

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

Add: Rial's Edge Mall Center

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

**KLETT ROONEY LIEBER & SCHORLING**  
A Professional Corporation

By: 

Adam G. Landis (I.D. No. 3407)  
1000 West Street, Suite 1410  
Wilmington, DE 19801  
Telephone: (302) 552-4200  
Facsimile: (302) 552-4295

- and -

Frances Gecker, Esquire  
Joseph D. Frank (ARDC #6216085)  
**FREEBORN & PETERS**  
311 South Wacker Drive, Suite 3000  
Chicago, IL 60606  
Telephone: (312) 360-6000  
Facsimile: (312) 360-6596

Co-Counsel to the Official Committee of Unsecured  
Creditors

**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

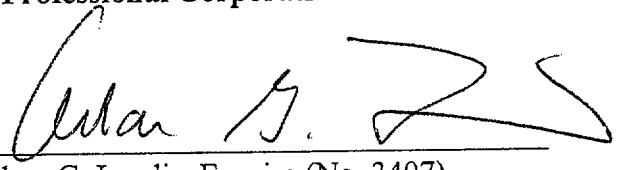
submits that the Debtors have failed to meet their burden under section 105 of the Bankruptcy Code and the necessity of payment doctrine.

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

**KLETT, ROONEY, LIEBER & SCHORLING,  
A Professional Corporation**

By: 

Adam G. Landis, Esquire (No. 3407)  
Jeffrey M. Carbino (No. 4062)  
The Brandywine Building  
1000 West Street, Suite 1410  
Wilmington, DE 19801  
(302) 552-4200 (Telephone)  
(302) 552-4295 (Facsimile)

-and-

Frances Gecker, Esquire  
Joseph D. Frank, Esquire  
**FREEBORN & PETERS**  
311 South Wacker Drive, Suite 3000  
Chicago, IL 60606  
(312) 360-6000 (Telephone)  
(312) 360-6596 (Facsimile)

Co-Counsel to the Official Committee  
of Unsecured Creditors



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FANSTEEL INC., et al., : (Bankruptcy #02-10109)  
: :  
Debtors. : :

**AFFIDAVIT OF  
PATRICIA A. JACKSON, PARALEGAL**

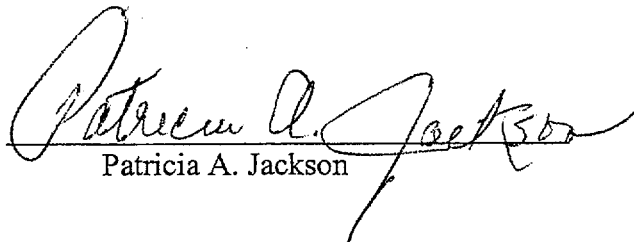
STATE OF DELAWARE:  
SS:  
NEW CASTLE COUNTY:

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**

Fansteel Inc. - 2002

Ellis Merschoff, Regional Administrator  
Attention: Dr. Blair Spitzberg  
U.S. Nuclear Regulatory Commission  
Region IV - Harris Tower  
611 Ryan Plaza Drive, Suite 400  
Arlington, TX 76011-8064

Jim Gardella  
Reade Manufacturing  
PO Box 930862  
Atlanta, GA 31193-0862

Karen Serrucci  
Remet Corporation  
PO Box 101142  
Atlanta, GA 30392

Celest Burton  
OMG, Nations Bank Of GA  
PO Box 198734  
Atlanta, GA 30384-8374

Richard Burkchart  
7205 Chagrin Road, Suite 4  
Bainbridge, OH 44023

Sharyl O'Farrell  
Ridge Realty Group  
257 East Main Street  
Barrington, IL 60010

Roco Mastrobattisti  
Bass Plating Co.  
Old Windsor Road  
Bloomfield, CT 50613

Linda Bartels  
John Schneider & Associates  
Box 78518  
Milwaukee, WI 53278

Bob Beimel  
J.I.T. Tool & Die  
RD#1 Box 113c  
Brockport, PA 15823

Judy Anderson  
Interstate Chemical Co.  
PO Box 295  
Brookfield, OH 44403

Judy Anderson  
Interstate Chemical Company  
PO Box 295  
Brookfield, OH 44403

Dana Hammond  
CIT  
2500 W. County Rd. 42, Ste. ES 120  
Burnsville, MN 55337

Dell Financial Services  
Payment Processing Center  
PO Box 5292  
Carol Stream IL 60197

Joseph Martinez  
DFS Acceptance Corp  
PO Box 4125  
Carol Stream, IL 60197

Linda Calabrese  
Wright Tool And Die  
770 Industrial Drive Unit A  
Cary, IL 60013

Claudia Romero  
H Kramer & Co.  
1339-1345 W 21<sup>st</sup> Street  
Chicago, IL 60608

Jeff Smith  
Metokote Corp  
312 Savannah Park Rd  
Cedar Falls, IA 50613

Todd Williams  
HA International  
22668 Network Place  
Chicago, IL 60673-1226

Dean Alexandrou  
NSA Ltd. LP (Aluminum Alloys)  
PO Box 99803  
Chicago, IL 60694-5197

Kevin Moon  
Ami Metals Inc.  
PO Box 3072574  
Chicago, IL 37230

The Northern Trust Company  
Attn: Legal Department  
50 South La Salle Street  
Chicago, IL 60675

Tamara Volkov  
The Aviant Group  
PO Box 33574  
Chicago, IL 60694-3574

Foothill Captial Corporation  
161 North Clark Street, Suite 3590  
Chicago, IL 60601

Chris Dimou  
IBM Corporation  
91222 Collection Center Drive  
Chicago, IL 60693-1222

Misty  
Accts Receivable  
Heather, Buyer Pechiney Rolled Products  
22112 Network Place  
Chicago, IL 60673-1221

Sheryl Sanetra  
Magid Glove & Safety Mfg  
2060 North Kolmar Ave  
Chicago, IL 60639-3483

Patrick M. Goy, Managing Director  
Lincoln Partners  
181 West Madison Street, Ste 3750  
Chicago, IL 60602

Frances Gecker, Esquire  
Freeborn & Peters  
311 South Wacker Drive, Suite 3000  
Chicago, IL 60606  
**(Counsel to Official Committee)**

Kelly Page  
Rudell Carbide Inc.  
4351 Schaefer Ave  
Chino, CA 91710

Sandy Thrasha  
Fisher-Anderson, L.C.  
PO Box 660631  
Dallas, TX 75266-0631

Mark Sumner  
Industrial Powder Coatings  
Location 0648  
Cincinnati, OH 45264

Adan Gutow  
Southwestern Processors  
PO Box 398936  
Dallas, TX 75339-8936

Jeff Solen  
Johnson Lift / Hyster  
PO Box 60007  
City of Industry, CA 90706

Denise Locklair  
American Stainless & Alloy  
PO Box 527  
Darlington, SC 29540

Tony Kaszarsky  
OMG Americas  
PO Box 6066N  
Cleveland, OH 44193

Tom Mccauley  
Strohs  
500 Park Avenue  
Des Moines, IA 50321

Chris Keller  
Safety Kleen Corp.  
PO Box 12349  
Columbia, SC 29211-2349

Loan Servicing  
Iowa Department of Economic Development  
Attn: Loan Servicing  
200 East Grand Avenue  
Des Moines, IA 50309

Doug Liebe  
Safety Kleen  
PO Box 12349  
Columbia, SC 29211-2349

Sharon Post  
Wellmark Blue Cross & Blue Shield of Iowa  
PO Box 9124  
Des Moines, IA 50306-9124

Timothy J. Ostroski  
Southern Iowa Council of Governments  
PO Box 102  
101 East Montgomery St.  
Creston, IA 50801-0102

Micky  
Scientific Metal Treating  
299 W. Old Higgins Rd.  
Des Plaines, IL 60018

John Dawson  
Brown Truck Leasing Corp  
2525 E Euclid, Suite 214  
Des Moines, IA 50317

Mary Gagin  
Kolene Corporation  
Dept. 0929  
PO Box 67000  
Detroit, MI 48267-0929

Noel Kocher  
Walker Wire & Steel Corp  
PO Box 77022  
Detroit, MI 48277

Richard Lucy  
Brighton Properties  
2401 East El Segundo Blvd., Ste. 430  
El Segundo, CA 90245  
**(Brighton Properties)**

Julia Hasenzahl  
Bankruptcy Management Corporation  
1330 E. Franklin Ave  
El Segundo, CA 90245  
**(Claims Agent)**

David Gillespie  
Krueger & Company Inc  
900 Industrial Dr  
Elmhurst, IL 60126

Cliff Clark  
Anita Levy Issuer:  
Cameron County Industrial Development  
Authority  
421 North Broad Street  
Emporium, PA 15834

Jim Burke  
Embassy Powdered Metal  
PO Box 344  
Airport Rd.  
Emporium, PA 15834

Rich Guisto  
M & R Machine Shop  
RD 2 Box 170d  
Emporium, PA 15834

Jim Hornung  
JSH  
Allegany Ave., Suite 1  
Emporium, PA 15834

Bill Farren  
B & R Tool & Die  
445 Allegany Ave  
Emporium, PA 15834

Barry Schmutz  
US Bronze  
PO Box 31, Route 202  
Flemington, NJ 08822-0031

Robert Holmes  
Solidiform Inc.  
PO Box 99214  
Fort Worth, TX 76199

Dave Barre  
Kittyhawk Products  
11651 Monarch St  
Garden Grove, CA 92841

Accounts Receivable Department  
Allegheny Power  
800 Cabin Hill Drive  
Greensburg, PA 15606

Sean McKay  
McKay's Plating Co.  
PO Box 200  
Hampton, IL 61256

Kelly Stephens  
PA Economic Development Finance  
Authority  
Dept Of Community & Economic  
Development  
466 Forum Building  
Harrisburg, PA 17120

Bob Young  
Howmet Aluminum Casting, Inc.  
201 Cercon Drive  
Hillsboro, TX 76645

Barry Klein  
Global Shop Solutions  
PO Box 60396  
Houston, TX 77205

Accounts Payable  
Alldyne Powder Technologies  
7300 Highway 20 West  
Huntsville, AL 35806

Tom Wright  
Arc Metals  
PO Box 700  
Indiana, PA 15701

Bill Barry  
Mississippi Business Finance Corporate  
1306 Walter Sillers Bldg  
550 High Street  
PO Box 849  
Jackson, MI 39205

Mel Green  
N F & M International, Inc  
125 Jericho Turnpike  
Jericho, NY 11753

American National Bank  
Attn: Legal Department  
1201 S. Milwaukee Avenue  
Libertyville, IL 60048

Hamid Rafatjoo, Esquire  
Pachulski, Stang, Ziehl, Young & Jones P.C.  
10100 Santa Monica Boulevard, Suite 1100  
Los Angeles, CA 90067  
**(Co-Counsel for Debtors)**

Sheri Schleicher  
Prime Alloy Steel Castings  
PO Box 513589  
Los Angeles, CA 90051

Mary Cliff  
Transtar Metals  
PO Box 59906  
Los Angeles, CA 90059

Don Garcia  
Neuvant Aerospace Corp  
PO Box 51518  
Los Angeles, CA 90051

Mark Colton  
Alliant Energy  
PO Box 77004  
Madison, WI 53707

Connie-AP Clerk  
M. Argueso & Co./Cerita West LLC  
441 Waverly Ave.  
Mamaroneck, NY 10543

Jerry Bayless  
Gamma Engineering  
601 Airport Drive  
Mansfield, TX 76063

Garrett Mckay  
R S Huges Co. Inc.  
601 East Cedar Ave. Unit E  
Mc Allen, TX 78501

Debbie Wagner  
Tel Comm NEC America, Inc  
PO Box 5548  
McAllen, TX 78502

Lender:  
GE Capital Public Finance, Inc., Ste 470  
8400 Normandale Lake Blvd  
Minneapolis, MN 55402

Foreign Louise Goulard  
QMP America  
770 Sherbrooke St. West, Ste 1800  
Montreal, QUE, CA H3A 1G1

Cindy Freeby  
Kobelco Metal  
PO Box 3234  
Church St. S  
New York, NY 10008-3235

Rhonda Keuhl  
Liberty Pattern  
PO Box 67  
New Liberty, IA 52765-0067

Jeffrey S. Sabin, Esquire  
Mark A. Broude, Esquire  
Schulte, Roth & Zabel LLP  
919 Third Avenue  
New York, NY 10022  
**(Counsel for Debtors)**

Jeffrey N. Rich, Esquire  
Elizabeth Singer, Esquire  
Kirkpatrick & Lockhart LLP  
1251 Avenue of the Americas, 45th Floor  
New York, NY 10020-1104  
**(DIP Lender)**

Valerie L. Sheaffer  
919 Third Avenue  
New York, NY 10022

Vivek Melwani, Esquire  
Fried, Frank, Harris, Shriver & Jacobson  
One New York Plaza  
New York, NY 10004  
**(Counsel for CIT)**

Patricia Schrage  
U.S. Securities and Exchange Commission  
Northeast Regional Office  
233 Broadway  
New York, NY 10279

David B. Berkson  
Berkson & Sons  
333 Skokie Blvd Suite 111  
Northbrook, IL 78680

Rick Pannell  
Remet  
112 Industrial Drive  
Oak Hill, WV 25901

Carl Roberts  
GSC Foundaries  
2738 Commerce Way  
Odgen, UT 84401

John Fuller  
Advance Services  
Lock Box #3366  
Omaha, NE 68176-0615

Fern Slay  
Arcturus Manufacturing Co  
6001 Arcturus Way  
Oxnard, CA 93030

Kathy Carpenter  
Cannon-Muskegon Corp.  
Dept. CH 10016  
Palatine, IL 60055-0016

John Schulz  
3570 San Pasqual  
Pasadena, CA 91107

Marilyn Schulz  
3444 San Pasqual  
Pasadena, CA 91107

Mac King  
ALLVAC  
Dept. LA 21001  
Pasadena, CA 91185

Doris Schulz  
3444 San Pasqual  
Pasadena, CA 91107

Peter S. Clark, II, Esquire  
Reed Smith LLP  
2500 One Liberty Place  
1650 Market Street  
Philadelphia, PA 19103  
**TTI Metals**

John Weiland  
Precision Rolled Products, Inc  
PO Box 7247  
Philadelphia, PA 19170

Richard G. Scherder  
Aon Risk Service, of PA  
PO Box 7247-7389  
Philadelphia, PA 19170

Val Rivera  
Citicorp Vendor Finance Inc.  
PO Box 8500-6075  
Philadelphia, PA 19178

Debbie Strauser  
De Lage Landen Financial Svs  
P O Box 41601  
Philadelphia, PA 19101



Jeff Jones  
American Express  
20002 N. 19<sup>th</sup> Avenue A-21  
Phoenix, AZ 85027-4250

Tony Vasquez  
Karsten Precision  
PO Box 83750  
Phoenix, AZ 85071-3750

Bill Amos  
Hoeganaes  
PO Box 371136M  
Pittsburgh, PA 15251

Vennie Krutz  
Alldyne  
Lock Box 360281M  
Pittsburgh, PA 15251

Jean Mazolic  
H.C. Starck  
PO Box 371229  
Pittsburgh, PA 15251

Bob Donadieu  
US Silica Co.  
PO Box 360038  
Pittsburgh, PA 15250-6038

Clint Moreland  
Saegertown  
PO Box 641484P  
Pittsburgh, PA 15264

Ruth Thomas  
BOC Gas  
PO Box 36090M  
Pittsburgh, PA 15259-6904

Manufacturers Association  
1 Gateway Center, Suite 1250  
420 Fort Duquesne Blvd  
Pittsburgh, PA 15222

Larry Duffy  
Timken Latrobe Steel  
PO Box 360434  
Pittsburgh, PA 15251

Clay Hardin  
T.T.I. Metals  
290 King of Prussia Rd.  
Radnor, PA 19087

Joe Ransom  
Umicore  
Magnolia Bldg. Suite 110  
Raleigh, NC 27604

Joe Ransom  
Sogem-Afrimet  
Magnolia Bldg, Ste 110  
3120 Highwoods Blvd  
Raleigh, NC 27604

Craig Hackert  
Hackerts Wood Products  
30511 285<sup>th</sup> Street  
Richland, IA 52585

Jim Weeter  
A-1 Wire  
840 39<sup>th</sup> Ave  
Rockford IL 61109-2937

Stuart Treby, Esquire  
Office of the General Counsel  
Attention: Stephen Lewis  
U.S. Nuclear Regulatory Commission  
Mail stop 0-15D21-One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738

Melvyn Leach  
Office of Nuclear Materials Safety &  
Safeguards  
Attention: Ms. Leslie Fields  
Mail Stop T-8A33-Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738

Ms. Leah Tremper  
License Fee & Accounts Receivable Branch  
Office of the Chief Financial Officer  
Mail stop T-9E10 - Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738

Document Control Desk  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738

Larry Camper, Chief Decommissioning  
Branch  
Office of Nuclear Materials Safety &  
Safeguards  
Attention: Dr. Blair Spitzberg/Thomas  
Fredrichs  
Mail stop T-7F27-Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738

John Cordes, Solicitor  
U.S. Nuclear Regulatory Commission  
Mail stop 0-15D21  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738

Linda Fletcher  
Texas Heat Treating Inc  
303 Texas Ave  
PO Box 1117  
Round Rock, TX 78680

Nichole Michelle  
Fry Steel Company  
PO Box 4028  
Santa Fe Springs, CA 90670

Susan Krogsgaard  
RBC Transport Dynamics Corp  
PO Box 1953  
Santa Ana, CA 92702

John Matraia  
Vanguard Executive Services  
512 West Main Street  
Shrewsbury, MA 01545

Scott Bonnema  
North Star Imaging, Inc  
953 Westgate Dr., Suite 109  
St Paul, MN 55114

Suzanne Cane  
Act I Personnel Services  
5334 Torrance Blvd  
Torrance, CA 90503

Stacey Mckee  
PA Industrial Heat Treaters  
Access Road  
St. Mary's, PA 15857

Josephine Velarde  
Joachim Machinery Co  
920 Knox Street  
Torrance, CA 90502

Robert Wechter  
Acupowder  
PO Box 798017  
St. Louis, Mo 63179-8000

Mike Bennett  
US Bankcorp  
7659 SW Mohawk Street  
Tualatin, OR 97062

Ellen Poteat  
Nuclear Regulatory Commission  
License Fee & Accounts Receivable Branch  
PO Box 954514  
St. Louis, MO 63195-4514

Mike Thompson  
Thompson Gundrilling Inc.  
13840 Saticoy Street  
Van Nuys, CA 90051-3589

Bob Freidl  
Advanced Heat Treaters  
Trout Run Rd.  
St. Mary's, PA 15857

James R. Curtiss  
Winston & Strawn  
1400 L Street, N.W.  
Washington, DC 20005-3502

Dorey  
St. Mary Box  
Pistner Lane  
St. Marys, PA 15857

Jeff Rosien  
City Of Washington  
PO Box 516  
Washington, IA 52353

Foreign Scott Shook  
Timminco Metals  
PO Box 1160 Station A  
Toronto, ONT, CA M5W 1G5

Jeff Garrett  
Washington County Treasurer  
PO Box 889  
Washington, IA 52353

Express Mail  
Richard Gladstein, Esquire  
U.S. Department of Justice  
Environmental Enforcement Section  
PO Box 7611  
Washington, DC 20044

Terry Nielson  
Washington State Bank  
121-125 South Marion  
Washington, IA 52353

Terry Nielson  
Washington State Bank  
121-125 South Marion  
Washington, IA 52353

Sandy Flannagan  
Bristol Metals  
3000 Lebanon Church Rd.  
West Mifflin, PA 15122

Vito I. DiMiao  
Parcels, Inc.  
4 East Seventh Street  
Wilmington, DE 19801  
**(Parcels)**

David Buckbinder, Esquire  
Office of the United States Trustee  
844 King Street, Suite 2313  
Wilmington, DE 19801

Laura Davis Jones, Esquire  
Rosalie L. Spelman, Esquire  
Pachulski, Stang, Ziehl, Young & Jones P.C.  
919 Market Street, 16th Floor  
P.O. Box 8705  
Wilmington, DE 19899-8705  
**(Co-Counsel for Debtors)**

Ellen W. Slights, Esquire  
U.S. Attorney's Office  
1201 Market Street, Suite 1100  
Wilmington, DE 19899

Adam G. Landis, Esquire  
Klett Rooney Lieber & Schorling  
1000 West Street, Suite 1410  
Wilmington, DE 19801  
**(Counsel to Official Committee)**

David Hale  
Hale Mfg. LLC  
1065 Wayne Rd.  
Wilmington, OH 45177

Edward B. Rosenthal, Esquire  
Rosenthal, Monhait, Gross & Goddess, P.A.  
Mellon Bank Cente, Suite 1401  
PO Box 1070  
Wilmington, DE 19899-1070  
**(Counsel for CIT)**

Tobey M. Daluz, Esquire  
Reed Smith LLP  
1201 Market Street, Suite 1500  
Wilmington, DE 19801  
**TTI Metals**