

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

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>DAN RIVER INC., <i>et al.</i></b>	)	<b>Case Nos. 04-10990 through 04-10993</b>
	)	<b>Jointly Administered</b>
	)	
<b>Debtors.</b>	)	<b>Judge Drake</b>
<hr/>	)	

**DEBTORS' MOTION FOR AUTHORITY  
TO IMPLEMENT A KEY EMPLOYEE RETENTION PLAN**

Dan River Inc. and its debtor affiliates (collectively, the "Debtors") file this motion, respectfully showing the Court as follows:

**Jurisdiction**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

**Background**

2. On March 31, 2004 (the "Petition Date"), the Debtors filed voluntary petitions for relief under the Bankruptcy Code. The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The United States Trustee appointed an official committee of unsecured creditors on April 12, 2004.

### **Relief Requested**

3. By this Motion, the Debtors seek authority, under Sections 105(a), 363(b), and 503(b)(1) of the Bankruptcy Code, to implement a management retention and severance plan for key employees (the “Key Employee Retention Plan” or “Plan”), because the Debtors believe that the Key Employee Retention Plan is crucial to the Debtors’ ability to retain and provide necessary incentives to those employees who provide essential management and operational services that will be vital to the Debtors’ successful reorganization.<sup>1</sup>

4. Increased responsibilities placed on employees and the other burdens and uncertainties occasioned by the filing and administration of the Debtors’ Chapter 11 cases have led and will continue to lead some of the Debtors’ key employees to consider seeking alternative employment despite the Debtors’ need for their continued services. It is not uncommon for employees of a debtor whose plans for reorganization are uncertain to seek employment elsewhere. Indeed, the most valuable employees are likely to have the best opportunity to find employment with other companies.

5. Since the Petition Date, several key employees of the Debtors have resigned, including a senior vice president of sales and marketing, the vice president of human resources, a director of information systems, and a director of sales. These departures have impaired the operations of the Debtors’ business and have caused the Debtors to incur significant expenses in attempting to replace the departed individuals.

---

<sup>1</sup> In its Order Authorizing Payment of Pre-Petition Wages, Payroll Taxes, Certain Employee Benefits and Related Expenses dated April 1, 2004, this Court authorized the Debtors to pay severance benefits to certain employees in accordance with the Debtors’ pre-petition severance program, subject to compliance with the terms of the Debtors’ post-petition financing. That order, however, expressly excluded severance benefits payable to executives of the Debtors. The proposed Key Employee Retention Plan would make severance benefits, in addition to retention bonuses, available to executives of the Debtors, thus helping to prevent a drain of executive talent while the Debtors reorganize their finances.

6. To address these issues, the Debtors propose to implement the Key Employee Retention Plan. The Key Employee Retention Plan was developed by the Debtors based in part on their review of retention plans adopted in recent Chapter 11 cases and advice from an independent and recognized consultant in this area. The Key Employee Retention Plan is the product of substantial consideration by the Debtors' management, board of directors, and primary constituents, including their lenders and the Official Committee of Unsecured Creditors.

7. The Key Employee Retention Plan provides for a variety of incentives and benefits to certain of the Debtors' critical employees, including senior executives, vice-presidents, directors, and other key managers (the "Covered Employees").<sup>2</sup>

8. Under the Key Employee Retention Plan, the Covered Employees are divided into five (5) categories based upon each Covered Employee's position with the Debtors, and, in management's business judgment, the relative importance and indispensability of that employee's contribution to the Debtors' business operations.

9. Employee Tier 1 consists of the Debtors' Chairman and Chief Executive Officer. Employee Tier 2 consists of four (4) senior executives. Employee Tier 3 consists of ten (10) key executives. Employee Tier 4 consists of fifteen (15) key members of middle management. Employee Tier 5 consists of seventeen (17) key members of middle management and production staff. Participation in the Key Employee Retention Plan is voluntary for the Covered Employees, some of whom may be parties to pre-petition employment contracts with one or more of the Debtors. By "opting in" to the Key Employee Retention Plan, the Covered Employees will be

---

<sup>2</sup> The Debtors reserve the right to add certain new hires to the Key Employee Retention Plan provided that the aggregate costs of the Plan do not exceed the amounts set forth herein.

deemed to agree that the terms and conditions of the Key Employee Retention Plan supersede any contractual obligations related to compensation or severance in their employment contracts.<sup>3</sup>

10. Although the Key Employee Retention Plan covers five tiers of employees, including senior management, the Debtors are continuing to discuss the parameters of the Key Employee Retention Plan as to Tier 1 and Tier 2 employees. To facilitate the success of those discussions, the Debtors are not seeking in this Motion approval of the Key Employee Retention Plan as to Tier 1 and Tier 2 employees. The Debtors expect to amend this Motion or to file a companion motion shortly seeking approval of the Key Employee Retention Program for Tier 1 and Tier 2 employees.

11. The Key Employee Retention Plan, as it relates to Tier 3, 4, and 5 employees, is described in detail in Exhibit A attached hereto; however, its basic terms are as follows:

- Each Covered Employee employed by the Debtors on the dates mentioned below will receive a stay bonus (“Stay Bonus”) equal to a percentage of his or her base salary. Each Tier 3 employee is eligible for a Stay Bonus equal to 60% of his or her base salary; each Tier 4 employee is eligible for a Stay Bonus equal to 40% of his or her base salary; and each Tier 5 employee is eligible for a Stay Bonus equal to 20% of his or her base salary. Stay Bonuses are payable in three installments: one-fourth payable 120 days after the Petition Date; one-half payable upon the earlier of the closing of a sale of substantially all of the Debtors’ assets or the effective date of a plan of reorganization or liquidation; and one-fourth payable 90 days after the second installment. The cost of Stay Bonuses for Tiers 3, 4, and 5 will not exceed \$2,500,000 in the aggregate.
- In addition, a discretionary pool of \$500,000 will be established to fund stay bonuses for employees of the Debtors other than Covered Employees who contribute extraordinary efforts toward the restructuring of the Debtors’ financial affairs. Payment of these discretionary stay bonuses will require the consent of the Debtors’ secured lenders and the Official Committee of Unsecured Creditors.

---

<sup>3</sup> The Debtors reserve all their rights to reject any employment contract pursuant to Section 365 of the Bankruptcy Code.

- Covered Employees in Tiers 3, 4, and 5 will receive severance benefits (“Severance Payments”) which will be payable in a lump sum at the time of termination and will not be subject to mitigation. The aggregate amount of Severance Payments for Tiers 3, 4, and 5 will not exceed \$5,500,000.
- Severance Payments for Covered Employees in Tiers 3, 4, and 5 will be calculated as follows: (i) for the twelve Covered Employees with employment contracts, according to the terms of their contracts; (ii) for three Covered Employees without employment contracts, in the amount of one year’s base salary plus incentive opportunity (calculated in the same fashion as for employees with contracts); and (iii) for all other Covered Employees, according to the formula used in the Debtors’ general severance policy (based on years of service, with a maximum of 28 weeks’ base pay and 4 weeks’ accrued vacation).
- Severance will not be payable to Covered Employees in the event of an employee’s (i) voluntary resignation; (ii) discharge for cause; (iii) receipt of an employment offer from the purchaser of substantially all of the Debtors’ assets, which employment offer is on substantially the same terms and conditions as the employee’s current employment with the Debtors; (iv) failure to work through the date that employment is scheduled to be terminated; or (v) failure to perform all required duties until the date that employment is scheduled to be terminated. Each of a material reduction in salary or annual incentive opportunity, material change to or removal from participation in any compensation or benefit plan, and termination due to sale of substantially all of the assets of the Debtors in a manner that results in the employee’s not receiving payment of one or more installments of a Stay Bonus will constitute an involuntary severance by the Debtors entitling a Covered Employee to a Severance Payment.
- Severance Payments to any Covered Employee will not be reduced by the amount of any Stay Bonus paid to such Covered Employee.
- Severance Payments will be conditioned on a Covered Employee’s execution of a general release and separation agreement and any other document or agreement which the Debtors in their discretion may require as a condition of payment under the Key Employee Retention Plan, including a non-solicitation agreement with respect to employees, trade secrets, and other matters, the term of which shall extend 18 months.
- The right of any Covered Employee to Severance Payments will terminate on the earliest of (i) six months after the effective date of any plan of reorganization or liquidation, (ii) six months after the sale, merger, or disposition of substantially all of the Debtors’ assets, or (iii) six months

after a determination by the Debtors' board of directors that the Severance Payments are no longer in effect.

- The approval of the Key Employee Retention Plan by the Court will be without prejudice to the Debtors' ability to propose an incentive bonus plan for members of management and other employees, either by separate motion or in a plan of reorganization, and retention and severance programs for Tier 1 and Tier 2 employees, either by amendment to this Motion or by separate motion.

### **Basis for Relief Requested**

12. Section 363(b)(1) of the Bankruptcy Code provides that a trustee or debtor in possession may, after notice and a hearing, use property of the estate outside of the ordinary course of business. In addition, under Section 503(b)(1) of the Bankruptcy Code, a trustee or debtor in possession may incur, and the Court, after notice and hearing, shall allow as administrative expenses, among other things, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." To supplement these powers, Section 105(a) of the Bankruptcy Code further authorizes "[t]he court [to] issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

13. The use, sale or lease of property of the estate, other than in the ordinary course of business, is authorized when there is a "sound business purpose" that justifies the requested action. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (explaining that the Third Circuit has adopted the "sound business purpose" test to evaluate motions brought pursuant to Section 363(b)). In essence, this inquiry amounts to a "business judgment test." *In re Montgomery Ward Holding Corp.*, 242 B.R. 147 (D. Del. 1999) (citations omitted).

14. In the context of Chapter 11 cases, the establishment of an employee benefits programs similar to the Key Employee Retention Plan here, pursuant to Section 363(b)(1) of the Bankruptcy Code, where the continued loyalty of employees is an important ingredient of a successful reorganization, has been approved by numerous courts, both without and within this jurisdiction. *See, e.g., In re Centennial HealthCare Corp.*, No. 02-74974 (Bankr. N.D. Ga. Sept. 12, 2003) (Massey, J.); *In re The New Power Co.*, No. 02-10835 (Bankr. N.D. Ga. Aug. 9, 2002) (Drake, J.); *In re Wolf Camera, Inc.*, No. 01-83470 (Bankr. N.D. Ga. Aug. 30, 2001) (Mullins, J.); *In re Vista Eyecare, Inc.*, No. 00-65214 (Bankr. N.D. Ga. April 17, 2001) (Bihary, J.); *see also, e.g., In re Galey & Lord, Inc.*, Case No. 02-40445 (Bankr. S.D.N.Y. June 5, 2002 and July 23, 2002); *In re Burlington Industries,, Inc.*, Case No. 01-11282 (Bankr. D. Del. Jan. 17, 2002 and Feb. 27, 2002); *Montgomery Ward*, 242 B.R. 147.

15. The *Montgomery Ward* decision is instructive. There, the Chapter 11 debtors sought approval of employee incentive programs, including a severance plan, retention bonus plan, and retirement plan, that were intended to retain key employees during the pendency of the reorganization. The “Retention Incentive Plan” provided a payment to eligible employees who remained with the debtors through a certain date. The “Severance Program” provided that certain employees who were terminated for reasons other than death, disability, or cause, were entitled to receive severance payments ranging from one week of pay for each year of service to 78 weeks of pay. Under the “Retirement Plan Amendment,” employees who were not otherwise included in the incentive programs, and experienced a job loss as a result of the shutdown of a location, were entitled to the payment of an additional pension benefit. 242 B.R. at 150-51. The potential amount that would be owed under the incentive programs approximated \$74.6 to \$77.6 million. *Id.* at 151. The *Montgomery Ward* debtors presented evidence that because of the

bankruptcy, employee morale was low, and without these programs the debtors could experience significant employee defections. *Id.* at 150-51.

16. The creditors' committee in *Montgomery Ward* objected to the programs on the grounds that the debtors had failed to establish that the debtors had a reasonable prospect of reorganizing. The district court rejected the creditors' committee's argument, holding that all that was required of the debtors was to show "that a sound business purpose justifies such actions." *Id.* at 153. The debtors met their burden by presenting ample evidence that the incentive programs stabilized employee turnover, boosted employee morale, and retained key employees essential to the debtors' reorganization efforts. *Id.* at 155.

17. The recent order entered in the bankruptcy case of *In re Centennial Healthcare Corporation*, No. 02-74974 (Bankr. N.D. Ga. Sep. 12, 2003) is also instructive. In that case, the proposed retention plan provided a "Stay Bonus," an "Incentive Bonus," and "Severance Payments" for certain key employees. The Stay Bonus ranged from 20 to 30 percent of the employees' base salary and was to be paid five days after the earlier of (1) a sale of substantially all of the Debtors' assets or (2) the effective date of any plan of reorganization or liquidation. The incentive bonus ranged from 15 to 30 percent of the employee's base salary and was contingent upon the achievement of at least 100% of 2003 budgeted EBITDAR. Additional amounts would be paid if the debtors exceeded that goal. Finally, the plan provided for severance payments for periods ranging from six to nine months. This plan was approved in full over the objection of the creditors' committee. *Id.*

18. Just as in the cases of *Montgomery Ward* and *Centennial Healthcare*, the Key Employee Retention Plan in this case serves a business purpose that is not only sound, but also vital. If the Key Employee Retention Plan is not implemented, the Debtors' ability to continue to



operate their businesses will be jeopardized. Without the services and dedication of their employees—especially their key employees who are the most knowledgeable and skilled—a rapid deterioration of the Debtors’ going-concern value may occur. In contrast, granting the relief requested will afford the Debtors the ability to effect a reduction in corporate overhead expense and to facilitate the reorganization of the Debtors’ businesses.

19. The Debtors have determined that the costs associated with the adoption of the Key Employee Retention Plan are more than justified by the benefits that are expected to be realized by boosting morale, discouraging employees from resigning while the Debtors are still in need of their services, and avoiding the substantial cost of accelerated employee turnover.

20. Because the Key Employee Retention Plan is needed to retain employees who are key to the Debtors’ continued operations and are necessary for the preservation of the Debtors’ estates, the payments thereunder are “actual, necessary costs and expenses of preserving the [Debtors’] estate[s],” and should be accorded administrative expense priority under Section 503(b)(1)(a) of the Bankruptcy Code.

21. In addition, under Section 105(a) of the Bankruptcy Code, the Court has expansive equitable powers to fashion any order or decree that is in the interest of preserving or protecting the value of the Debtors’ assets. *See, e.g., In re NWFEX, Inc.*, 864 F.2d 588, 590 (5th Cir. 1988). There is ample support for invoking Section 105(a) to authorize payment to employees who remain with a Chapter 11 debtor on account of their pre-petition services, when such payment is important to the Debtors’ continued operation or necessary to facilitate its rehabilitation. *See In re Gulf Air, Inc.*, 112 B.R. 152 (Bankr. W.D. La. 1989) (court authorized payment of all pre-petition amounts due the debtor’s employees because “retention of skills, organization, and reputation for performance must be considered valuable assets contributing to

going concern value and aiding rehabilitation where that is possible.”); *In re Chateaugay Corp.*, 116 B.R. 887, 898 (Bankr. E.D.N.Y. 1990); *see also In re Columbus Gas Sys.*, 136 B.R. 930, 939 (Bankr. D. Del. 1992) (recognizing that “[i]f payment of a pre-petition claim ‘is essential to the continued operation of [the debtor], payment may be authorized”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (a bankruptcy court’s use of its equitable powers to “authorize the payment of pre-petition debt when such payment is needed, to facilitate the rehabilitation of [a debtor] is not a novel concept.”); *In re UNR Indus., Inc.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992).

22. As explained above, without approval of the Key Employee Retention Plan, the Debtors’ key employees, faced with uncertainty and lack of job security, will have little incentive to remain with the Debtors at this critical juncture. This Court has the authority to enter an order pursuant to Section 105(a) approving the Key Employee Retention Plan.

23. The relief requested herein is essential, appropriate, and in the best interests of the Debtors’ estates and all parties in interest. Given that the Key Employee Retention Plan is an appropriate exercise of the Debtors’ business judgment under 11 U.S.C. § 363(b), or that the expenses to be incurred qualify as actual, necessary expenses of preserving the estates under 11 U.S.C. § 503(a)(1), this Court may issue an order under 11 U.S.C. § 105(a) to authorize the Key Employee Retention Plan.

### **Notice**

24. Notice of this Motion has been provided to the parties listed on the Master Service List. In light of the nature of the relief requested, the Debtors submit that no further notice is necessary.

**Conclusion**

WHEREFORE, the Debtors respectfully request entry of an order granting the relief requested herein, and granting the Debtors such other and further relief as may be just.

This 7<sup>th</sup> day of June, 2004.

Respectfully submitted,

KING & SPALDING LLP

/s/ James A. Pardo, Jr.  
James A. Pardo, Jr.  
Georgia Bar No. 561206  
Sarah Robinson Borders  
Georgia Bar No. 610649  
191 Peachtree Street  
Atlanta, Georgia 30303-1763  
(404) 572-4600  
Fax: (404) 572-5149

ATTORNEYS FOR THE DEBTORS

**EXHIBIT “A”**

**KEY EMPLOYEE RETENTION PLAN**

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

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>DAN RIVER INC., <i>et al.</i></b>	)	<b>Case Nos. 04-10990 through 04-10993</b>
	)	<b>Jointly Administered</b>
	)	
<b>Debtors.</b>	)	<b>Judge Drake</b>
<hr/>	)	

**ORDER AUTHORIZING DEBTORS TO IMPLEMENT A  
KEY EMPLOYEE RETENTION PLAN**

This matter is before the Court on the motion of Dan River Inc. and its debtor affiliates (collectively, the “Debtors”) for authority to implement a key employee retention plan (the “Motion”). Capitalized terms used in this Order without definition shall have the meanings ascribed to them in the Motion.

The Court has considered the Motion and the matters reflected in the record of the hearing held on the Motion. It appears that the Court has jurisdiction over this proceeding; that this is a core proceeding; that notice of the Motion has been given to all parties on the Master Service List; that no further notice is necessary; that the relief sought in the motion is in the best interests of the Debtors, their estates, and their creditors; and that good and sufficient cause exists for such relief.

Accordingly, it is hereby ORDERED as follows:

1. The Motion (document no. \_\_\_\_ ) is GRANTED.
2. The Debtors are authorized to adopt and implement the Key Employee Retention Plan, as defined in the Motion.
3. The Debtors are hereby authorized to make payments relating to severance and retention benefits in accordance with the terms and conditions of the Key Employee Retention

Plan.

4. The relief granted in this Order shall not constitute or be deemed to be an express or implied assumption by the Debtors or their estates of any pre-petition agreement, policy, plan, program, practice, procedure or liability, pursuant to Section 365 of the Bankruptcy Code or otherwise.

5. The relief granted in this Order is without prejudice to the Debtors' ability to propose an incentive bonus plan for members of management and other employees, either by separate motion or in a plan of reorganization, and retention and severance programs for Tier 1 and Tier 2 employees.

6. The Debtors are hereby authorized and empowered to take such actions as may be necessary or appropriate to implement the Key Employee Retention Plan or terms of this Order.

7. The Court retains jurisdiction over any and all disputes, controversies, claims or other matters arising under or otherwise relating to this Order.

**SO ORDERED.**

At Newnan, Georgia this \_\_\_\_ day of June, 2004.

---

W. HOMER DRAKE, JR.  
UNITED STATES BANKRUPTCY JUDGE

Prepared and Presented by:

KING & SPALDING LLP

/s/ James A. Pardo, Jr.

James A. Pardo, Jr.

Georgia Bar No. 561206

Sarah Robinson Borders

Georgia Bar No. 610649

191 Peachtree Street

Atlanta, Georgia 30303-1763

(404) 572-4600

Fax: (404) 572-5149

Attorneys for the Debtors