IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MET-COIL SYSTEMS CORPORATION, a Delaware corporation,	Case No. 03-12676
the Debtor.	Jointly Administered Adversary Proceeding No. 03-_____

EMERGENCY MOTION OF DEBTOR AND DEBTOR IN POSSESSION FOR INTERIM AND FINAL ORDER AUTHORIZING DEBTOR TO (A) USE CASH COLLATERAL AND GRANT REPLACEMENT LIENS AND (B) OBTAIN POST-PETITION FINANCING PURSUANT TO SECTION 364(c) OF THE BANKRUPTCY CODE

Met-Coil Systems Corporation, the debtor and debtor in possession in the above-captioned chapter 11 case (the "Debtor"), hereby moves the Court on an emergency basis for an Order pursuant to sections 361, 363, and 364 of title 11 of the United States Code, 11 U.S.C. § 101, et seq. (the "Bankruptcy Code"), and Rules 2002, 4001(b), 4001(c), and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"):

A. Authorizing the Debtor to use the collateral of the Pre-Petition Lender (as defined below), including cash collateral (the "Pre-Petition Collateral"), in the ordinary course of business to operate the Debtor's business pending the Final Hearing (as defined below) and grant replacement liens in support thereof;

B. Authorizing the Debtor to obtain post-petition financing (the "Post-Petition Financing") in the form of loans and other advances pursuant to that certain Post-Petition Loan and Security Agreement, dated August ___, 2003 (the "DIP Loan Agreement")

between the Debtor and Mestek, Inc., or its designee ("Mestek" or, in its capacity thereunder, the "DIP Lender") and entering the proposed interim order approving the Motion (the "Interim Order") on an interim basis, pending a final hearing on this Motion, so as to avoid immediate and irreparable harm to the Debtor;

C. Authorizing the Debtor to enter into, on a permanent basis, the DIP Loan Agreement (the DIP Loan Agreement, the Interim Order and all agreements, documents, instruments and schedules delivered in connection therewith are hereafter referred to collectively as the "DIP Loan Documents");

D. Granting for the benefit of the DIP Lender with respect to all of the Debtor's obligations under the DIP Loan Agreement (the "DIP Facility Obligations"):

(i) a valid and perfected first priority senior security interest and lien pursuant to § 364(c)(2) of the Bankruptcy Code on unencumbered property of the Debtor's estate, of any kind or nature whatsoever, real or personal, now existing or hereafter acquired or created (the "DIP Senior Collateral") as provided in the DIP Loan Agreement;

(ii) a junior lien, pursuant to § 364(c)(3) of the Bankruptcy Code, on encumbered property of the Debtor's estate of any kind or nature whatsoever, real or personal, now existing or hereafter acquired or created except to the extent described in (iii) below (the "Junior Collateral"); and

(iii) a valid and perfected first priority senior security interest and lien on property of the Debtor's estate, of any kind or nature whatsoever, real or personal, now existing or hereafter acquired or created which is encumbered by a pre-petition lien in favor of the Pre-Petition Lender (the "Mestek Collateral").

The DIP Senior Collateral, the Mestek Collateral and the Junior Collateral shall be referred to herein as the "DIP Collateral." DIP Collateral includes all property of the estate other than Avoidance Actions (irrespective of

lien priority) not excluded from the definition of Collateral in the DIP Loan Agreement.

E.. To the extent the lien granted to the DIP Lender is insufficient to secure the Debtor's DIP Facility Obligations, granting to the DIP Lender an allowed administrative expense claim in this case pursuant to Bankruptcy Code sections 364(c)(1) and 507(b) having priority over any and all administrative expenses of the kind specified in or incurred pursuant to Bankruptcy Code sections 503(b) or 507(b) subject to the Carve-Outs (as defined in the DIP Loan Agreement);

F. Authorizing the Debtor, on a permanent basis, to use the Pre-Petition Lender's Collateral in the ordinary course of the Debtor's business during the Chapter 11 case and to grant replacement liens in support thereof;

G.. Scheduling a final hearing (the "Final Hearing") to consider entry of the Final Order granting the relief sought herein; and

H. Following the Final Hearing, for the entry of the Final Order granting the relief requested herein.

Pursuant to Bankruptcy Rules 4001(b), 4001(c) and (d), the Debtor requests that this Court hold an immediate emergency hearing on this Motion to consider entry of the Interim Order authorizing the Debtor to, inter alia: use cash collateral subject to the terms and conditions provided herein and borrow up to $750,000 under the DIP Credit Agreement (the "DIP Facility") as revolving loans, during the period between the entry of the Interim Order and the entry of the Final Order, to avoid immediate and irreparable harm to this estate, pending the Final Hearing.

In support of the relief requested herein, the Debtor submits this Motion and the Affidavit of Charles F. Kuoni, III (the "Kuoni Affidavit"); the pleadings, documents and records in this bankruptcy case; and other arguments, evidence and representations that may be provided at or before the hearing on this Motion.

More specifically, the Debtor states the following:

I

STATEMENT OF FACTS

In order to preserve the going concern value of the Debtor so that the Debtor can formulate and obtain approval of a reorganization plan, preserve the jobs of the Debtor's employees, and maximize the value of its estate for the benefit of its creditors, the Debtor has initiated this case and filed this Motion. If the Debtor does not have the ability to use cash collateral and a source of post-petition financing and funds available, the Debtor will lack the liquidity necessary for its operations and may be forced to shut down its business, which would irreparably harm the Debtor's estate and potentially foreclose prospects for a going concern reorganization of the Debtor or any meaningful value for creditors including the plaintiffs in the litigation described herein.

As set forth in further detail below, Mestek, the Debtor's parent, has agreed to fund the Debtor's operations post-petition. Mestek is also the Debtor's pre-petition lender (the "Pre-Petition Lender")with a lien on substantially all of the Debtor's assets. In its capacity as the Pre-Petition Lender, Mestek has consented to the Debtor's use of the Pre-Petition Collateral, including cash collateral, in the ordinary course of business subject to the granting of replacement liens and the other conditions agreed to between the Debtor and the Pre-Petition Lender.

The terms of the DIP Loan Agreement are fair and reasonable. The DIP Loan Agreement provides for sufficient funding of the Debtor to formulate and implement a plan of reorganization which the Debtor anticipates will maximize the recovery to the creditors of the estate. Because the Debtor must maintain its operations as a going concern in order to effect the reorganization and provide value for its creditors, the relief requested in the Motion is essential to maximizing the value of the Debtor's estate.

A. General Background.

On August ___, 2003 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for reorganization relief under chapter 11 of the Bankruptcy Code. No trustee has been appointed in this case. The Debtor has all the rights, powers, and duties of a debtor in possession pursuant to section 1107(a) of the Bankruptcy Code.

No creditors' committee has yet been appointed in this case.

This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

The statutory predicates for the relief sought herein are sections 105(a), 361, 363, 364, 503, and 507 of the Bankruptcy Code.

B. The Debtor.

The Debtor is a metal forming company with two separate operating divisions, The Lockformer Company ("Lockformer") and Iowa Precision, Inc. ("IPI"). Through its two divisions, the Debtor manufacturers advanced sheet-metal-forming equipment, fabricating equipment and computer controlled fabrication systems for HVAC sheet metal contractors, steel service centers and custom roll formers in the global market. The Debtor's products are generally designed and manufactured to meet unique customer specifications and are often incorporated into the customer's standard product line.

Lockformer operates out of a manufacturing facility in Lisle, Illinois and IPI operates out of a manufacturing facility in Cedar Rapids, Iowa. The Debtor employs approximately 250 people in its operations.

The primary customers for the Debtor's products are sheet metal and metal contractors, steel service centers, contract metal stampers, contract roll formers and

manufacturers of large and small appliances, commercial and residential lighting fixtures, automotive parts and accessories, office furniture and equipment, tubing and pipe products, metal construction products, doors, windows and screens, electrical enclosures, shelves and racks and HVAC equipment.

Lockformer has been operating for over 30 years. In 2000, Lockformer was acquired by Mestek. The Debtor is a 100% wholly-owned, indirect subsidiary of Mestek.

C. The Litigation.

Lockformer has been subject to significant litigation related to the alleged discharge of trichloroethylene onto or into the soil of the Lockformer site in Lisle, Illinois. To date, 11 suits have been filed against Lockformer by individual plaintiffs and governmental agencies. The suits allege, among other things, property damage and personal injury claims against the Debtor and, in some cases, Mestek.

On May 22, 2003, the Debtor announced that it had settled one of the pending lawsuits with 187 homeowners who had alleged property damage. Without admitting liability, Lockformer agreed to pay the class of plaintiffs $10,000,000 and to pay the costs of hooking up members of the class of plaintiffs to public water.

On July 11, 2003, the Debtor was found liable in connection with another of the pending lawsuits and damages of approximately $2,400,000 were awarded. The post-trial motions in that lawsuit have not yet been filed.

The other litigation is continuing and the Debtor is incurring substantial costs and disruption in its business as well as risk of liability. In 2002, the Debtor recorded expenses of $18,046,000 related to the litigation. In addition, there can be no assurance that future claims for

personal injury or property damage will not be asserted by other plaintiffs with respect to the Lockformer site and facility.

The Debtor is also involved in developing remediation plans with the Environmental Protection Agency and the Illinois Environmental Protection Agency. The Debtor currently carries a reserve of related to these remediation plans. In addition to the existing remediation plans, additional off-site remediation costs may exist which are not currently included in the Debtor's reserves.

D. The Debtor's Bank Debt.

The Debtor had the following indebtedness as of the Petition Date (the "Pre-Petition Debt"):

(i) A $5.5 million credit facility with Manufacturers Bank ("MB Financial") which is backed by a letter of credit from Mestek (the "MB Facility"). As of the Petition Date, the Debtor owed $_____ under the MB Facility. It is anticipated that the MB Facility will remain outstanding during this case. The MB Facility benefits from a letter of credit posted by Mestek. The obligations of the Debtor to Mestek to reimburse them for draws on the letter of credit are secured by a pre-petition lien on substantially all of the assets of the Debtor.

(ii) A $4.5 million secured term loan from Mestek under which $_____ was owed as of the Petition Date (the "Mestek Term Loan"). It is anticipated that the Mestek Term Loan will remain outstanding during this case with no further borrowings permitted.

(iii) A $2.5 million secured revolving facility from Mestek under which $_____ was owed as of the Petition Date (the "Mestek Revolver"). It is anticipated that the Mestek Revolver will remain outstanding during this case with no further borrowings permitted. The Mestek Revolver terminated as of the Petition Date.

(iv) An unsecured guaranty of Mestek's credit facility with Fleet National Bank.

The Mestek Term Loan and the Mestek Revolver are secured by a lien on substantially all of the Debtor's assets.

E. The Debtors' Financing Requirements.

The Debtor is faced with continuing litigation and costs that are disrupting operations and threatening the viability of the Debtor. The goal of this case is to provide a forum for resolution of the litigation and the continued operation of the Debtor. To achieve this goal, the Debtor requires post-petition financing.

Attached to the Kuoni Affidavit as Exhibit "_" is a 17 week cash flow projection prepared on a cash basis (the "Projections").[1] As set forth in the Projections, absent the use of cash collateral and availability of the DIP Facility, the projected revenues to be generated by the Debtor during the first weeks of this case are insufficient to finance its operations.

The Debtor has not been able to obtain sufficient credit on an unsecured basis. Thus, the Debtor believes that the funds to be made available to the Debtor through the use of cash collateral and under the DIP Loan Agreement represent the only available source of essential working capital. Absent such working capital, the Debtor will be forced to liquidate its business which will result in a significantly diminished return for the Debtor's creditors.

Absent authorization to use cash collateral and to enter into the DIP Loan Agreement, the Debtor will have insufficient cash available to conduct ordinary business operations and to maintain and preserve the value of the Debtor's estate. The Projections assume the infusion of additional working capital during this chapter 11 case primarily to fund operations in order to maintain the going concern value and maximize the value of the Debtor's estate. The Debtor believes that the disbursements identified in the Projections are reasonable

[1] Projections are considered to be reliable evidence on which a court may base its decision regarding the stability of a business and adequate protection. See In re Pursuit Athletic Footwear, Inc., 193 B.R. 713, 717 (Bankr. D. Del. 1996) ("The projection was carefully prepared . . . , used conservative sales figures, and accounted for the Debtors' financial history. Such a projection is entitled to some deference.").

and necessary business expenses that must be paid in order to continue its business and maintain its value as a going concern. The Debtor would suffer immediate, irreparable injury, including the possible cessation of operations, if it is not allowed to use cash collateral and obtain the DIP Facility.

F. The Debtor's Attempts To Obtain Post-Petition Financing.

The Debtor could not secure alternate sources of borrowing for several reasons. Although the Debtor contacted several lenders, no third party lender was willing to provide debtor in possession financing within the necessary time frame. First, while some lenders might be interested in providing financing, there was limited time for due diligence and insufficient time for complete documentation by a third party unfamiliar with the Debtor and its business. Second, the environmental issues at the Lockformer site exacerbated the difficulties faced by the Debtor in obtaining financing. Finally, MB Financial, the Debtor's existing lender, declined to make the loans at the present time.

After concluding that the Post-Petition Financing was the best source of financing available, the Debtor and Mestek engaged in negotiations over the terms of such financing, resulting in the DIP Loan Agreement. Based upon the Debtor's evaluation of alternative funding sources prior to the Petition Date, the Debtor believes that the terms of the DIP Loan Agreement, described in further detail below, are more favorable to the Debtor than any other financing arrangement it could realistically expect to obtain from any other financing source. Indeed, with no prior relationship with the Debtor or understanding of its business, the time it would take to negotiate and document a loan with a new lender make alternative financing prohibitive. It is highly unlikely that any new lender would fund the necessary financing as required during the first weeks of this case and any delay in such funding could cause irreparable harm to the Debtor's going concern value and reorganization goals. Moreover, as set forth in further detail below, Bankruptcy Code section 364 does not impose on the Debtor the onerous duty to seek credit from every available source.

G. Summary of Terms contained in the DIP Credit Agreement.

The Post-Petition Financing is the result of arm's length negotiations between the Debtor and the DIP Lender. The following summarizes the terms of the proposed DIP Loan Agreement. The following summary is qualified in all respects by the actual terms and conditions of the DIP Loan Agreement. In the event of a conflict between the summary set forth below and the DIP Loan Agreement, the DIP Loan Agreement shall control. The reader is advised to review the full text of the DIP Loan Agreement.

The key provisions of the DIP Loan Agreement are:

- Borrower: Met-coil Systems Corporation
- Lender: Mestek, Inc.
- Commitment: The DIP Lender has committed (the "Loan Commitment") to provided up to $8,000,000, consisting of revolving loans (the "DIP Revolving Loans").
- Conditions: All borrowings are subject to the following conditions: (i) entry of an interim order and entry of a final order satisfactory to DIP Lender approving the DIP Facility by August ___, 2003; and (ii) satisfaction (or waiver by the DIP Lender) of conditions set forth in the DIP Loan Agreement.
- Term: The maturity date is the earliest of (a) December 26, 2003, (b) the effective date of a confirmed plan of reorganization, and (c) the occurrence of an Event of Default (as defined in the DIP Loan Agreement).
- Representations/Covenants: The DIP Loan Documents will contain standard and customary representations and affirmative and negative covenants.
- Priority: The DIP Lender shall have an allowed administrative expense claim pursuant to Bankruptcy Code sections 364(c)(1) and 507(b) having priority over any and all administrative expenses of the kind specified in or incurred pursuant to Bankruptcy Code sections 503(b) or 507(b), with certain limited exceptions provided for in the DIP Loan Documents.

- Liens: A perfected first priority lien against and security interest in all unencumbered presently owned and hereafter acquired property, assets, and rights, of any kind or nature, of the Debtor and proceeds thereof (with certain exceptions and limitations in the DIP Loan Documents) pursuant to Bankruptcy Code section 364(c)(2) as well as a perfected first priority lien against and security interest in all such assets which are otherwise only to a pre-petition lien in favor of the Pre-Petition Lender. In addition, junior perfected lien in all encumbered assets of the Debtor pursuant to Bankruptcy Code Section 364 (c)(3).

- Carve-Out: The DIP Lender will subordinate its liens and administrative claims to pay the following carve-outs: (a) fees pursuant to 28 U.S.C. Section 1930; and (b) allowed fees and expenses of professionals employed by the Debtor and any Committee (including Committee members) and of any Chapter 7 Trustee in the amounts set forth in the DIP Loan Documents.

- Fees: As provided in the DIP Loan Documents.

- Interest: The Prime Rate (as defined in the DIP Loan Agreement) plus 6 percent per annum compounded annually on a 360-day year and payable monthly in arrears.

- Events of Default: The Events of Default are set forth in the DIP Loan Agreement.

- Relief From Stay: Upon either (a) an event of default or (b) termination of the DIP Facility, the automatic stay shall be lifted without further action on the part of DIP Lender provided that five business days prior notice is provided to the Borrower and any creditors' committee. During such period, the Debtor shall have the right to seek a hearing to prevent such lifting of the automatic stay on the sole basis that such Event of Default has not occurred.

- Remedies: As specified in the DIP Loan Agreement.

- Reporting Requirements. The DIP Loan Documents will require the Debtor to provide on a regular basis customary financial and other information.

- **Pursuant to Del. Bankr. LR 4001-2(2), in exchange for the DIP Lender paying certain post-petition predefault expenses the Debtor will agree to not charge the DIP Collateral, pursuant to Section 506(c) or otherwise without prior written consent of the DIP Lender (see Interim Order ¶¶ 9, 19 and 25).**

The Post-Petition Financing should provide the Debtor with adequate capital to operate its business in the ordinary course for a sufficient time so it can formulate and implement a chapter 11 plan of reorganization. The DIP Loan Agreement grants first priority liens on all unencumbered property of the estate (subject to certain exceptions and limitations set forth in the

DIP Loan Documents) and property of the estate subject only to a pre-petition lien in favor the Pre-Petition Lender. Mestek, the Debtor's Pre-Petition Lender, has consented to be primed on its pre-petition liens and thus there is no need for any adversarial priming under Bankruptcy Code section 364(d)(1) at this stage in the case.

II.

ARGUMENT

A. Emergency Consideration Of This Motion Is Appropriate.

Bankruptcy Rules 4001(c) and (d) govern the procedure for consideration of motions to use cash collateral and to obtain post-petition financing. Both of these subsections provide for an expedited consideration of the Motion.

> If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. P. 4001(c)(2) and (d)(3).

Courts have recognized that immediate interim relief may be crucial to the success of a corporate reorganization:

> We realize that in certain circumstances, the entire reorganization effort may be thwarted if emergency leave is withheld and that reorganization under the Bankruptcy Code is a perilous process, seldom more so than at the outset of the proceedings when the debtor is often without sufficient cash flow to fund a central business operation. In re Sullivan Ford Sales, 2 B.R. 350, 355 (Bankr. D. Me. 1980). It is for this reason that Congress specified that hearings concerning the use of cash collateral "shall be scheduled in accordance with the needs of the debtor." 11 U.S.C. § 363(c)(3) (1982).

In re Center Wholesale, Inc., 759 F.2d 1440, 1449 n.21 (9th Cir. 1985).

The use of cash collateral and the Post-Petition Financing are needed to pay the essential operating expenses of the Debtor. The Debtor must use cash collateral and/or borrow under the DIP Loan Agreement immediately upon filing as these funds are necessary to pay the

Debtor's critical operating expenses, including payroll, utilities, and other essential expenses. The cash needs of the Debtor are immediate. Absent satisfying those needs, the Debtor may be forced to terminate its operations, which could destroy the going concern value of the enterprise. There is no question that the Debtor has demonstrated that there will be "immediate and irreparable harm to the estate" absent emergency consideration of the relief requested in this Motion.

The interim relief requested by the Debtor is precisely what is contemplated by Bankruptcy Rules 4001(c)(1) and 4001(c)(2) and should be granted to avoid immediate and irreparable harm to the Debtor's estate. The Debtor has served the Motion on the United States Trustee, counsel for MB Financial, counsel for the DIP Lender, counsel for the Pre-Petition Lender of the Debtor, the 20 largest unsecured creditors for the Debtor, and certain other parties in interest.

A. The Debtor Should be Permitted To Use the Collateral.

The Debtor's use of property of its estate is governed by Bankruptcy Code section 363, which provided in pertinent part:

> If the business of the debtor is authorized to be operated under section 1108 of this title and unless the court orders otherwise, the trustee [or debtor in possession] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S. C. § 363 (c)(1).

The Bankruptcy Code, however, establishes a special requirement regarding the debtor in possession's use of "cash collateral" which is defined as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest. . . " 11 U.S. C. § 363(a).

Section 363(c)(2) permits the debtor in possession to use, sell, or lease "cash collateral" under subsection (c)(1) only if either of two alternative circumstances exist:

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

11 U.S.C. § 363 (c)(2).

Here, the Pre-Petition Lender has consented to the use of the pre-Petition Collateral, including cash collateral, by the Debtor in the ordinary course of business subject to the granting of replacement liens provided for herein and the other conditions agreed to by the Pre-Petition Lender and the Debtor.

B. The Debtor Will Provide The Pre-Petition Lender With Adequate Protection.

The Debtor has agreed to provide the Pre-Petition Lender with adequate protection. In addition, the Debtor and the Pre-Petition Lender have agreed to certain other conditions to the use of Pre-Petition Collateral which will be set forth in the Order.

First, the Debtor will provide the Pre-Petition Lender with regular financial reports containing detailed information relating to the Debtor's operation and performance. This information will enable the Pre-Petition Lender to monitor its interest in its collateral. Numerous courts have held that a debtor's reporting of financial information is a form of adequate protection. See, e.g., Abbott Bank-Thedford v. Hanna (n re Hanna), 912 F. 2d 945, 957 (8th Circ. 1990); Mutual Benefit Life Ins. Co. v. Stanley Station Assocs. L.P. (In re Stanley Station Assoc., L.P.), 140 B. R. 806, 809 (D. Kan. 1992) ("In addition, we believe a request by MBL for '[t]imely filing of proper monthly operating reports. . .' falls within the gambit of adequate

protection. . .'); Sumitomo Trust & Banking Co. v. Holly's Inc. (In re Holly's Inc.), 140 B.R. 743, 706 (Bankr. W.D. Mich. 1992) (reports required as part of adequate protection).

Second, the Debtor will grant the Pre-Petition Lender replacement liens on its assets to the extent the value of the collateral declines as a result of the Debtor's use thereof. Specifically, the Debtor will, to the extent of the value of any post-petition decline in the value of the collateral, including cash collateral, grant to the Pre-Petition Lender replacement liens in substantially all of its assets (collectively, the "Replacement Lien Collateral").

The Bankruptcy Code expressly provides that the granting of such replacement liens constitutes a means of adequate protection. See 11 U.S. C. § 361(2). Accordingly, granting replacement liens will provide the Pre-Petition Lender with more than adequate protection against any decrease in the value of the Pre-Petition Lender's interest in its collateral. See, e.g., Mbank Dallas, N.A. . O'Connor (In re O'Connor), 808 F.2d 1393 (10th Cir. 1987); In re Coody, 59 B. R. 164, 167 (Banr. M.D. Ga. 1986); In re Dixie-Shamrock Oil and Gas, Inc., 39 B. R. 115, 118 (Banker. M.D. Tenn. 1984); see also In re Beker Indus. Corp. 58 B. R. 725, 741 (Bankr. S.D.N.Y. 1986 ("Adequate protection, not absolute protection, is the statutory standard.")

C. Approving The DIP Credit Agreement Is Appropriate Under Bankruptcy Code Section 364.

As debtor in possession, the Debtor is authorized to operate its business under Bankruptcy Code section 1108. As part of that operation, the debtor in possession may incur unsecured debt in the ordinary course of business. 11 U.S.C. § 364(a). The Bankruptcy Code offers a debtor in possession additional flexibility to the extent it needs additional credit, but cannot attract such credit on unsecured terms. Bankruptcy Code section 364 provides a

progression of various protections to induce a post-petition lender to extend credit to a debtor in possession.

The necessity for obtaining the Post-Petition Financing from the DIP Lender has been fully described above and is contained in the Kuoni Affidavit filed concurrently herewith and will not be repeated here. Bankruptcy Code section 364 governs a debtor in possession's ability to incur debt or obtain credit post-petition. More specifically, subsections (c)(1)-(3) of Bankruptcy Code section 364 address the incurrence of post-petition credit on a non-priming basis, providing as follows:

> (c) If the [debtor in possession] is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the Court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt —
>
> > (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
> >
> > (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
> >
> > (3) secured by a junior lien on property of the estate that is subject to a lien.

In order to obtain post-petition credit on a "superpriority" basis or by granting liens on unencumbered assets or junior liens, a debtor in possession must show that it is unable to obtain the necessary credit otherwise. Bankruptcy Code section 364, however, does not impose upon a debtor in possession the onerous duty to seek credit from every possible lender before concluding that such credit is available. See Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co., Inc.), 789 F.2d 1085, 1088 (4th Cir. 1986). Instead, a good faith effort to obtain less burdensome credit from other sources is all that is required of a debtor, especially when time is of the essence. See, e.g., id.; In re Reading Tube Indus., 72 B.R. 329, 333 (Bankr. E.D. Pa. 1987); In re Stacy Farms, 78 B.R. 494, 498 (Bankr. S.D. Ohio 1987).

1. The Debtors Have Satisfied The Requirements Under Bankruptcy Code Sections 364(c) And Should Be Allowed To Borrow Under The DIP Credit Agreement.

The DIP Credit Agreement provides the DIP Lenders with the following protections:

(i) Superpriority administrative claim status pursuant to Bankruptcy Code section 364(c)(1), subject only to certain Carve-Outs and other limited exceptions;

(ii) a valid and perfected first priority senior security interest and lien pursuant to § 364(c)(2) of the Bankruptcy Code on the DIP Senior Collateral as provided in the DIP Loan Agreement;

(iii) a junior lien, pursuant to § 364(c)(3) of the Bankruptcy Code, on the Junior Collateral; and

(iv) a valid and perfected first priority senior security interest and lien on the Mestek Collateral.

Other than the requirement of "notice and a hearing," the only statutory prerequisite for obtaining credit on a secured basis on a "superpriority" basis under Bankruptcy Code section 364(c)(1) or by granting liens on unencumbered property under Bankruptcy Code section 364(c)(2) or by granting junior liens under Bankruptcy Code section 364(c)(3) is that "the [debtor in possession] is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense." This threshold test is certainly satisfied here.

As set forth above and in the Kuoni Affidavit, despite the Debtor's efforts, the Debtor, as of the Petition Date, was unable to obtain unsecured credit sufficient to finance its operations. Moreover, the Debtor simply cannot obtain alternative financing of the magnitude proposed under the Post-Petition Financing on an unsecured basis, even if the resulting claim were to be allowed as an administrative claim. Finally, Mestek has agreed to fund the Debtor only if it is given the added protection and benefits provided by the Post-Petition Financing. Consequently, the Debtor should be permitted to borrow under the DIP Loan Agreement on a "superpriority" basis under section 364(c)(1), or by the granting of liens pursuant to Bankruptcy

Code sections 364(c)(2) and (c)(3) as such borrowing is the only source of funds available to the Debtor at this time.

2. Approval Of The DIP Financing Is Supported By The Exercise Of Sound Business Judgment.

The fact that the Debtor has satisfied the requirements of Bankruptcy Code section 364, of course, does not end the inquiry, as these sections are permissive, not mandatory. See 11 U.S.C. § 364(c)(1) and (d) ("after notice and a hearing", the court "may authorize the obtaining of credit or the incurring of debt") (emphasis added). Generally, however, courts give broad deference to business decisions of a debtor in possession. See, e.g., Richmond Leasing v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, a Bankruptcy Court generally will respect a debtor in possession's business judgment regarding the need for and the proposed use of funds. As the Court noted in In re Ames Dep't Stores, Inc.,

> A court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party in interest.

In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y 1990).

The power of the debtor in possession to incur secured debt follows necessarily from the general power of the debtor in possession to operate its business in the exercise of its business judgment. 11 U.S.C. § 1108. Without the ability to incur secured debt, the debtor in possession would be placed at a significant competitive disadvantage and its efforts to reorganize could be seriously impaired.

In the present case, the Debtor's decision to obtain the Post-Petition Financing represents an exercise of sound business judgment in the continued operation of the Debtor's business and the process to consummate a reorganization plan. Like most business decisions, the Debtor's decision to enter into the DIP Loan Agreement will both confer a number of benefits on the Debtor and impose several tradeoffs. The DIP Loan Agreement should provide the Debtor

with sufficient capital to operate the business in the ordinary course and permit it to pursue its reorganization goals.

In exchange for the foregoing, the Debtor has agreed, among other things, that: (i) the Debtor's obligations under the DIP Loan Agreement shall be secured by the liens described herein and therein; (ii) post-petition borrowings will bear interest at the higher market rates as is typical for DIP loans; (iii) the Debtor shall pay various fees to the DIP Lender; and (iv) the Debtor will provide on a periodic basis financial and other information to the DIP Lender.

These types of concessions are commonplace in complex financing arrangements and are amply justified here in light of the benefits conferred upon the Debtor under the DIP Loan Agreement. In fact, bankruptcy courts routinely recognize that provisions are more onerous than these are often included in both debtor-in-possession financing and cash collateral arrangements. See, e.g., In re Adams Apple, Inc., 829 F.2d 1484, 1488 (9th Cir. 1987) ("section 364 was designed to provide a debtor a means to obtain credit after filing bankruptcy. As such, cross collateralization clauses appear to be covered by section 364"); In re Keystone Camera Prods. Corp., 126 B.R. 177, 182-83 (Bankr. D.N.J. 1991); In re Stein & Day, Inc., 87 B.R. 290, 292 (Bankr. S.D.N.Y. 1988) (providing for payment of pre-petition debt); Unsecured Creditors' Comm. v. First Nat'l Bank and Trust Co. (In re Ellingsen MacLean Oil Co.), 65 B.R. 358 (W.D. Mich. 1986), aff'd, 834 F.2d 599 (6th Cir. 1987), cert. denied, 488 U.S. 817 (1988) (validation of liens, repayment of debt, cross collateralization); In re FCX, Inc., 54 B.R. 833, 840-41 (Bankr. E.D.N.C. 1985) (cross collateralization); In re Quigley Gen. Elec. Co. (In re Elec. City, Inc.), 43 B.R. 336, 338 (Bankr. W.D. Wash. 1984) (stipulation provided for post-petition lien and conceded validity of lien).

Such concessions are especially justified in cases where the failure to approve the requested financing threatens to doom any prospects the debtor has for a successful reorganization as is the case here. See, e.g., In re Vanguard Diversified, Inc., 31 B.R. 364 (Bankr. E.D.N.Y. 1983) (approving cross collateralization and the granting of a super-

administrative priority claim in favor of a pre-petition lender where, among other things, failure to provide such financing would result in the failure of the chapter 11 case and the value of the encumbered assets at liquidation were less than the lenders' claims). Accord In re Roblin Indus., Inc., 52 B.R. 241, 245 (Bankr. N.D.N.Y. 1985) (approving cross collateralization; "if in fact [the lenders] are undersecured [and] absent financing the debtor would in all likelihood shut down, [then] liquidation would follow, and unsecured creditors would receive no distribution from the debtor's estate").

In sum, the substantial benefits the Debtor will derive from the proposed financing amply justify its decision to enter into the DIP Loan Agreement, a decision that the Court should ratify as being in the best interests of the Debtor and its estate.

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III.

CONCLUSION

WHEREFORE, the Debtor respectfully moves the Court for entry of an order, substantially in the form of the Interim Order: (1) authorizing the Debtor to use Pre-Petition Collateral, including cash collateral; (2) authorizing the Debtor to obtain the Post-Petition Financing from the DIP Lender pursuant to the terms of the DIP Loan Agreement; (3) granting the DIP Lender perfected liens pursuant to Bankruptcy Code sections 364(c)(2) and (c)(3) to secure the DIP Facility Obligations; (4) granting the DIP Lender administrative priority under Bankruptcy Code section 364(c)(1) as additional security for the Post-Petition Financing; (5) setting a hearing on the final approval of use of cash collateral and the Post-Petition Financing and establishing deadlines related to the final hearing; (6) following such a final hearing, approving use of cash collateral and the Post-Petition Financing on a final basis; and (7) authorizing the Debtor to execute any and all documents and take such other actions as necessary to effectuate the transactions set forth in the DIP Loan Documents.

DATED: August 26, 2003

MORRIS, NICHOLS, ARSHT & TUNNELL

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