

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

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In re:	)	Chapter 11
MET-COIL SYSTEMS CORPORATION,	)	Case No. 03-12676 (MFW)
Debtor.	)	Objection Deadline: Nov. 11, 2003 @ 4:00 p.m. ET
	)	Hearing Date: Nov. 18, 2003 @ 12:30 ET

**MOTION TO ASSUME CERTAIN EXECUTORY  
DISTRIBUTION AGREEMENTS AND CURE EXISTING DEFAULTS**

Met-Coil Systems Corporation, (the "Debtor" or "Met-Coil") debtor and debtor in possession in the above-captioned chapter 11 case (the "Case"), hereby moves (the "Motion"), pursuant to section 365 of title 11 of the United States Code (the "Bankruptcy Code") to assume certain executory distribution agreements and to cure existing defaults with respect thereto. In support of this Motion, the Debtor respectfully states as follows:

**JURISDICTION**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b).
2. The statutory predicate for the relief requested herein is section 365 of the Bankruptcy Code.

**INTRODUCTION**

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

4. The Debtor is operating its business as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.<sup>1</sup> An official committee of unsecured creditors (the "Committee") has been appointed and is serving.

5. The Debtor's primary business is metal fabrication, including manufacturing advanced sheet metal forming equipment, fabricating equipment, and computer-controlled fabrication systems. The Debtor's products are generally custom-designed and manufactured to meet unique customer specifications, and the products are often incorporated into the customer's standard product line.

6. The majority of the Debtor's products are sold to customers through a well-established dealer/distribution network (the "Distribution Network"). To maintain this Distribution Network, the Debtor is party to various distribution agreements (the "Distribution Agreements")<sup>2</sup> with distributors (the "Distributors") both in the United States and abroad.

7. The Distribution Agreements provide the terms by which the Distributors represent the Debtor in the Distributors' respective markets. The Distributors are obligated to perform many functions under the Distribution Agreements. Such functions include sourcing the Debtor's customers, assisting those customers establish specifications for equipment to be manufactured by the Debtor, and responding to customers' service needs with respect to such equipment. In addition, often times the Distributors assist in installation of equipment manufactured by the Debtor, advertise the Debtor's products, and set up trade shows for advertising, communicative and marketing purposes.

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<sup>1</sup> A detailed description of the Debtor's business operations and the events leading to the filing of this chapter 11 case can be found in the *Affidavit of Charles F. Kuoni III in Support of First Day Motions of Met-Coil Systems Corporation* [Docket No. 3].

<sup>2</sup> Those Distribution Agreements that the Debtor seeks to assume hereby are identified, together with cure amounts, on Exhibit "A" attached hereto.

8. The Distribution Network and the Distribution Agreements are key to Met-Coil's market position in the metal fabrication industry. They are vital to the Debtor's responsiveness to customers' specific needs as well as the general trend and requirements of the metal fabrication market. Indeed, the advantages of the Distribution Network have enabled the Debtor to become a top manufacturer of HVAC equipment in the industry.

9. Understanding the Debtor's products requires specialized technical knowledge on the part of the Distributors. The Debtor has made large investments of time, training and good will in order to create the Distribution Network. As such, there are a limited number of Distributors able to represent Met-Coil, because many distributors do not have the training or technical wherewithal required to perform the functions required under the Distribution Agreements.

10. Replacing the current Distribution Agreements would require a massive expenditure of time and money, and would greatly detriment the Debtor's operations. Even were the Debtor able to locate adequate alternate distributors, the Debtor would have to hire additional sales personnel, incur additional travel and training man-hours and expense, and would also have to increase its advertising and marketing budget.

#### **RELIEF REQUESTED**

11. Pursuant to section 365 of the Bankruptcy Code, the Debtor seeks authority to assume the Distribution Agreements identified on Exhibit "A" attached hereto, and to cure any defaults existing with respect to those Distribution Agreements.

#### **APPLICABLE AUTHORITY**

12. Section 365 of the Bankruptcy Code provides, in relevant part:
- (a) Except as provided in section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval,

may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(a).

13. Under § 365(a) of the Bankruptcy Code, a debtor may assume or reject an executory contract or unexpired lease. An executory contract is a "contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach." Sharon Steel Corp. v. Nat'l Fuel Gas Distrib., 872 F.2d 36, 39-40 (3rd Cir. 1989); see also In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) ("A contract is executory if each side must render performance, on account of an existing legal duty or to fulfill a condition, to obtain the benefit of the other party's performance.").

14. In order to assume and assign an executory contract or unexpired lease under § 365 of the Bankruptcy Code, the debtor must establish that the decision is one made in its sound business judgment. In re ANC Rental Corporation, Inc., 278 B.R. 714, 723 (Bankr. D. Del. 2002) (citing In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999)). The decision to assume or reject an executory contract is a matter within the "business judgment" of the debtor. See National Labor Relations Board v. Bildisco (In re Bildisco), 682 F.2d 72, 79 (3rd Cir. 1982) ("The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the "business judgment" test.").

15. The business judgment standard is satisfied when a debtor demonstrates that assumption will benefit the estate or its reorganization effort. See In re Bullet Jet Charter, Inc., 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995). "The bankruptcy judge should have a deferential view of the debtor's business judgment in this regard, but need not accept that judgment blindly." Id. "The rule as applied to a bankrupt's decision to reject an executory

contract because of perceived business advantage requires that the decision be accepted by courts unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1046 (4th Cir. 1985), cert denied, 475 U.S. 1057, 106 S.Ct. 1285 (1986).

16. Assuming the Distribution Agreements is an exercise of the Debtor's sound business judgment and is in the best interests of the Debtor's estate and creditors. Clearly, maintaining the Distribution Agreements is crucial to the preservation of the carefully-crafted Distribution Network, thus making the Distribution Agreements fundamental in allowing the Debtor to disseminate its products into the marketplace.

17. The Distributors perform many functions that are integral to servicing the needs of the Debtor's customers, including installation, establishing specifications, marketing, and servicing installed products. Because these functions require specialized technical knowledge on the part of the Distributors, the availability of alternate distributors of the Debtor's products is very limited. Even were such alternates readily available, the training, hiring and contracting with such alternates would be cost-prohibitive and would severely disrupt the Debtor's operations. As such, assuming the Distribution Agreements clearly reflects sound business judgment on the part of the Debtor and is in the best interests of the Debtor's estate and creditors.

18. Section 365(b)(1) requires the Debtor to cure any defaults in any executory contract before it can be assumed. 11 U.S.C. § 365(b)(1); see also In re ANC Rental, 278 B.R. at 724. The Debtor proposes to cure any pre- or post-petition defaults currently existing under the Distribution Agreements. As shown on Exhibit "A" attached hereto, the amounts to be cured under the Distribution Agreements total \$92,332.74. Payment of the

amounts to cure the Debtor's defaults will cause no disruption to the Debtor's business and will not result in any significant drain on estate resources. In addition, the Debtor's expense to cure the Distribution Agreements is well-justified given the importance of the Distribution Network to the Debtor's operations.

19. By seeking authorization to assume the Distribution Agreements, the Debtor does not hereby waive any claims, defenses or rights of setoff that it may have against the Distributors.

**NOTICE**

20. 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) counsel for the Committee; (e) the Distributors; and (f) all parties listed on the Core Group service list and those that have requested notice of pleadings pursuant to Bankruptcy Rule 2002.


**NO PRIOR REQUEST**

21. No previous request for the relief sought in this Motion has been made to this Court or any other court.

WHEREFORE, the Debtor respectfully requests the entry of an order substantially in the form attached hereto authorizing it to assume the Distribution Agreements and to pay the cure amounts, and granting such other and further relief as is just and proper.

Dated: October 31, 2003

MORRIS, NICHOLS, ARSHT & TUNNELL

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