

**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 MOTION FOR ENTRY OF ORDER
AUTHORIZING PAYMENT OF CERTAIN PREPETITION
SHIPPING AND STORAGE CHARGES AND POSSESSORY LIENS**

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 motion (the "**Motion**") for entry of an Order authorizing payment of certain prepetition shipping and storage charges and possessory liens. In support of the Motion, 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 Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion 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), 361 and 363 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.

SHIPPING AND WAREHOUSING

6. In the ordinary course of its business, the Debtor uses various shippers and common carriers (the "**Shippers**") to ship, transport and deliver goods. In addition, the Debtor uses third-party warehouses to store goods (the "**Warehouses**").

7. The Debtor pays storage charges to the operators of the Warehouses based upon a flat fee (the "**Warehouse Charges**"). The Shippers are compensated based upon the corporate rates charged by individual carriers, published tariffs or contractual rates (the "**Shipping Charges**").

8. The Debtor estimates that as of the Petition Date, the Shippers are owed approximately \$20,000.00 for prepetition Shipping Charges, and the Warehouses are owed a minimal amount for prepetition Warehouse Charges.

RELIEF REQUESTED

9. By this Motion, the Debtor respectfully requests authority, pursuant to §§ 105(a), 361, and 363 of the Bankruptcy Code, to pay in its discretion certain prepetition amounts owed to the Shippers with respect to the Shipping Charges and to the Warehouses with respect to the Warehouse Charges, and to discharge the liens, if any, that the Shippers and Warehouses have on goods in their possession.

10. To facilitate the Debtor's ability to make the payments described, the Debtor requests that (a) its banks be authorized to process, honor, and pay, to the extent of funds on deposit, any and all prepetition wire transfer requests or checks issued by the Debtor in respect of any prepetition Shipping Charges and Warehouse Charges prior to or after the Petition Date, (b) the Debtor be authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of prepetition Shipping Charges and Warehouse Charges dishonored or rejected as of the Petition Date, and (c) upon the Debtor's payment of a Shipping Charge to a Shipper or Warehouse Charge to a Warehouse, any property of the Debtor held by such Shipper or Warehouse as security for said payment shall be immediately released and, with respect to Shippers, be delivered by such Shipper to its destination as directed by the Debtor, consistent with its customary practices in the ordinary course of business with the Debtor. The Debtor also seeks authority to require, in its discretion, a release and/or waiver from any Shipper or operator of a Warehouse, should any payment be made.

11. Further, the Debtor requests that nothing in this Motion or any Order entered pursuant thereto be construed as (a) prejudicing any rights the Debtor may have to dispute or contest the amount of or basis for any claims against the Debtor arising in connection with the Shipping Charges or Warehouse Charges, or (b) constituting the assumption of any executory contract pursuant to § 365 of the Bankruptcy Code.

BASIS FOR RELIEF REQUESTED

12. If the Shipping Charges and/or Warehouse Charges are not paid by the Debtor, the Debtor believes that the goods and merchandise held by the Shippers and Warehouses may be subject to possessory liens under applicable state law. Typically, state

laws grant an entity that furnishes services or materials with respect to goods, such as a common carrier or warehouse, a possessory lien on such goods to secure payment for such charges and related expenses, if such entity retains possession of the goods at issue.¹

13. Further, § 9-310 of the Uniform Commercial Code grants to creditors, such as common carriers and warehouses holding possessory liens, a priority in payment over consensual lien creditors. Under the Bankruptcy Code, the Shippers and Warehouses, are entitled to receive payment in full for the Shipping Charges and Warehouse Charges pursuant to any confirmed plan(s) of reorganization in the Case. Consequently, payment at this time of such charges and fees gives the Shippers and Warehouses no more than that to which they are entitled. On the other hand, without payment of the amounts owed, personal property of the Debtor having an approximate aggregate retail value of \$50,000.00 is likely to be retained by those Shippers and Warehouses as security for payment of outstanding prepetition Shipping Charges and outstanding prepetition Warehouse Charges.

14. The Debtor submits that the amounts it seeks authority to pay, estimated at approximately \$20,000.00, are *de minimis* in comparison to the value to the Debtor's estate of an uninterrupted supply of goods.

15. Section 105(a) of the Bankruptcy Code grants the Court broad authority to enforce the Bankruptcy Code's provisions either under the specific statutory language of the Bankruptcy Code or under equitable common law doctrines. In a long line of well-

¹ For example, section 7-307 of Delaware's Uniform Commercial Code provides, in pertinent part:

A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law.

DEL. CODE ANN. Tit. 6, § 7-307 (2003). Section 7-209(1) of Delaware's Uniform Commercial Code provides for a similar lien for warehousemen. DEL. CODE ANN. tit. 6, § 7-209 (2003).

established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. See, e.g., Miltenberger v. Logansport Ry., 106 U.S. 286 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of relations"); In re Leigh & New England Ry., 657 F.2d 581 (3d Cir. 1981) (holding that payment of creditors' prepetition claims was authorized under "necessity of payment" doctrine); In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999) ("The Supreme Court, the Third Circuit and the District of Delaware all recognize the Court's power to authorize the payment of prepetition claims when such payment is necessary for the debtor's survival during Chapter 11").

16. This "doctrine of necessity" functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claim that are not explicitly authorized by the Bankruptcy Code. Just for Feet, 242 B.R. at 824; see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (noting that Debtor may pay one class of prepetition creditors in advance of a confirmed plan if essential to continued operation of the business).

17. Courts have authorized the payment of charges similar to the Shipping Charges and Warehouse Charges in other chapter 11 cases in this District. See, e.g., In re HQ Global Holdings, Inc., Case No. 02-10760 (MFW) (Bankr. D. Del. 2002); In re Kaiser Aluminum Corp., Case No. 02-10429 (EIK) (Bankr. D. Del. 2002); In re Questron Technologies, Inc., Case No. 02-10319 (EIK) (Bankr. D. Del. 2002); In re Converse, Inc., Case No. 01-233 (SLR) ((Bankr. D. Del. 2001); In re Lids Corp., Case No. 01-00021 (SLR)

(Bankr. D. Del. 2001); In re Just For Feet, Inc., Case No. 99-04110 (MFW) (Bankr. D. Del. 2001).

NOTICE AND PRIOR APPLICATION

18. 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.

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

CONCLUSION

WHEREFORE, the Debtor respectfully requests entry of an order substantially in the form annexed hereto, (i) authorizing the Debtor to pay the prepetition Shipping Charges and Warehouse Charges; (ii) authorizing the Debtor to discharge the liens, if any, that Shippers and/or Warehouses have on goods in their possession; and (iii) granting such other and further relief as is just under the circumstances.

Dated: August 26, 2003

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