

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
Met-Coil Systems Corporation,)	
)	Case No. 03-12676 ()
)	
Debtor.)	

**DEBTOR'S APPLICATION FOR ENTRY OF ORDER AUTHORIZING
DEBTOR TO EMPLOY AND COMPENSATE PROFESSIONALS FOR
SERVICES RENDERED IN THE ORDINARY COURSE OF BUSINESS**

Met-Coil Systems Corporation, debtor and debtor in possession (the "**Debtor**" or "**Met-Coil**") in the above-captioned Chapter 11 case (the "**Case**"), hereby presents this application (the "**Application**") for entry of an Order authorizing the Debtor to employ and compensate professionals for services rendered in the ordinary course of business. In support of the Application, the Debtor refers to and relies upon the Affidavit of Charles F. Kuoni III in Support of First Day Motions of Met-Coil Systems Corporation (the "**Kuoni Affidavit**"), filed contemporaneously herewith and incorporated herein by reference, and respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Application is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested herein are §§ 105(a), 327, 330 and 331 of title 11 of the United States Code (the "**Bankruptcy Code**").

INTRODUCTION

4. On August 26, 2003 (the "**Petition Date**"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. The Debtor is operating its business as a debtor in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee of unsecured creditors has been appointed.

ORDINARY COURSE PROFESSIONALS

6. Prior to the Petition Date, the Debtor retained the services of certain professionals in the ordinary course of operating its business. A schedule of the professionals engaged to provide services for the Debtor as of the Petition Date (the "**Ordinary Course Professionals**"), along with a description of the type of services provided, is attached hereto as **Exhibit A**. Ordinary Course Professionals are law firms and other professionals responsible for providing services to the Debtor in a variety of discrete matters concerning environmental remediation, litigation and compliance, insurance matters, products liability issues and warranty claims. The Ordinary Course Professionals may represent the Debtor in litigation, or provide other consulting services to the Debtor, as more specifically described on Exhibit A attached hereto.

RELIEF REQUESTED

7. By this Application, the Debtor seeks authority to (a) continue the employment of the Ordinary Course Professionals already rendering services for the Debtor as of the Petition Date, (b) employ other law firms, consultants and entities as Ordinary Course Professionals to render services to the Debtor in the ordinary course of its business on an as-needed basis on or after the Petition Date, without the necessity of filing additional formal retention applications for approval by this Court, and (c) exempt the Ordinary Course

Professionals from the necessity of obtaining Court approval of their compensation if they meet certain limitations, as detailed herein.

8. With respect to those Ordinary Course Professionals already rendering services to the Debtor as of the Petition Date, the Debtor requests authority to employ such Ordinary Course Professionals to provide services on terms substantially similar to those in effect prior to the Petition Date, without the need to file individual retention applications for such Ordinary Course Professionals. With respect to those Ordinary Course Professionals to be employed during the course of the Debtor's Case, the Debtor requests authority to employ such Ordinary Course Professionals without the need to file any additional retention applications for such Ordinary Course Professionals.

9. The Debtor seeks to employ Ordinary Course Professionals pursuant to the following terms, conditions and procedures:

- (a) The Debtor may, in the reasonable and ordinary course of its business and affairs as debtor in possession, employ professional persons for the performance of tasks related to the Debtor's ordinary operations and course of business. Professionals used by the Debtor to handle matters in connection with the bankruptcy case, other than ordinary course or ministerial matters, will be retained by the Debtor pursuant to individual retention applications, as allowed by the Court;
- (b) The acceptance of employment by Ordinary Course Professionals shall constitute a representation by the Debtor and the involved professionals that:
 - (i) the arrangements for compensation reached between the Debtor and such professionals are based reasonably upon the nature, extent and value of such services, the time spent on such services, and the cost of comparable services other than in a case under chapter 11 of the Bankruptcy Code, as well as for reimbursement of actual and necessary expenses, not exceeding the value of such expenses; and
 - (ii) all transactions between the Debtor and such professionals shall be subject to § 329 of the Bankruptcy Code as well as to all other provisions of the Bankruptcy Code regulating the fairness

and reasonable worth of services rendered by professionals seeking and receiving compensation; and

- (c) The Debtor further proposes that it be permitted to pay to each Ordinary Course Professional, on a monthly basis, without formal application to the Court, one hundred percent (100%) of the interim fees earned and expenses incurred to each of the Ordinary Course Professionals upon their submission to the Debtor of an appropriate invoice setting forth in reasonable detail the nature of the services rendered, and provided that the fees and expenses of each Ordinary Course Professional do not exceed \$50,000.00 in the aggregate in any one calendar month during the post-petition period (the "**Maximum Allowance Figure**").
- (d) In the event that any Ordinary Course Professional exceeds the Maximum Allowance Figure, such Ordinary Course Professional will not have any material involvement in the administration of the Debtor's estate without the Debtor first receiving an order of the Court authorizing the retention and employment of such professional pursuant to § 327 of the Bankruptcy Code. Subsection (c) and (d) shall not apply to the remediation consultants listed on **Exhibit A** hereto.

10. The Debtor proposes to file with the Court and serve on the United States Trustee, counsel to any official committee(s) of unsecured creditors (when and if appointed), counsel to the postpetition lender and all parties who have filed requests for notices in the Case (the "**Notice Parties**"), a notice listing any additional Ordinary Course Professionals retained by the Debtor.

11. If the Court grants this Motion, within thirty (30) days after entry of an order approving the Motion, each Ordinary Course Professional shall file with the Court and serve on each of the Notice Parties an affidavit, substantially in the form of that annexed hereto as **Exhibit B**, stating, among other things, that the affiant and each member of affiant's firm does not hold or represent any interest adverse to the Debtor's estate (the "**Affidavit**"). Each Ordinary Course Professional retained after the Court's approval of this Application shall file with the Court and serve on the Notice Parties an Affidavit prior to being eligible to receive compensation from the Debtor.

12. Upon the filing of an Affidavit by an Ordinary Course Professional, the Notice Parties shall have ten (10) business days to object to such retention (the "**Objection Deadline**"). If no objection is filed with the Court prior to the Objection Deadline, such Ordinary Course Professional's retention shall be approved. If an objection is filed prior to the Objection Deadline, the retention shall be set for hearing.

13. The Debtor also seeks authority to pay a retainer to certain of the Ordinary Course Professionals. The Debtor intends to pay a retainer to Clayton Group Services, Inc. in the amount of \$_____, Baker & McKenzie in the amount of \$_____, and Deutsch, Levy & Engel, Chartered in the amount of \$70,000.00. To the extent that the Debtor determines that any additional retainers need be paid to any of the Ordinary Course Professionals, the Debtor shall provide the United States Trustee and any committee with notice and an opportunity to object to such payment.

BASIS FOR RELIEF REQUESTED

14. The Debtor needs to retain the Ordinary Course Professionals to continue to provide legal, consulting and other services to the Debtor, which are essential to the Debtor's operations. It may later be necessary for the Debtor to retain additional consultants, attorneys or other professionals to provide discrete services to the Debtor.

15. It would be costly, time-consuming and administratively cumbersome for the Debtor and this Court to require each Ordinary Course Professional to apply separately for approval of its employment and compensation. Moreover, the uninterrupted service of the Ordinary Course Professionals is essential for the Debtor's continuing operations, remediation of its property and ability to reorganize.

16. The Debtor submits that its ability to employ and compensate the Ordinary Course Professionals in the manner proposed herein is in the best interests of its estate, its creditors and other parties-in-interest. Moreover, without the expertise and background knowledge of certain of the Ordinary Course Professionals with respect to the particular areas and matters for which they have been responsible prior to the Petition Date, the estate undoubtedly will incur additional and unnecessary expenses in retaining other professionals without such background and knowledge. It is in the best interests of the estate and its creditors that the Debtor avoid any undue disruption in the professional services they require in the day-to-day operation of its business and, especially, the remediation of its property and its reorganization.

17. Because of the limited nature of the matters for which the Ordinary Course Professionals are employed, the Debtor submits that no creditor or party-in-interest would be prejudiced by the entry of an order authorizing the Debtor to employ and compensate its Ordinary Course Professionals.

18. To the best of the Debtor's knowledge, no Ordinary Course Professional holds or represents any interest adverse to either the Debtor or its estate with respect to the matters upon which each such Ordinary Course Professional is to be employed.

19. The foregoing proposed procedures for retention and payment will not apply to those attorneys and professionals retained by or to be retained by the Debtor pursuant to separate orders of this Court.

LEGAL BASIS FOR RELIEF REQUESTED

20. To determine whether an entity to be employed in a bankruptcy case is a "professional" within the meaning of § 327(a) of the Bankruptcy Code, courts typically have

applied either a "quantitative" or a "qualitative" test. See In re First Merchants Acceptance Corp., No. 97-1500, 1997 WL 873551 at *2 (D. Del. December 15, 1997). Under the quantitative test, courts have required that an entity providing professional services must play a "central role" in the administration of the estate before it is considered a professional under § 327 of the Bankruptcy Code.¹ By contrast, under the qualitative test, an entity is considered a professional if it is permitted to exercise discretion and autonomy in addressing the administration of the estate.²

21. In First Merchants, the Court clarified and harmonized the quantitative and qualitative line of cases by developing a nonexclusive list of factors to determine whether an entity to be employed by a debtor is a professional within the meaning of § 327(a) of the Bankruptcy Code. See First Merchants, 1997 WL 873551 at *3. The First Merchants factors include the following:

- (a) whether the entity controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization;
- (b) whether the entity is involved in negotiating the terms of a plan of reorganization;
- (c) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations;

¹ See, e.g., Elstead v. Nolden, 168 B.R. 226, 230 (N.D. Cal. 1994) (only the retention of professionals whose duties are central to the administration of the estate require prior court approval under § 327); In re Madison Management Group Inc., 137 B.R. 275, 283 (Bankr. N.D. Ill. 1992) (same); In re Sieling Assocs. L.P., 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (same); In re United Color Press, Inc., 129 B.R. 143, 145 (Bankr. S.D. Ohio 1991) (same); In re Johns Manville Corp., 60 B.R. 612, 620 (Bankr. S.D.N.Y. 1986) (same); In re Pacific Forest Indus., Inc., 95 B.R. 740, 743 (Bankr. C.D. Cal. 1989) (same); In re D'Lites of Am., Inc., 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989) (section 327 approval is not necessary for "one who provides services to the debtor that are necessary whether the petition was filed or not").

² See, e.g., In re Leslie Oil and Gas Co., Inc., 98 B.R. 774, 775-76 (Bankr. S.D. Ohio 1989); In re Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989); In re Frederick Petroleum Corp., 75 B.R. 774, 780 (Bankr. S.D. Ohio 1987).

- (d) whether the entity is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate;
- (e) the extent of the entity's involvement in the administration of the debtor's estate; and
- (f) whether the entity's services involve some degree of special knowledge or skill, such that the entity can be considered a professional within the ordinary meaning of the term.

Id. at *3.

22. Under the First Merchants analysis, these factors must be considered in their totality – none of the factors alone is dispositive. Id. Nevertheless, the First Merchants court recognized that professionals assisting in the day-to-day operation of a debtor's business, rather than in the administration of the debtor's bankruptcy estate, are not professionals that must be retained under § 327 of the Bankruptcy Code. Id. at *4.

23. Considering all of the First Merchants factors, the Debtor believes that the Ordinary Course Professionals are not "professionals" within the meaning of § 327(a) of the Bankruptcy Code. The Ordinary Course Professionals generally will not be involved in the administration of the Case, but instead will provide (a) services in connection with the Debtor's ongoing business operations and the resolution of any related operational difficulties, (b) litigation support with respect to any pending or future litigation that is either not subject to the automatic stay provision of the Bankruptcy Code or for which the automatic stay is eventually lifted and (c) continued consultation with respect to litigation, insurance and environmental matters. Any involvement by the Ordinary Course Professionals in the administration of the Debtor's estate will be minimal. As a result, the Debtor does not believe that the retention and payment of the Ordinary Course Professionals must be approved by the Court. Out of an abundance of caution, the Debtor nevertheless

seeks the relief requested herein to avoid controversy regarding the Debtor's employment and payment of the Ordinary Course Professionals during the pendency of the Case. The Debtor will seek Court authority pursuant to § 327(a) of the Bankruptcy Code to employ all professionals materially involved in the actual administration of the Case.

24. The relief requested in this Application has been granted in other chapter 11 cases in this District and elsewhere. See, e.g., In re Loewen Group Int'l, Inc., No. 99-1244 (PJW) (Bankr. D. Del. 1999) (order authorizing the retention, employment and payment of certain professionals in the ordinary course of the debtors' businesses); In re Montgomery Ward Holding Corp., No. 97-1409 (PJW) (Bankr. D. Del. 1997) (same).

NOTICE AND PRIOR APPLICATION

25. Notice of this Motion has been given to (a) the Office of the United States Trustee for the District of Delaware; (b) counsel for the Debtor's prepetition and postpetition secured lenders; (c) the Debtor's twenty (20) largest unsecured creditors; (d) the United States Environmental Protection Agency; (e) the Attorney General of the State of Illinois; (f) the DuPage County State's Attorney; and (g) counsel to the plaintiffs in the environmental litigation matters pending before the United States District Court for the Northern District of Illinois and the Circuit Court for the Eighteenth Judicial District, DuPage County (collectively, the "Core Group"). As this Motion is seeking "first day" relief, notice of this Motion and any order entered respecting this Motion will be served as required by Del. Bankr. LR 9013-2(d). The Debtor submits that under the circumstances no other or further notice need be given.

26. No previous motion for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests the entry of an order, substantially in the form annexed hereto, (i) granting this Application, (ii) authorizing the Debtor to employ and compensate professionals for services rendered in the ordinary course of business, and (iii) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: August 26, 2003
Wilmington, Delaware

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