

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

IN RE:	:	CHAPTER 11
	:	
DAN RIVER INC., <i>et al.</i> ,	:	CASE NO. 04-10990
	:	
DEBTORS.	:	JUDGE DRAKE
	:	

---

**UNITED STATES TRUSTEE’S OBJECTION TO  
DEBTOR’S MOTION FOR AUTHORITY  
TO PAY “CRITICAL VENDORS”**

COMES NOW the United States Trustee, in furtherance of the administrative responsibilities imposed pursuant to 28 U.S.C. § 586(a), and objects to the debtors’ motion for authority to pay “critical vendors.” As cause therefore, the United States Trustee shows as follows.

1.

These chapter 11 cases were commenced by voluntary petition filed March 31, 2004.

2.

The United States Trustee has solicited, but has not yet appointed, a committee of unsecured creditors. The United States Trustee anticipates the committee will be formed on the afternoon of Monday, April 12, 2004.

3.

Among the debtors’ “first day” pleadings was the “Motion of Debtors for Order Pursuant to 11 U.S.C. §§ 105(a) and 363(b) Authorizing Payment of Prepetition Claims of Certain Critical Vendors and Service Providers” (hereinafter the “Critical Vendor Motion”).

4.

In the Critical Vendor Motion, the debtors request this Court grant them authority to pay unnamed vendors, in their sole discretion, up to an aggregate of \$7 million, on account

of prepetition claims.<sup>1/</sup>

5.

The debtors maintain that their request to pay pre-petition debt outside a confirmed plan of reorganization is necessary to the reorganization process, because they do not have any viable alternatives to obtain substitute goods from other suppliers, the vendors may refuse to continue doing business with the debtors or may even go out of business if they are not paid, and they must pay these vendors in order to ensure that essential goods will continue to be available without interruption. In support of the Critical Vendor Motion, the debtors rely on Bankruptcy Code sections 105(a) and 363(b)(1).

6.

Section 105(a) allows the bankruptcy court to issue any order, process, or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code. However, “this section does not create discretion to set aside the Code’s rules about priority and distribution; the power conferred by § 105(a) is one to implement rather than override.” In re Kmart Corp., 359 F.3d 866, 871 (7<sup>th</sup> Cir. 2004). “Every circuit that has considered the question has held that this statute does not allow a bankruptcy judge to authorize full payment of any unsecured debt, unless all unsecured creditors in the class are paid in full.” Id. citing In re Oxford Management, Inc., 4 F.3d 1329 (5<sup>th</sup> Cir. 1993); Official Committee of Equity Security Holders v Mabey, 832 F.2d 299 (4<sup>th</sup> Cir. 1987); In re B & W Enterprises, Inc., 713 F.2d 534 (9<sup>th</sup> Cir. 1983); In re Swallen’s Inc., 269 B.R. 634, 347 (B.A.P. 6<sup>th</sup> Cir. 2001).

7.

Likewise, preferring certain creditors over others through “critical vendor” payments under the “doctrine of necessity” has become disfavored. See Kmart, 359 F.3d at 871 (“A doctrine of necessity is just a fancy name for a power to depart from the Code.”

---

<sup>1/</sup>Although the debtors define the term “Critical Vendors” as being “...certain specialty vendors (who) supply essential goods and services for the operation of their businesses” the identities of these “Critical Vendors” are not disclosed.

)

8.

In the *Kmart* decision the Sixth Circuit stated, in *dicta*, that if section 363(b)(1) were used to support payment of some prepetition debts, its should be employed "...to do the least damage possible to priorities established by contract and by other parts of the Bankruptcy Code." Id. at 872.

9.

The Sixth Circuit ruled that, "...it is necessary to show not only that the disfavored creditors will be as well off with the reorganization as with liquidation...but also that the supposedly critical vendors would have ceased delivered if old debts were left unpaid while the litigation continued." Id. at 873.

10.

In order to grant the relief requested by the debtors, the Court must find that: (1) each vendor will cease doing business with the debtors if not paid its prepetition claim; (2) discrimination among unsecured creditors is the only way to facilitate reorganization; and (3) the disfavored creditors will be at least as well off as they would be if the critical vendor order is not entered. In short, "preferential payments to a class of creditors are proper only if the record shows that the prospect of benefit to the other creditors." Id. at 874.

11.

The debtors have not offered to present evidence that would enable the Court to make the necessary findings of fact.

12.

The debtors insisted that the hearing on their motion be set no later than April 9, 2004, prior to the appointment of a committee.

WHEREFORE, the United States Trustee respectfully requests that the Motion be denied or held in abeyance pending the appointment of a committee.

FELICIA S. TURNER  
United States Trustee, Region 21

s/ Jeneane Treace  
R. JENEANE TREACE  
Trial Attorney  
Georgia Bar No. 716620

United States Department of Justice  
Office of the United States Trustee  
362 Richard B. Russell Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303  
(404)-331-4437

#### CERTIFICATE OF SERVICE

I certify that on April 8, 2004, a copy of this objection was served on the following by facsimile and email:

James A. Pardo, Jr.  
Fax: (404) 572-5149  
[Jpardo@KSLAW.com](mailto:Jpardo@KSLAW.com)

Jonathan W. Jordan  
Fax: (404) 572-5100  
[jjordan@kslaw.com](mailto:jjordan@kslaw.com)

Michael S. Stamer  
Fax:(212) 407-3225  
[mstamer@akingump.com](mailto:mstamer@akingump.com)

Douglas L. Furth  
Fax: (212) 907-0777  
[dfurth@golenbock.com](mailto:dfurth@golenbock.com)

Harris B. Winsberg  
Fax: (404) 962-6719  
[harris.winsberg@troutmansanders.com](mailto:harris.winsberg@troutmansanders.com)

s/ Jeneane Treace  
R. Jeneane Treace

