reimbursable Expenses as they become due in the ordinary course of business.

**c. Deductions and Withholdings**

11. In connection with the foregoing, the Debtor accrues in the ordinary course of business state, local, and federal employment and withholding taxes as wages are earned by the Employees (“Withholding Obligations”). The Debtor routinely withholds from Employees’ paychecks amounts that the Debtor is required to remit to third parties. Examples of such Withholding Obligations include Social Security taxes, federal, state, and local income taxes, wage garnishments, and other court-ordered deductions. By this Motion, the Debtor seeks the authority to continue to timely pay the Withholding Obligations as they become due in the ordinary course of business.

**II. Employee Benefits**

12. The Employees receive usual and customary benefits such as health insurance, dental and vision insurance, disability insurance, life insurance, and retirement benefits under various employee benefits plans (the “Employee Benefit Plans”). Prior to Debtor’s former subsidiary, Doral Bank, being placed into receivership, as described in the Flaton Declaration, such benefits were provided pursuant to Employee Benefit Plans that covered employees of the Debtor as well as employees of Doral Bank and other affiliates. The Debtor has only 12 Employees, while Doral Bank, as of the time it was placed into receivership, had significantly more employees. Accordingly, the majority of the cost of the Employee Benefit Plans was to support benefits for employees of Doral Bank, not the Debtor.

13. The Debtor believes that the Employee Benefit Plans were largely current as of the filing date and is not seeking authority to pay any prepetition obligations under the Employee Benefit Plans. To the extent the contract for an Employee Benefit Plan is in the name of the Debtor, the Debtor expects to seek to reject such agreement early in this chapter 11 case. With respect to providing benefits on a going-forward basis for the Debtor's Employees, the Debtor intends to enter into new benefit plans, providing for the same or similar benefits as those provided under the Employee Benefit Plans, in the ordinary course of business postpetition.

### **III. Direction to Financial Institutions**

14. The Debtor also seeks an order authorizing and directing all Financial Institutions to receive, process, honor, and pay any and all checks, drafts, and other forms of payment drawn on the Debtor's bank accounts related to the Prepetition Employee Obligations, whether presented before or after the Petition Date, provided that sufficient funds are on deposit in the applicable bank accounts to cover such payments.

15. In addition, the Debtor seeks an order prohibiting Financial Institutions from placing any holds on, or attempting to reverse, any automatic transfers to Employees' accounts for Prepetition Employee Obligations.

16. Finally, the Debtor seeks an order authorizing the Debtor to issue new postpetition checks or effect new postpetition fund transfers on account of the Prepetition Employee Obligations or other payments authorized in this Motion to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

### **Basis for Relief**

17. Section 105(a) of the Bankruptcy Code empowers the court to "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). This equitable power is granted to effect the policies and goals of chapter 11 reorganization, which are to “create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.” Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 287 (S.D.N.Y. 1987); see also In re Structurlite Plastics Corp., 86 B.R. 922, 932 (Bankr. S.D. Ohio 1998) (rejecting a bright line rule prohibiting payment of prepetition debts because it “may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code”).

18. Under the “doctrine of necessity” or “necessity of payment” rule, first articulated in Miltenberger v. Logansport C. & S. W. R. Co., 106 U.S. 286 (1882), bankruptcy courts can exercise these equitable powers “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.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also In re Lehigh & N.E. Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (stating that payment of a claim arising before reorganization is authorized if it is “essential to the continued operation of the [debtor]”); In re Fin. News Network Inc., 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991) (observing that the doctrine of necessity “stands for the principle that a bankruptcy court may allow pre-plan payments of prepetition obligations where such payments are critical to the debtor’s reorganization”); In re Columbia Gas Sys., Inc., 171 B.R. 189, 192 (Bankr. D. Del. 1994) (noting that, in the Third Circuit, a debtor may pay prepetition creditors “in advance of a confirmed plan,” where such payments are “essential to the continued operation of the [debtor’s] business”). The doctrine of necessity permits a deviation from the equal treatment of creditors because “otherwise there will be no reorganization and no creditor will have an opportunity to

recoup any part of its pre-petition claim.” In re United Am., Inc., 327 B.R. 776, 781 (Bankr. E.D. Va. 2005); see also In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (stating that the necessity of payment exception is “well-established in bankruptcy common law”).

19. While section 105(a) alone is sufficient, see In re Ionosphere Clubs, 98 B.R. at 176, other courts have applied it in conjunction with sections 1107(a) and 362(d) to allow payment of prepetition claims under the doctrine of necessity. See In re CoServ, L.L.C., 273 B.R. 487, 496 (Bankr. N.D. Tex. 2002) (holding that there are occasions when the debtor in possession’s fiduciary duty to protect and preserve the estate “can only be fulfilled by the preplan satisfaction of a prepetition claim”); In re CEI Roofing, Inc., 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (opining that the debtor-in-possession and its “critical vendors” could request relief under section 362(d) for cause, such cause “being the urgency and necessity of paying the prepetition claims, such payment being the only means of protecting the going concern value of the operating business in Chapter 11”).

20. Many courts have authorized debtors to pay critical prepetition claims pursuant to the doctrine of necessity, including claims that are not accorded priority in section 507 of the Bankruptcy Code. For example, in In re Just for Feet, Inc., the Delaware District Court authorized the debtor to pay prepetition claims of certain trade vendors because they were “essential to the survival of the debtor during Chapter 11 reorganization,” stating that “[t]he Supreme Court, the Third Circuit, and the District of Delaware all recognize the court’s power [under section 105(a)] to authorize payment of pre-petition claims when such payment is necessary for the debtor’s survival during chapter 11.” 242 B.R. 821, 825-26 (D. Del. 1999); see also In re Mirant Corp., 296 B.R. 427, 429 (Bankr. N.D. Tex. 2003) (setting procedural rules to authorize the debtor to pay “critical” creditors outside of a confirmed plan without advance court

approval); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (authorizing the debtor, an automobile part supplier, to pay prepetition obligations to its toolmakers because the payments were “necessary to avert a serious threat to the Chapter 11 process”). Because flexibility is most needed during the immediate postpetition period to safeguard the debtor from the loss of essential goods and services and the collapse of the reorganization, it is both an appropriate and vital use of bankruptcy courts’ equitable powers to permit debtors to pay critical creditors during that time.

21. Courts are also empowered to authorize debtors to pay prepetition claims under section 363(b)(1), which provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). This section gives the court “broad flexibility in tailoring its orders to meet a wide variety of circumstances.” In re Ionosphere Clubs, Inc., 98 B.R. at 175. Before the court can apply section 363(b) in its favor, the debtor must “articulate some business justification, other than mere appeasement of major creditors . . . .” Id. (finding that the debtor gave “sound business reasons for its decision to pay pre-petition wages,” those reasons being that it was necessary to “preserve and protect its business and ultimately reorganize, retain its currently working employees and maintain positive employee morale”). Here, the Debtor’s request to pay prepetition amounts related to Prepetition Employee Obligations satisfies this standard because the failure to do so could have a material adverse impact on the winding down of the Debtor’s operations.

22. Certain Prepetition Employee Obligations are entitled to priority treatment under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. Sections 507(a)(4) and (a)(5) of the Bankruptcy Code give priority up to \$12,475 per individual for prepetition claims for wages,

salaries, vacation and sick leave, and claims for contributions to employee benefit plans. By this Motion, the Debtor seeks authority to pay Prepetition Employee Obligations up to \$12,475 per person. The amounts the Debtor seeks authority to pay are entitled to priority under sections 507(a)(4) and (a)(5) of the Bankruptcy Code, and, as such, must be paid in full as a condition to confirmation of a chapter 11 plan. See 11 U.S.C. § 1129(a)(9). Payment in the ordinary course of business simply accelerates the timing of the payment of obligations that otherwise will have to be paid in any event, and therefore does not significantly alter the priority scheme set forth in the Bankruptcy Code.

23. In other chapter 11 cases, courts in this district have approved payment of prepetition claims for compensation and benefits similar to those described herein. See, e.g., In re dELiA\*s, Inc., Case No. 14-23678 (Bankr. S.D.N.Y. Dec. 24, 2014) [Docket No. 100]; In re MPM Silicones, LLC, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. May 16, 2014) [Docket No. 215]; In re Am. Roads LLC, Case No. 13-12412 (BRL) (Bankr. S.D.N.Y. Aug. 21, 2013) [Docket No. 35]; In re Broadview Networks Holdings, Inc., Case No. 12-13581 (SCC) (Bankr. S.D.N.Y. Sept. 14, 2012) [Docket No. 94]; In re Velo Holdings Inc., Case No. 12-11384 (MG) (Bankr. S.D.N.Y. Apr. 23, 2012) [Docket No. 92]; In re TBS Shipping Servs. Inc., Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2012) [Docket No. 86]; In re United Retail Grp, Inc., Case No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 22, 2012) [Docket No. 249]; In re Eastman Kodak Co., Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. Feb. 16, 2012) [Docket No. 357]; In re Old HB, Inc. (f/k/a Hostess Brands, Inc.), Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Jan. 27, 2012) [Docket No. 194]. The Debtor respectfully submits that similar relief is warranted in this case.

24. Accordingly, the Debtor respectfully submits that the relief requested herein should be granted in all respects because it is (i) necessary and appropriate in light of the foregoing and (ii) in the best interests of the Debtor's estate, its creditors and other parties in interest.

**Notice**

25. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the Southern District of New York; (b) the entities listed on the List of Creditors Holding the 20 Largest Unsecured Claims filed pursuant to Bankruptcy Rule 1007(d); and (c) the indenture trustees for the DFC Notes and the AFICA Bonds. In light of the nature of the relief requested, the Debtor submits that no other or further notice is necessary.

**Conclusion**

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as Exhibit A, granting the relief requested in the Motion and such other and further relief for the Debtor as may be just or proper.

Dated: March 11, 2015  
New York, New York

/s/ Mark I. Bane  
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*Proposed Counsel to the Debtor*

**EXHIBIT A**

**Proposed Order**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
In re : Chapter 11  
 :  
Doral Financial Corporation,<sup>1</sup> : Case No. 15-\_\_\_\_\_ ()  
 :  
Debtor. :  
-----X

**ORDER (I) AUTHORIZING, BUT NOT DIRECTING,  
PAYMENT OF PREPETITION WAGES, SALARIES, BUSINESS  
EXPENSES, AND RELATED ITEMS, AND (II) DIRECTING ALL FINANCIAL  
INSTITUTIONS TO HONOR CHECKS FOR PAYMENT OF SUCH OBLIGATIONS**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtor (the “Debtor”), for entry of an order (the “Order”) (i) authorizing, but not directing, the Debtor to pay or otherwise honor the Debtor’s employee-related obligations to or for the benefit of Employees earned and accrued prior to the Petition Date that, but for the commencement of this case, would have otherwise been due and payable in the ordinary course of business and (ii) directing all Financial Institutions to honor checks for payment on account of such employee-related obligations; and upon the Flaton Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this proceeding being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue of this proceeding and the Motion in this Court being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given; and the Court having found that no other or further notice is needed or necessary; and the Court having reviewed the Motion and the Flaton Declaration and having heard statements in support of the Motion at a hearing held before the Court (the “Hearing”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the

<sup>1</sup> The last four digits of the taxpayer identification number of the Debtor are 2162.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

relief granted herein; and the relief requested in the Motion being in the best interests of the Debtor's estate, its creditors, and other parties in interest; and any objections to the relief requested in the Motion having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED, THAT:**

1. The Motion is GRANTED to the extent provided herein.
2. Pursuant to sections 105(a), 363(b), 507(a)(4), 507(a)(5), and 1107(a) of the Bankruptcy Code, the Debtor is authorized, but not directed, in its sole discretion, to (i) continue to honor all obligations and to pay any and all prepetition amounts relating to employee wages and compensation up to \$12,475 per person, (ii) pay for Payroll Services, (iii) pay the Reimbursable Expenses, and (iv) pay the Debtor's Withholding Obligations.
3. The Debtor is authorized, but not directed, in its sole discretion, to pay all prepetition processing fees associated with, and all costs incident to, the foregoing.
4. All banks and other financial institutions on which checks were drawn or electronic payment requests were made in connection with the payments approved by this Order are authorized and directed to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient funds are then available in the Debtor's bank accounts to cover such payments) and (ii) rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order. The Debtor is authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for all payments approved by this Order where such method of payment has been dishonored postpetition.

5. The Debtor is authorized and empowered to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. The Court retains jurisdiction with respect to all matters arising from, or related to, the implementation and interpretation of this Order.

Dated: \_\_\_\_\_, 2015  
New York, New York

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UNITED STATES BANKRUPTCY JUDGE