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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	Chapter 11
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Metaldyne Corporation, <i>et al.</i> ,	:	Case No. 09-13412 (MG)
	:	
Debtors.	:	(Jointly Administered)
	:	
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**MOTION OF DEBTORS AND DEBTORS IN POSSESSION,  
PURSUANT TO SECTIONS 105(a), 327 AND 330 OF THE  
BANKRUPTCY CODE AND BANKRUPTCY RULE 2014(a), FOR  
AN ORDER AUTHORIZING THEM TO RETAIN, EMPLOY AND PAY  
CERTAIN PROFESSIONALS IN THE ORDINARY COURSE OF THEIR BUSINESSES**

TO THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY JUDGE:

Metaldyne Corporation and 30 of its domestic direct and indirect subsidiaries, as  
debtors and debtors in possession (collectively, the "Debtors"), respectfully represent as follows:

## **Background**

1. On May 27, 2009 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). By an order entered on May 29, 2009, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. Metaldyne Corporation ("Metaldyne") is a wholly-owned subsidiary of Metaldyne Holdings LLC ("Metaldyne Holdings"). On January 11, 2007, in connection with a plan of merger, Asahi Tec Corporation ("Asahi Tec"), a Japanese corporation, acquired the shares of Metaldyne. On the same date, Asahi Tec contributed those shares to Metaldyne Holdings, and Asahi Tec thereby became the indirect parent of Metaldyne and the other Debtors. RHJ International S.A. ("RHJI"), a corporation formed under the laws of Belgium and listed on the Euronext exchange, presently holds approximately 60.1% of the outstanding capital stock of Asahi Tec.

3. Debtor MD Products Corp. ("MD Products") is a New York corporation. Metaldyne is the direct or indirect parent of MD Products, each of the other Debtors and each of the Debtors' nondebtor subsidiaries (collectively, the "Metaldyne Companies"). Metaldyne maintains its corporate headquarters in Plymouth, Michigan. The Debtors own or lease 23 different properties, including 14 domestic manufacturing facilities in six states, and also have manufacturing and business operations in more than 10 foreign countries in North America, Europe, South America and Asia.

4. The Metaldyne Companies are leading global manufacturers of highly engineered metal components for the global light vehicle market, are market leaders for many of the products they sell and are among the 50 largest auto parts suppliers in North America. The Metaldyne Companies operate through two business units, the Powertrain segment and the Chassis segment. The Powertrain segment manufactures a range of products for engine and transmission applications, including sintered powder metal engine connecting rods and engine bearing caps, aluminum transmission valve bodies, transmission clutch modules, engine balance shaft modules, transmission differential assemblies, engine crankshaft dampers, engine tubular fabricated exhaust manifolds, front engine cover assemblies and transmission end cover assemblies. The Chassis segment manufactures components, modules and systems, including wheel-ends, knuckles and mini-corner assemblies, and utilizes a variety of machining and assembly processes.

5. The Metaldyne Companies' products are used in cars, vans, sport-utility vehicles, light trucks, heavy trucks and other vehicles and provide content for the majority of the light vehicles manufactured in North America. The majority of the products manufactured by the Metaldyne Companies are sold directly to original equipment manufacturers ("OEMs"), but the Metaldyne Companies also make substantial amounts of sales to the OEMs' Tier I suppliers. The Metaldyne Companies' largest customers are Ford, Chrysler and General Motors (collectively, the "North American OEMs"), which accounted for approximately 43% of the Metaldyne Companies' 2008 direct sales. If "indirect sales" — the sales of parts that are made to Tier I suppliers that are incorporated into products and assemblies that are then sold to the North American OEMs — were added to the direct sales made to the North American OEMs, these

entities ultimately would have accounted for well over 60% of the Metaldyne Companies' 2008 sales.

6. The Metaldyne Companies went into and emerged from their merger transaction with Asahi Tec as highly-leveraged entities. To ameliorate the effects of such continuing leverage, in early 2008 the Debtors developed and began to implement an internal restructuring that was designed to excise costs, increase revenues and enhance operational efficiencies. Prior to the Petition Date, the Debtors had implemented several phases of that plan, which resulted in cost savings of approximately \$60 million per year (in addition to \$40 million in annual interest savings obtained through the Tender Offer transaction described below).

7. Due to the precipitous reduction in production levels by the North American OEMs in 2008 and the tightening of consumer and wholesale financing for the OEMs' vehicles, the Debtors experienced liquidity pressures in the Summer and Fall of 2008. These problems were exacerbated by the constraints placed upon the Debtors by their own debt service obligations. After reaching a series of agreements with Asahi Tec, RHJI and the North American OEMs, among other parties, on October 29, 2008, the Debtors launched a cash tender offer (the "Tender Offer") for the outstanding 11% senior subordinated notes due 2012 and 10% senior notes due 2013 (collectively, the "Notes"). The Tender Offer consideration to be paid by the Debtors was significantly less than the par value of the Notes. The Tender Offer, which was accepted by over 90% of the eligible noteholders, was completed on November 28, 2008 and resulted in the retirement of over \$350 million in debt, or approximately 40% of the aggregate long-term debt of the Debtors that was outstanding at the time. Cash for the Tender Offer was received from Asahi Tec (after Asahi Tec received such cash through an equity investment by RHJI) and from the North American OEMs in exchange for the issuance of

\$60 million in new notes to the North American OEMs by Metaldyne. In addition, as part of the Tender Offer, the Notes, which had been secured, became unsecured obligations of the Debtors.

8. While the completion of the Tender Offer provided the Debtors with a brief respite from liquidity pressures, the extended holiday shutdowns of the Debtors' North American OEM customers and the continued historic difficulties in the North American automotive industry quickly eroded the Debtors' liquidity in December 2008 and early 2009. As has been widely reported, North American vehicle production has dropped nearly in half, with over 15 million units produced in each year between 2004 and 2007, with approximately 12.6 million units produced in 2008 and only 1.7 million units produced in the first quarter of 2009. Key industry analysts are projecting production of approximately 8 million units for 2009.

9. Reacting to these unprecedented figures, in early 2009, the Metaldyne Companies implemented a new round of internal restructuring initiatives and began exploring options to further refinance and/or de-lever the Metaldyne Companies. Specifically, the Debtors sought additional capital from various sources, including private equity firms, RHJI and the Debtors' senior secured lenders. While various entities explored options for making a capital investment into the Debtors, ultimately none of the entities approached by the Metaldyne Companies were willing to make a direct investment in the companies or enter into a re-financing transaction; however, certain such entities expressed a desire to purchase certain assets or businesses from the Debtors pursuant to a sale under section 363 of the Bankruptcy Code. The Debtors' efforts, thus, were refocused upon negotiating with potential purchasers in an effort to arrange a sale of the company as a whole or a sale of one or more business units on a going concern basis.

10. The Debtors received interest from various parties in a purchase of certain of the assets of their Chassis segment and interest from other parties in a purchase of the majority of the assets of their Powertrain segment. The Debtors have entered into or are finalizing letters of intent to sell these two groups of assets and are negotiating the terms of asset purchase agreements for the sale of one of these businesses and will commence negotiations for the other business once the indications of interest are resolved. The Debtors anticipate that they shortly will file one or more motions to approve the establishment of an auction process or processes and bid procedures to consummate these sales (collectively, the "Sale Processes").

11. In addition, the Debtors have negotiated the terms of a debtor in possession financing facility that will be provided by Deutsche Bank AG, New York, and funded through economic participations purchased by certain of the Debtors' customers, which facility has the support of the lenders under the Debtors' prepetition asset-backed revolving credit facility. The Debtors expect this postpetition financing facility will provide them with sufficient funding to complete expedited Sales Processes in these cases notwithstanding current industry turmoil and the recent commencement of chapter 11 cases by Chrysler LLC. The Debtors believe that the institution of these chapter 11 cases and the consummation of the Sale Processes for the majority of their operating assets will allow the vast majority of their business operations to continue, thus preserving jobs, maximizing value to stakeholders and preventing additional turmoil in a sector of the economy that can ill afford it at this time.

12. For the fiscal year ended March 29, 2009, the Metaldyne Companies recorded annual revenue of approximately \$1.32 billion, of which approximately \$782 million was from sales of the Debtors. As of March 29, 2009, utilizing book values, the Metaldyne Companies had assets of approximately \$977 million and liabilities of approximately

\$927 million. As of the Petition Date, the Metaldyne Companies have approximately 4,450 employees, of which approximately 2,500 are employees of the Debtors.

### **Jurisdiction**

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

### **Relief Requested**

14. Pursuant to sections 105(a), 327 and 330 of the Bankruptcy Code and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors seek the entry of an order authorizing them to retain, employ and pay certain professionals (each, an "Ordinary Course Professional") and service providers (each, a "Service Provider") in the ordinary course of the Debtors' businesses on the terms and conditions set forth herein, without the submission of separate retention applications and the issuance of separate retention orders for each individual Ordinary Course Professional or Service Provider.

### **Basis for Relief**

#### ***Ample Cause Exists for Authorization to Retain, Employ and Pay Ordinary Course Professionals and Service Providers***

15. The Debtors' officers and management, in the performance of their duties, regularly call upon a wide variety of Ordinary Course Professionals including, without limitation, attorneys, accountants, public relations consultants and financial consultants to provide services to assist them and the Debtors in carrying out their assigned duties and responsibilities. These Ordinary Course Professionals provide valuable — often critical — assistance in addressing issues of importance to the Debtors and their businesses. Exhibit A

attached hereto and incorporated herein by reference is a nonexclusive list of the Ordinary Course Professionals identified by the Debtors as of the Petition Date (the "OCP List").<sup>1</sup>

16. In addition, the special committee of independent directors (the "Special Committee") of the Metaldyne Corporation Board of Directors<sup>2</sup> also utilizes its own professionals in the ordinary course of its duties. To permit the Special Committee to obtain necessary information to perform its duties, Metaldyne entered into agreements to pay for the advisors to the Special Committee and has been paying such advisors in the ordinary course of its business. The Debtors have included such advisors on the OCP List as "Special Committee Advisors" and intend to continue to pay such advisors as Ordinary Course Professionals for any postpetition work performed by such Special Committee attorneys and financial consultants.

17. Similar to the Ordinary Course Professionals, in the ordinary course of their businesses, the Debtors employ a variety of Service Providers, including, without limitation: (a) actuaries; (b) employee benefits and human resources consultants; (c) engineers and designers; (d) environmental consultants and technicians; (e) information technology consultants; (f) insurance brokers; (g) risk management consultants; (h) environmental consultants; (i) communications experts; and (j) trial experts. Although the Service Providers in some instances have professional degrees and certifications, these parties — like other vendors,

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<sup>1</sup> The Debtors have prepared the OCP List based on a review of the professionals that they have employed regularly on an historic basis. The Debtors have not determined which of the parties identified on the OCP List in fact will continue to provide services to the Debtors on a postpetition basis. As such, the OCP List is not intended to constitute a representation that each party listed thereon will be retained, employed and paid by the Debtors during the course of these cases. Likewise, the Debtors believe that there may be additional professionals that will provide services as Ordinary Course Professionals in these cases, but that were not identified by the Debtors' preliminary review and thus are not included on the attached OCP List. Accordingly, the Debtors reserve the right to supplement or otherwise amend the OCP List from time to time by filing a supplemental or amended OCP List with the Court and serving it on parties in interest.

<sup>2</sup> Prior to the Petition Date, the Metaldyne Board of Directors appointed the Special Committee to, among other things, evaluate restructuring or potential asset sale proposals where a member of the Board may have an interest. Currently, the nonbinding letter of intent submitted by the ultimate indirect parent company of Metaldyne, RHJI, falls within that purview.



suppliers and service providers — provide services to the Debtors that relate to the day-to-day operations of the Debtors' businesses.

18. Although the need for the service of Ordinary Course Professionals and Service Providers will be reduced once the Sale Processes are completed, the Debtors desire to employ the Ordinary Course Professionals and Service Providers to render a variety of services to their estates in the same manner and for the same purposes as such services were provided prior to the Petition Date. It is essential that the employment of the Ordinary Course Professionals and Service Providers, many of whom are familiar with the Debtors' businesses and affairs, be continued, to avoid disruption of the Debtors' normal business operations and preserve the value of their estates and, where appropriate, to assist with the sale processes. Yet, because of the magnitude and breadth of the Debtors' businesses and the geographic diversity of the professional parties the Debtors regularly retain, it would be costly, time-consuming and administratively cumbersome for the Debtors and this Court to require each Ordinary Course Professional and Service Provider to apply separately for approval of its employment and compensation through the filing of multiple pleadings in these cases. Requiring separate applications is also simply unnecessary under applicable law.

19. Accordingly, the Debtors request the authority to retain, employ and pay the Ordinary Course Professionals and the Service Providers on the terms set forth herein without further order of the Court. The relief requested will save the Debtors' estates the substantial expense associated with applying separately for the retention of each professional, as well as the incurrence of additional fees related to the preparation and prosecution of interim fee applications. The procedures outlined below also will relieve the Court, the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee") and any official

committee of unsecured creditors (a "Committee") of the burden of reviewing numerous applications involving relatively small amounts of fees and expenses.

***The Ordinary Course Professionals and the Service Providers  
Are Not Professionals Under Section 327(a) of the Bankruptcy Code***

20. To determine whether an entity to be employed in a bankruptcy case is a "professional" within the meaning of section 327(a) of the Bankruptcy Code, most courts 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. Dec. 15, 1997) (copy attached hereto as Exhibit B). 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 section 327 of the Bankruptcy Code.<sup>3</sup> Id. 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.<sup>4</sup> Id.

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<sup>3</sup> See, e.g., In re Palm Coast, Matanza Shores Ltd. P'ship, 101 F.3d 253, 257 (2d Cir. 1996) (citing In re Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981), as establishing as the "benchmark for the purposes of" section 327 of the Bankruptcy Code that professional persons are "limited to persons in those occupations which play a central role in the administration of the debtor proceeding"); In re Fortune Natural Res. Corp., 366 B.R. 558, 563 (Bankr. E.D. La. 2007) (adopting the quantitative test in ruling that "professional persons" under section 327 of the Bankruptcy Code are those who "play a central role in the administration" of the debtor's estate) (citing In re Seatrain Lines, Inc., 13 B.R. at 981); Elstead v. Nolden (In re That's Entm't Mktg. Group), 168 B.R. 226, 230 (N.D. Cal. 1994) (defining "professional person" under section 327 of the Bankruptcy Code as a person whose role is "central to the administration of the estate") (citation omitted); In re Sieling Assocs. Ltd. P'ship, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991) (same); In re D'Lites of Am., Inc., 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989) (section 327 approval not necessary for one who provides services to the debtor that are incidental to its ongoing business operations); Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 620 (Bankr. S.D.N.Y. 1989) (finding that "the phrase 'professional persons' . . . is a term of art reserved for those persons who play an intimate role in the reorganization of a debtor's estate").

<sup>4</sup> See, e.g., U.S. Trustee v. McQuaide (In re CNH, Inc.), 304 B.R. 177, 179-80 (Bankr. M.D. Pa. 2004) (discussing both the quantitative and qualitative tests before finding that a nursing supervisor was not a "professional" under section 327 of the Bankruptcy Code); In re Neidig Corp., 117 B.R. 625, 629 (Bankr. D. Colo. 1990) (most common factor in determining whether person is a professional is amount of autonomy or discretion person is given by debtor or trustee in performing its services); In re Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989) (applying qualitative test and stating, "it must be determined whether an employee is to be given discretion or autonomy in some part of the administration of the debtor's estate").

21. Seeking to synthesize the two approaches, the First Merchants court developed a nonexclusive list of factors to be considered when determining whether an entity to be employed by a debtor is a professional within the meaning of section 327(a) of the Bankruptcy Code. These factors include:

- (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 entity's 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;
- (d) whether the entity is given discretion or autonomy to exercise its 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.

See First Merchants, 1997 WL 873551, at \*3.

22. These factors must be considered in their totality — none of the factors alone are dispositive. Id. Nevertheless, professionals assisting in routine operation of a debtor's business and affairs, rather than the administration of its bankruptcy estate, are not professionals that must be retained under section 327 of the Bankruptcy Code. Id. at \*4.

23. Considering all of the First Merchants factors, the Debtors believe that the Ordinary Course Professionals and the Service Providers are not "professionals" within the meaning of section 327(a) of the Bankruptcy Code. In particular, the Ordinary Course Professionals and the Service Providers generally will not be involved in the administration of

these chapter 11 cases and will not be involved in counseling and advising the Debtors with respect to the material restructuring issues to be addressed. Instead, Ordinary Course Professionals and Service Providers will provide services in connection with the ongoing management of the Debtors' day-to-day business operations and affairs. Indeed, in most instances, the professional or service provider was retained prepetition and the services to be provided would be necessary whether or not the Debtors had commenced these chapter 11 cases. To the extent that services provided by the Ordinary Course Professionals and the Service Providers involve some element of administration of the Debtors' estates, that involvement will be minimal or tangential. As a result, the Debtors do not believe that the retention and payment of the Ordinary Course Professionals and the Service Providers must be approved by the Court. Nevertheless, out of an abundance of caution, the Debtors seek the relief requested in this Motion to avoid any subsequent controversy regarding the Debtors' employment and payment of the Ordinary Course Professionals and the Service Providers during the pendency of these chapter 11 cases.

### **Proposed Procedures**

#### ***Ordinary Course Professional Fee Limits***

24. Because the Debtors intend to sell their business operations, in most cases, the Debtors do not believe that any of the Ordinary Course Professionals will have monthly fees of more than \$35,000 or total fees of \$200,000 during the pendency of these chapter 11 cases (collectively, the "OCP Fee Limits"). As described below, however, if the monthly fees of any Ordinary Course Professional exceed the monthly OCP Fee Limit, or if the total postpetition fees of any Ordinary Course Professional exceed the OCP Fee Limit for the pendency of these chapter 11 cases, such fees will be subject to a further review and approval process as set forth

below.<sup>5</sup> Moreover, as also described below, any Ordinary Course Professional that becomes materially involved in the administration of these cases such that it is a "professional" under section 327 of the Bankruptcy Code — even if its fees are below the OCP Fee Limits — will be retained.

### ***Service Providers***

25. Because the Service Providers are providing day-to-day operational assistance to the Debtors' businesses and do not fall within the categories of "professionals" identified in section 327, the Debtors believe that the Service Providers are not acting as "professional persons" under the Bankruptcy Code and should be treated on terms consistent with other ordinary course vendors. Accordingly, Service Providers (a) are not included within the definition of Ordinary Course Professionals used herein; (b) are not listed on the OCP List attached hereto as Exhibit A; and (c) are not intended to be subject to the OCP Fee Limits, the OCP Payment Procedures (described below) or any other restrictions on Ordinary Course Professionals described herein. The Debtors, in their discretion, intend to continue to employ and pay the Service Providers from and after the Petition Date in the ordinary course of their businesses; provided, however, that consistent with the treatment of Ordinary Course Professionals, any Service Provider that becomes materially involved in the administration of these chapter 11 cases will be retained pursuant to section 327 of the Bankruptcy Code.

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<sup>5</sup> The OCP Fee Limits are intended only to limit the amounts of fees paid to Ordinary Course Professionals without further Court review and not to limit the reimbursement of out-of-pocket expenses incurred by Ordinary Court Professionals.

### ***OCP Payment Procedures***

26. The Debtors propose that they be permitted to pay each Ordinary Course Professional, without prior application to the Court, subject to the following procedures (the "OCP Payment Procedures");

- (a) The Debtors may pay 100% of the fees and disbursements incurred by an Ordinary Course Professional upon the submission to, and approval by, the Debtors of an appropriate monthly invoice setting forth in reasonable detail the nature of the services rendered and disbursements actually incurred during the month; provided, however, that all payments to Ordinary Course Professionals be subject to the OCP Fee Limits.
- (b) To the extent that the fees sought by any Ordinary Course Professional for a month exceed the monthly OCP Fee Limit of \$35,000.00, then such Ordinary Course Professional shall submit a statement of the fees incurred during the applicable month (a "Compensation Statement") to the following parties (collectively, the "Interested Parties"): (i) the Debtors, c/o Metaldyne Corporation, 47603 Halyard Drive, Plymouth, Michigan 48170 (Attn: David McKee, Esq.); (ii) Jones Day, 222 East 41st Street, New York, New York 10017 (Attn: Richard H. Engman, Esq.); and (iii) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190 (Attn: Heather Lennox, Esq.); (iv) the attorneys for any statutory committees appointed in these cases; and (v) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Paul Schwartzberg and Richard Morrissey). Pending review of the Compensation Statement by the Interested Parties, the Debtors are authorized, but not required, to pay the Ordinary Course Professional's fees up to the OCP Fee Limit and reimburse any expenses of the Ordinary Course Professional.
- (c) The Interested Parties will have 25 days after receipt from the Compensation Statement (the "Review Period") to review the Compensation Statement and object to the additional fees above the OCP Fee Limit requested by such Ordinary Course Professional. If any of the Interested Parties objects to the payment of the additional fees sought in a Compensation Statement, it shall serve a written statement of its objection on the Ordinary Course Professional and the other Interested Parties so that it is *received* by such parties before the end of the Review Period. If the Debtors, the applicable Ordinary Course

Professional and the objecting party or parties cannot informally resolve the objection(s), then the Ordinary Course Professional will be required to submit a formal application or request for payment to the Court for the additional compensation or waive its right to any monthly fees in excess of the OCP Fee Limit. If no Interested Party timely objects to the payment of fees sought in a Compensation Statement, then the Debtors shall be deemed authorized to pay the additional compensation sought (to the extent it is otherwise valid).

- (d) Likewise, if the aggregate fees incurred by an Ordinary Course Professional during the pendency of these cases would exceed the OCP Fee Limit of \$200,000 for the case if the professional's most recent request were to be paid, then until the earlier of (i) the termination of the Ordinary Course Professional's employment or (ii) further order of the Court addressing the issue, the Ordinary Course Professional shall submit to the Interested Parties each month a monthly statement (a "Monthly Statement") for all further compensation sought in these cases. The Interested Parties will have 25 days after service of each Monthly Statement (the "Monthly Review Period") to review the Monthly Statement and object to the fees requested by such Ordinary Course Professional. If any of the Interested Parties objects to the payment of the additional fees sought in a Monthly Statement, it shall serve a written statement of its objection on the Ordinary Course Professional and the other Interested Parties so that it is **received** by such parties before the end of the Monthly Review Period. If the Debtors, the applicable Ordinary Course Professional and the objecting party or parties cannot informally resolve the objection(s), then the Ordinary Course Professional will be required to submit a formal application or request to the Court for the additional compensation or waive its right to any fees in excess of the OCP Fee Limit. If no Interested Party timely objects to the payment of fees, then the Debtors shall be deemed authorized to pay the additional compensation sought (to the extent it is otherwise valid).

### ***Disinterestedness***

27. Although certain of the Ordinary Course Professionals may hold unsecured claims against the Debtors for prepetition services rendered to the Debtors, the Debtors do not believe that any of the Ordinary Course Professionals have an interest adverse to the Debtors, their creditors or other parties-in-interest on the matters for which they would be

employed, and thus all of the Ordinary Course Professionals whom the Debtors propose to retain would meet the special counsel retention requirement under section 327(e) of the Bankruptcy Code. The Debtors therefore propose that Ordinary Course Professionals be excused from filing an affidavit of disinterestedness pursuant to Bankruptcy Rule 2014, except that each Ordinary Course Professional that is an attorney located in the United States shall be required to file with this Court and to serve upon the Interested Parties an Affidavit of Disinterestedness (the "OCP Affidavit") no later than 45 days after the date that the Ordinary Course Professional first performs postpetition services for the Debtors. A form of the OCP Affidavit is attached hereto as Exhibit C. The Debtors propose that the U.S. Trustee, any Committee and the Debtors' postpetition lenders shall have 20 days after the receipt of each OCP Affidavit (the "Affidavit Objection Deadline") to object to the retention of such Ordinary Course Professional. An objecting party shall file its objection with the Court and serve the objection on the Interested Parties and the applicable Ordinary Course Professional so that it is received on or before the Affidavit Objection Deadline.

28. If any such objection cannot be resolved informally within 20 days after the Affidavit Objection Deadline, the matter shall be scheduled for hearing before this Court at the next regularly scheduled omnibus hearing date or at such time as may be agreed upon by the Ordinary Course Professional, the Debtors and the objecting party. If no objection is filed and served prior to the Affidavit Objection Deadline, the Debtors shall be deemed to be authorized to retain such Ordinary Course Professional without further action by the Court or any other party.

29. Relief similar to that requested herein has been granted by courts in this District in numerous cases. See, e.g., In re Interep Nat'l Radio Sales, Inc., No. 08-11079 (RDD) (Bankr. S.D.N.Y. April 22, 2008) (authorizing \$35,000 per month per ordinary course



professional or \$150,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re DJK Residential LLC, No. 08-10375 (JMP) (Bankr. S.D.N.Y. Feb. 5, 2008) (authorizing \$50,000 per month per ordinary course professional or \$500,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re PLVTZ, Inc., No. 07-13532 (REG) (Bankr. S.D.N.Y. Nov. 9, 2007) (authorizing \$35,000 per month per ordinary course professional or \$210,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re Dana Corp., No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 6, 2006) (authorizing \$50,000 per month per ordinary course professional or \$1,200,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Jan. 25, 2006) (authorizing \$50,000 per month per ordinary course professional or \$500,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re Musicland Holding Corp., No. 06-10064 (SMB) (Bankr. S.D.N.Y. Jan. 18, 2006) (authorizing \$50,000 per month per ordinary course professional or \$500,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Nov. 4, 2005) (authorizing \$50,000 per month per ordinary course professional or \$500,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re Loral Space & Commc'ns Ltd., No. 03-41710 (RDD) (Bankr. S.D.N.Y. Sept. 2, 2003) (authorizing \$25,000 per month per ordinary course professional or \$250,000 aggregate per ordinary course professional over the course of the chapter 11 cases); In re WorldCom, Inc., No. 02-13533 (AJG) (Bankr. S.D.N.Y. Sept. 4, 2002) (authorizing \$100,000 per month per ordinary course professional or \$2,000,000 per month in aggregate for all ordinary course professionals).<sup>6</sup>

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<sup>6</sup> The unreported orders listed in the text above are not attached to this Motion. Copies of these orders will be made available to the Court at or prior to the hearing on this Motion and are available to other parties

### **Notice**

30. No trustee or examiner has been appointed in these chapter 11 cases.

Notice of this Motion has been provided to: (a) the U.S. Trustee; (b) counsel to The Bank of New York Mellon and JPMorgan Chase Bank, N.A., as agents for the Debtors' prepetition senior secured credit facility; (c) counsel to Deutsche Bank, A.G., New York, as agent for the Debtors' prepetition asset-backed secured revolving credit facility and as agent and lender under the Debtors' postpetition financing facility; (d) counsel to The Bank of New York Trust Company, N.A., in its capacity as the indenture trustee for the remaining outstanding Notes; (e) counsel to the North American OEMs; (f) counsel to Asahi Tec; (g) counsel to RHJI; and (h) those creditors holding the 50 largest unsecured claims against the Debtors' estates. The Debtors submit that no other or further notice need be provided.

### **No Prior Request**

31. No prior request for the relief sought in this Motion has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the court (a) enter an order substantially in the form attached hereto as Exhibit D, granting the relief requested herein; and (b) grant such other and further relief to the Debtors as the court may deem proper.

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(continued...)

upon request from counsel to the Debtors.

Dated: June 2, 2009  
New York, New York

Respectfully submitted,

/s/ Ryan T. Routh

Richard H. Engman

JONES DAY

222 East 41st Street

New York, New York 10017

Telephone: (212) 326-3939

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- and -

Heather Lennox

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PROPOSED ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

**EXHIBIT A**

## **NONEXCLUSIVE SCHEDULE OF ORDINARY COURSE PROFESSIONALS**

### **Financial Consultants**

Stout Risius and Ross  
Donnelly Penman and Partners

### **Legal Services**

Abbott Nicholson PC  
Baker & McKenzie LLP  
Barnes & Thornburg  
Bodman LLP  
Butzel Long  
Cantor Colburn LLP  
Clark Hill PLC  
Dickie, McCamey & Chilcote, P.C.  
Dickinson Wright PLLC  
Giarmarco, Mullins & Horton, P.C.  
Gowling Lafleur  
Harrington Dragich PLLC  
Jackson Lewis LLP  
Kienbaum, Oppewahl, Hardy & Pelton, P.L.C.  
Krieg Devault LLP  
LeVasseur & LeVasseur, P.C.  
McCarter & English LLP  
McDonald Hopkins LLC  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
Sandra Nieman  
Scott, Scriven & Wahoff LLC  
Steve Schwartz, Esq.  
The Legal Department, PLLC  
Vorys, Sater, Seymour and Pease

### **Accounting/Tax Services**

Crowe Horwath LP  
Deloitte Tax LLP  
Diversified Property Solutions  
KPMG LLP

### **Public Relations Professional**

Our Two Cents Media

### **Special Committee Advisors**

Miller, Canfield, Paddock and Stone, P.L.C.  
Applied Strategies LLC (whose contract  
may be assigned to Mesirow Financial  
Consulting, LLC)

**EXHIBIT B**



Only the Westlaw citation is currently available.

United States District Court, D. Delaware.  
In Re: FIRST MERCHANTS ACCEPTANCE  
CORPORATION, a Delaware Corporation, Debtor.  
**No. 97-1500 JJF.**

Dec. 15, 1997.

Laura Davis Jones, Esquire, Robert S. Brady, Esquire, Edwin J. Harron, Esquire of Young, Conaway, Stargatt & Taylor, Wilmington, Special Counsel: Robert E. Richards, Esquire, of Sonnenschein Nath & Rosenthal, Chicago, IL, for Debtor and Debtor-in-Possession.

Patricia A. Staiano, Esquire, United States Trustee, Daniel K. Astin, Esquire of the Office of the U.S. Trustee, Philadelphia, PA, for the United States Trustee.

## OPINION

FARNAN, Chief J.

\*1 Presently before the Court in this Chapter 11 case is a Motion For An Order Pursuant To Sections 363 and 105 Of the Bankruptcy Code Approving (A) Consultation and Assistance Agreement between the Debtor and Ugly Duckling Corporation and (B) Break-Up Fee Agreement In Connection With Proposal For a Chapter 11 Plan (D.I.391) filed by the Debtor, First Merchants Acceptance Corporation (the "Debtor" or "First Merchants"). The United States Trustee (the "Trustee") has filed an objection to the Debtor's Motion to enter into a Consultation and Assistance Agreement with Ugly Duckling Corporation ("UDC"). For the reasons set forth below, the Court will deny the Motion insofar as it pertains to the Consultation and Assistance Agreement.<sup>FN1</sup>

<sup>FN1</sup>. It is the Court's understanding that no objection has been filed with regard to the Break-Up Fee Agreement.

## BACKGROUND

On July 11, 1997, First Merchants filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtor is continuing to operate and manage its properties, affairs and assets as a debtor-in-possession. Although no trustee or examiner has been sought or appointed in this case, An Official Committee of Unsecured Creditors (the "Committee") was appointed by the Trustee on July 28, 1997.

On October 22, 1997, after considering proposals from four interested parties, the Debtor, the Committee and Financial Security Assurance, Inc., ("FSA") selected a plan proposed by UDC. In connection with the UDC plan proposal, the Debtor seeks the Court's approval to enter into a "Consultation and Assistance Agreement" with UDC, in which UDC will assist the Debtor with its loan servicing operations.

The Debtor is a national specialty finance company, primarily engaged in the business of servicing retail installment sale contracts for the purchase of new or used automobiles, trucks and sport utility vehicles by consumers who have limited access to traditional sources of credit. These contracts were acquired by the Debtor pre-petition and have been coined by the Debtor as "Receivables." The Debtor has entered into various agreements with various entities concerning these Receivables. Based on these agreements, the Receivables can be divided into three groups: (1) the FSA Receivables<sup>FN2</sup>, (2) the Bank Group Receivables<sup>FN3</sup>, and (3) the Greenwich Receivables.<sup>FN4</sup> Pursuant to a motion dated August 28, 1997, UDC, as an agent for the Bank Group, intends to purchase the Bank Group

Receivables from the Debtor. After the sale, the Debtor intends to service the Bank Group receivables pursuant to an agreement entered into between the Debtor and UDC until confirmation of the Debtor's Chapter 11 Plan. However, pursuant to the Consultation and Assistance Agreement (the "Consultation Agreement"), which is the subject of the Trustee's current objection, the Debtor seeks UDC's assistance with the task of servicing the Bank Group Receivables, as well as the FSA and Greenwich Receivables.

**FN2.** With respect to these receivables, the Debtor entered into a securitization transaction in which certain notes and/or certificates were issued that are payable from the proceeds of and collection and payments on the receivables. FSA guaranteed the payment obligations on these notes and upon payment, will be subrogated to the rights of the holders of these notes. By agreement between the Debtor and FSA, the Debtor currently services the FSA Receivables.

**FN3.** The Bank Group Receivables are non-securitized receivables that secure obligations of the Debtor to certain of its main pre-petition warehouse line lenders, known as the Bank Group. UDC purchased 78% of these receivables, and has an agreement to purchase the remaining 22% from Cerebrus Partners, LP and Bear Stearns.

**FN4.** The Debtor granted Greenwich Capital Financial Products, Inc. ("Greenwich") a security interest in the Greenwich Receivables. Pursuant to an agreement between the Debtor and Greenwich, the Debtor currently services these Receivables.

## DISCUSSION

The Trustee objects to the Consultation Agreement between the Debtor and UDC based on [Section 327\(a\) of the Bankruptcy Code](#). The Trustee contends that by entering into the Consultation Agreement with UDC, the Debtor is employing a "professional," as that term is used in [Section 327](#), and that UDC's creditor status in this case precludes its retention.

**\*2** In contrast, the Debtor contends that [Section 327](#) is not, in any way, implicated by the instant Motion. Rather, the Debtor prefers to characterize its Motion as a Motion under [Section 363](#), in which the Debtor seeks to retain assistance with the daily operation of its business, and accordingly, the "interestedness" of the entity to be retained is not in issue.

[Section 327\(a\) of the Bankruptcy Code](#) provides:

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

**11 U.S.C. § 327(a).** Although the term "professional" is not statutorily defined, it has been judicially defined by a number of courts examining the issue.

The judicial trend with respect to the definition of "professional" can be divided into two camps, those adopting a quantitative analysis and those adopting a qualitative analysis. Under the quantitative analysis, the definition of "professional" is limited to those occupations which play a central role in the administration of the debtor proceeding, and not those occupations which are involved in the day-to-day mechanics of the debtor's business. *In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr.S.D.N.Y.1981); *see also In re River Ranch*, 176 B.R. 603, 604 (Bankr.M.D.Fla.1994); *In re*



*Biocoastal Corporation*, 149 B.R. 216, 218 (Bankr.M.D.Fla.1993) (defining professional as person who assists debtor in administration of bankruptcy). Under the qualitative analysis, a “professional” is an employee that is given discretion or autonomy in some part of the administration of the debtor's estate. *In re Fretheim*, 102 B.R. 298, 299 (Bankr.D.Conn.1989) (espousing qualitative analysis and criticizing quantitative approach as “difficult to apply and subject to arbitrary and inconsistent results”); *In re Semenza*, 121 B.R. 56, 57 (Bankr.D.Mont.1990) (adopting qualitative analysis).

In determining the manner in which this Court should approach the definition of “professional,” the Court makes two observations regarding the differing approaches. First, it is the Court's view that the quantitative and qualitative analyses need not be mutually exclusive. While the quantitative test focuses on the significance of the individual's role to the debtor proceeding and the qualitative test focuses on the amount of discretion the individual has in accomplishing that role, the bottom line of both tests involves an examination of the types of duties to be undertaken by the individual. See *In re Sieling Associates Limited Partnership*, 128 B.R. 721, 722 (Bankr.E.D.Va.1991) (describing *Fretheim* qualitative approach as only “deviating slightly” from *Seatrain* quantitative approach). Second, it is the Court's view that both tests are somewhat vague and difficult to apply. While other courts have agreed with this view, they have been reluctant to propose an alternative method or to improve upon the methods previously discussed. See e.g. *In re First Security Mortgage Company, Inc.*, 117 B.R. 1001, 1006-1007 (Bankr.N.D.Okla.1990) (criticizing both approaches, but assuming arguing that employee in issue was “professional” and thereby avoiding clarification of approaches).

\*3 In an effort to lend some clarity to this issue, the Court has examined the cases to discern a list of factors to be considered and applied in making the determination of whether an employee is a

“professional” within the meaning of Section 327. Although the list is not exclusive, the Court believes that it reflects many of the considerations that have impacted judicial decisions in this area. The factors embrace both the qualitative and quantitative approaches and include the following: (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization FN5, (2) whether the employee is involved in negotiating the terms of a Plan of Reorganization FN6, (3) 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; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate, i.e. the qualitative approach, (5) the extent of the employee's involvement in the administration of the debtor's estate, i.e. the quantitative approach; and (6) whether the employee's services involve some degree of special knowledge or skill FN7, such that the employee can be considered a “professional” within the ordinary meaning of the term. In applying these factors, the Court stresses that no one factor is dispositive and that the factors should be weighed against each other and considered in toto.

FN5. *In re Biocoastal*, 149 B.R. at 218.

FN6. *In re Sieling Associates Ltd. Partnership*, 128 B.R. at 723 (concluding that environmental consultant was not “professional” within meaning of § 327, where consultant was not employed to assist debtor with reorganization, or with sale or purchase of assets).

FN7. *In re Metropolitan Hospital*, 119 B.R. 910, 916 (Bankr.E.D.Pa.1990) (“[A] professional should be considered someone with a special knowledge and skill usually achieved by study and educational attainments whether licensed or not.”)

Applying the above factors to the instant case, the Court concludes that UDC is a professional within the meaning of [Section 327\(a\)](#). It is clear from the terms of the Consultation Agreement, that the type of work which UDC intends to perform for the Debtor is work that requires a specialized skill or knowledge, such that UDC can be considered a “professional” within the ordinary and common sense meaning of the term. However, what is unclear in this case is whether UDC's employment pertains to the ordinary course of business of the Debtor, or whether UDC's employment pertains to the administration of the Debtor's estate. According to the terms of the Consultation Agreement, UDC is to assist the Debtor in servicing its Receivables. In this case, this function is simultaneously linked with the ordinary operations of the Debtor, in that the Debtor is by trade a national specialty finance company, primarily engaged in servicing retail installment sales contracts, and with the administration of the Debtor's estate, in that the Receivables that will be serviced under the Consultation Agreement form the primary asset of the Debtor's estate. Because these Receivables are so vital to the underlying estate, quantitatively speaking, UDC's role, from an estate administration point of view, would be quite significant.

Given the overlap between the Debtor's estate administration and the Debtor's ordinary business operations in this case, the Court finds the amount of discretion afforded UDC in the Consultation Agreement to be troublesome. For example, the terms of the original draft Consultation Agreement provided that consultation, advice, evaluation, and servicing of receivables would be in the sole discretion of UDC, and that UDC, in its sole discretion, could employ outside personnel or consultants without the scrutiny of the Court, creditors, or the U.S. Trustee, and by implication, without the supervision, control, or advance approval of the Debtor. Although the Debtor has submitted a revised Consultation Agreement which provides that “UDC shall not utilize third party professionals or consultants except such persons as the Debtor currently

utilizes or as approved by the Court or the United States Trustee's office,” the revised Consultation Agreement still provides that UDC's assistance will be within its sole discretion. Consultation Agreement, § 1.A. Moreover, the revised Consultation Agreement also provides that “[t]o the extent deemed necessary and appropriate by UDC, [UDC] will support the Debtor with specific accounting, record keeping and cash management functions with respect to billing, payment and collection of the Serviced Receivables, except that UDC will not hereunder, prior to the effective date of any plan, collect or distribute property of the estate.” Consultation Agreement, § 1.B. Again, under these terms, UDC will be intimately involved in the *management* of these receivables, the primary asset remaining in the Debtor's estate, and in accomplishing tasks that are within the fiduciary duties undertaken by a debtor-in-possession. As such, it is the Court's view that such unbridled discretion, though less worrisome than the discretion provided for in the original draft, still weighs against the Debtor's position that [Section 327](#) is inapplicable and that UDC is not a “professional.”

\*4 Of course, if these Receivables are viewed as simply a part of what the Debtor does as a national specialty financing company, and not as the primary assets of the Debtor's estate, then, despite the discretion afforded UDC, UDC would simply be functioning to assist the Debtor's daily business operations. However, given the extent of the overlap between the ordinary business operations and the debtor's estate administration in this case, the fact that these Receivables comprise the bulk of the remaining estate, and the fact that the Consultation Agreement affords UDC wide discretion in its employment, the Court does not believe it proper to view UDC's role as purely pertaining to the Debtor's ordinary course of business. Indeed, in the Court's view, UDC's role under the terms of the Consultation Agreement is akin to that of a professional, specialized “collection agency.” In *In re Metropolitan Hospital*, the United States Bankruptcy Court for the Eastern District of

Pennsylvania concluded that a company that was retained to perform debt collection, as well as other services, was a “professional person” within the meaning of [Section 327](#). 119 B.R. at 918, *see also Windsor Communications Group, Inc. v. Rogers and Rogers Inc.*, 54 B.R. 844, 848-49 (Bankr.E.D.Pa.1985) (concluding that collection agency falls within meaning of “professional person” under [§ 327](#), particularly where collection of accounts receivable was central to administration of case), *vacated by*, 68 B.R. 1007 (E.D.Pa.1986) (vacating decision because genuine issues of material fact existed, but declining to rule out possibility that collection agency could be “professional person”). Of additional importance to the Court in *Metropolitan Hospital* was the company's role in collecting receivables that enabled the debtor to increase its cash flow and continue to operate and try to reorganize. *Id.* at 918.

Similarly, UDC's role under the Consultation Agreement extends beyond mere debt collection to the evaluation and assessment of the Debtor's equipment, personnel, organization, current and future facilities, and certain procedures and policies, relating to servicing the Receivables. Although other entities performing these types of functions have been referred to as “managers” or “management consultants,” courts examining the duties of these entities have concluded that they fall within the ambit of [Section 327](#). *See e.g. In re Marion Carefree Ltd. Partnership*, 171 B.R. 584, 588 (Bankr.N.D.Ohio 1994) (concluding “manager” was within definition of professional, where manager had significant responsibility and discretion in area of personnel management, and performed general accounting, payroll accounting and cash management functions which played critical role in providing estate with financial data). Moreover, it is not disputed that the Receivables in this case play a substantial role in the Debtor's estate and that maximizing recovery of these Receivables is important to the Debtor's continued operations and reorganization.

\*5 Accordingly, given the nature of the work to be performed by UDC, the skill involved in that work, the degree of discretion afforded UDC in performing that work, and the importance of that work to the estate administration, the Court concludes that the factors discussed by the Court weigh in favor of the conclusion that [Section 327](#) is applicable to UDC's retention and that UDC's role falls within the definition of “professional.” Because UDC is a creditor of the estate, UDC cannot satisfy the disinterestedness requirement of [Section 327](#), and accordingly, the Court cannot approve the Debtor's Motion to retain UDC.

## CONCLUSION

For the reasons discussed, the Debtor's Motion For An Order Pursuant To [Sections 363](#) and [105 Of the Bankruptcy Code](#) Approving Consultation and Assistance Agreement between the Debtor and Ugly Duckling Corporation (D.I.391) will be denied.

An appropriate Order will be entered.

## ORDER

At Wilmington this 15 day of December 1997, for the reasons set forth in the Opinion issued this date;

IT IS HEREBY ORDERED that the Debtor's Motion For An Order Pursuant To [Sections 363](#) and [105 Of the Bankruptcy Code](#) Approving Consultation and Assistance Agreement between the Debtor and Ugly Duckling Corporation (D.I.391) is DENIED.

D.Del.,1997.

In re First Merchants Acceptance Corp.

Not Reported in F.Supp., 1997 WL 873551 (D.Del.)

END OF DOCUMENT

**EXHIBIT C**

-----X	
	:
In re	:
	:
	:
Metaldyne Corporation, <i>et al.</i> ,	:
	:
	:
Debtors.	:
	:
	:
-----X	

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ )      SS:

1. I am a member, partner or similar representative of the following firm  
(the "Firm"), which maintains offices at the address and phone number listed below:

Address and Phone Number:

CLI-1651323v25

were commenced (the "Petition Date"), the Debtors have requested that the Firm provide services (or continue to provide services) to the Debtors, and the Firm has agreed to provide such services. Accordingly, the Firm is filing this Affidavit pursuant to the Order.

3. The Firm, through me, and other members, partners, associates or employees of the Firm, has provided, or plans to provide, the following services to the Debtors from and after the Petition Date: [\_\_\_\_\_].

4. To the best of my knowledge, information, and belief, formed after due inquiry, (a) the Firm does not currently provide services to any party in any matter related to the Debtors and (b) the Firm does not represent or hold an interest adverse to the Debtors.

5. The Firm may provide services to certain creditors of the Debtors or other parties in matters that are unrelated to the Debtors, but the Firm's work for these clients will not include the provision of services on any matters relating to the Debtors' chapter 11 cases.

6. The Firm believes that it is owed approximately \$[\_\_\_\_\_] on account of services rendered and expenses incurred prior to the Petition Date in connection with the Firm's employment by the Debtors.

7. The Firm further states that it has not shared, has not agreed to share, nor will it agree to share, any compensation received in connection with these chapter 11 cases with any party or person, although such compensation may be shared with any member or partner of, or any person employed by, the Firm.

8. If, at any time during its employment by the Debtors, the Firm discovers any facts bearing on the matters described herein, the Firm will supplement the information contained in this Affidavit.

Dated \_\_\_\_\_

By: \_\_\_\_\_  
[name]

Sworn to and subscribed before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2009

**EXHIBIT D**



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re : Chapter 11  
Metaldyne Corporation, *et al.*, : Case No. 09-13412 (MG)  
Debtors. : (Jointly Administered)  
-----X

**ORDER, PURSUANT TO SECTIONS 105(a), 327  
AND 330 OF THE BANKRUPTCY CODE AND BANKRUPTCY  
RULE 2014(a), AUTHORIZING DEBTORS AND DEBTORS  
IN POSSESSION TO RETAIN, EMPLOY AND PAY CERTAIN  
PROFESSIONALS IN THE ORDINARY COURSE OF THEIR BUSINESSES**

This matter coming before the Court on the Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 327 and 330 of the Bankruptcy Code and Bankruptcy Rule 2014(a), for an Order Authorizing Them to Retain, Employ and Pay Certain Professionals in the Ordinary Course of Their Businesses (the "Motion"),<sup>1</sup> filed by the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"); the Court having reviewed the Motion and the Affidavit of Thomas A. Amato filed in support of the Debtors' first day papers (the "Affidavit") and having considered the statements of counsel with respect to the Motion at a hearing before the Court (the "Hearing"); the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (c) notice of the Motion and the Hearing was sufficient under the circumstances and (d) the Ordinary Course Professionals and the Service Providers are not "professionals" within the meaning of section 327(a) of the Bankruptcy Code; and the Court

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

having determined that the legal and factual bases set forth in the Motion and the Affidavit and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 105(a), 327 and 330 of the Bankruptcy Code and Bankruptcy Rule 2014(a), to the extent deemed necessary or appropriate by the Debtors, the Debtors are authorized to retain and employ Ordinary Course Professionals and Service Providers in the ordinary course of the Debtors' businesses, effective as of the Petition Date, on the terms set forth herein.
3. The Service Providers include, without limitation: (a) actuaries; (b) employee benefits and human resources consultants; (c) engineers and designers; (d) environmental consultants and technicians; (e) information technology consultants; (f) insurance brokers; (g) risk management consultants; (h) environmental consultants; (i) communications experts; and (j) trial experts. The Service Providers (a) are not included within the definition of Ordinary Course Professionals used herein; and (b) are not subject to the OCP Fee Limits, the OCP Payment Procedures or any other restrictions on Ordinary Course Professionals described herein.
4. The Debtors are hereby permitted to pay each Ordinary Course Professional, including those identified on the OCP List attached to the Motion as Exhibit A, without prior application to the Court, subject to the following OCP Payment Procedures:
  - (a) The Debtors may pay 100% of the fees and disbursements incurred by an Ordinary Course Professional upon the submission to, and approval by, the Debtors of an appropriate monthly invoice setting forth in reasonable detail the nature of the services rendered and disbursements actually incurred during the month; provided, however, that all payments to Ordinary Course Professionals be subject to the OCP Fee Limits. The OCP Fee Limits are, for each

Ordinary Course Professional, (a) \$35,000 in fees during any month and (b) \$200,000 in total fees during the pendency of the Debtors' chapter 11 cases. The OCP Fee Limits apply only to the payment of fees and not to the reimbursement of expenses.

- (b) To the extent that the fees sought by any Ordinary Course Professional for a month exceed the monthly OCP Fee Limit of \$35,000.00, then such Ordinary Course Professional shall submit a statement of the fees incurred during the applicable month (a "Compensation Statement") to the following parties (collectively, the "Interested Parties"): (i) the Debtors, c/o Metaldyne Corporation, 47603 Halyard Drive, Plymouth, Michigan 48170 (Attn: David McKee, Esq.); (ii) Jones Day, 222 East 41st Street, New York, New York 10017 (Attn: Richard H. Engman, Esq.); (iii) Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190 (Attn: Heather Lennox, Esq.); (iv) the attorneys for any statutory committees appointed in these cases; and (v) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Paul Schwartzberg and Richard Morrissey). Pending review of the Compensation Statement by the Interested Parties, the Debtors are authorized, but not required, to pay the Ordinary Course Professional's monthly fees up to the OCP Fee Limit and reimburse any expenses of the Ordinary Course Professional.
- (c) The Interested Parties shall have 25 days after the receipt of the Compensation Statement (the "Review Period") to review the Compensation Statement and object to the additional fees above the OCP Fee Limit requested by such Ordinary Course Professional. If any of the Interested Parties objects to the payment of the additional fees sought in a Compensation Statement, it shall serve a written statement of its objection on the Ordinary Course Professional and the other Interested Parties so that it is *received* by such parties before the end of the Review Period. If the Debtors, the applicable Ordinary Course Professional and the objecting party or parties cannot informally resolve the objection(s) then the Ordinary Course Professional will be required to submit a formal application or request for payment to the Court for the additional compensation or waive its right to any monthly fees in excess of the OCP Fee Limit. If no Interested Party timely objects to the payment of fees sought in a Compensation Statement, then the Debtors shall be deemed authorized to pay the additional compensation sought (to the extent it is otherwise valid).

- (d) Likewise, if the aggregate fees incurred by an Ordinary Course Professional during the pendency of these cases would exceed the OCP Fee Limit of \$200,000 for the case if the professional's most recent request were to be paid, then until the earlier of (i) the termination of the Ordinary Course Professional's employment or (ii) further order of the Court addressing the issue, the Ordinary Course Professional shall submit to the Interested Parties each month a monthly statement (a "Monthly Statement") for all further compensation sought in these cases. The Interested Parties will have 25 days after service of each Monthly Statement (the "Monthly Review Period") to review the Monthly Statement and object to the fees requested by such Ordinary Course Professional. If any of the Interested Parties objects to the payment of the additional fees sought in a Monthly Statement, it shall serve a written statement of its objection on the Ordinary Course Professional and the other Interested Parties so that it is *received* by such parties before the end of the Monthly Review Period. If the Debtors, the applicable Ordinary Course Professional and the objecting party or parties cannot informally resolve the objection(s), then the Ordinary Course Professional will be required to submit a formal application or request for payment to the Court for the additional compensation or waive its right to any fees in excess of the OCP Fee Limit. If no Interested Party timely objects to the payment of fees, then the Debtors shall be deemed authorized to pay the additional compensation sought (to the extent it is otherwise valid).

5. The Ordinary Course Professionals are excused from filing an affidavit of disinterestedness pursuant to Bankruptcy Rule 2014, except that each Ordinary Course Professional that is an attorney located in the United States is required to file with this Court and to serve upon the Interested Parties an Affidavit of Disinterestedness, substantially in the form attached to the Motion as Exhibit C (the "OCP Affidavit"), no later than 45 days after the date that the Ordinary Course Professional first performs postpetition services for the Debtors.

6. The U.S. Trustee, any Committee and the Debtors' postpetition lenders shall have 20 days after the receipt of each OCP Affidavit (the "Affidavit Objection Deadline") to object to the retention of such Ordinary Course Professional. An objecting party shall file its objection with the Court and serve the objection on the Interested Parties and the applicable

Ordinary Course Professional so that it is received on or before the Affidavit Objection Deadline. If any such objection cannot be resolved informally within 20 days after the Affidavit Objection Deadline, the matter shall be scheduled for hearing before this Court at the next regularly scheduled omnibus hearing date or at such time as may be agreed upon by the Ordinary Course Professional, the Debtors and the objecting party. If no objection is filed and served prior to the Affidavit Objection Deadline, the Debtors are authorized to retain such Ordinary Course Professional without further action by the Court or any other party.

7. Notwithstanding any of the foregoing, the Debtors shall separately retain any Ordinary Course Professional or Service Provider that becomes materially involved in the administration of these cases, pursuant to section 327 of the Bankruptcy Code.

Dated: New York, New York  
\_\_\_\_\_, 2009

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UNITED STATES BANKRUPTCY JUDGE