

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
RED TOP RENTALS, INC.) CAUSE NO: 09-05229-JKC-11
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DEBTOR.)
_____)
)
)
)

**FIRST DAY MOTION REQUESTING AUTHORITY TO
CONTINUE USE OF EXISTING BANK ACCOUNTS, CASH
MANAGEMENT SYSTEM, CHECKS AND BUSINESS FORMS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

In support of the above entitled motion (this “Motion”), Red Top Rentals, Inc., the debtor and debtor-in-possession (the “Debtor”), by counsel, states:

1. The Debtor filed its petition for relief under Title 11, Chapter 11 of the United States Code on April 20, 2009 (the “Petition Date”).
2. Since the Petition Date, the Debtor has continued in the possession of its property pursuant to §§ 1107 and 1108 of the Bankruptcy Code, codified at 11 U.S.C. §101, *et seq.* (the “Code”), and is a debtor-in-possession. No trustee or examiner has been appointed in this case. No committees have been appointed or designated.
3. This Court has jurisdiction over this Motion and this matter pursuant to 28 U.S.C. §157(b). Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).
4. The statutory predicates for relief are §§103, 105(a), 363(b)(1), 1106, 1107(a) and 1108 of the Code.

5. The United States Trustee for the Southern District of Indiana (the “UST”) has established certain operating guidelines for a debtor-in-possession that operates its businesses. One such provision requires a chapter 11 debtor-in-possession to open new bank accounts and to close all existing accounts. This requirement, designed to provide a clear line of demarcation between pre- and post-petition claims and payments, helps to protect against the inadvertent payment of prepetition claims by preventing the banks from honoring checks drawn before the bankruptcy filing.

6. Before the Petition Date, the Debtor, in the ordinary course of its business, received cash from customers either by checks or credit cards. Checks mailed to the Debtor were deposited into a lock box at M&I Marshall & Ilsley Bank (“M&I Bank”) and held there in a cash collateral account (the “Cash Collateral Account”). Once posted to the lock box the Debtor posts the monies to the appropriate customer’s account receivable relieving the outstanding balance. Checks mailed directly to the lock box go directly to the Cash Collateral Account held at M&I Bank. The Debtor reviews those posting and posts monies to the appropriate customer’s account receivable relieving the outstanding balance.

7. Credit card payments are deposited by Harris Trust and Savings Bank into the operating disbursement account, also held at M&I Bank, pursuant to a certain Merchant Services Agreement. The customer’s payment is then posted directly to the customer’s account receivable relieving the outstanding balance.

8. Cash is disbursed to suppliers once a week on Friday. These disbursements are either on a payment cycle of 45 to 60 days for credit accounts or cash prior to goods or services being provided. On occasion the Debtor will issue checks for monies received on deposit for the sale of equipment which is then returned to the potential buyer.

9. The Debtor meets with M&I Bank (its primary secured lender, which has a blanket lien on all assets of the Debtor, including cash) once a week to review disbursements for the prior week based on an actual payment to suppliers.

10. Based on a cash forecast that generally spans 13 weeks, the Debtor requests funds to be transferred from the Cash Collateral Account to the disbursement account also at M&I Bank (the “Disbursement Account”) (the Cash Collateral Account and the Disbursement Account are the “Bank Accounts”) for payments in the upcoming week that are in the cash forecast. These payments range from suppliers, payroll, taxes and any debt payments coming due. The Debtor then issues payment from the Disbursement Account. These disbursements include payments to vendors, customers (for refunds), employees (for expense reimbursements), and operating expenses. Additionally, fiduciary payments are made on behalf of employees for garnishments, child support and various insurance withholdings from the Disbursement Account. Finally, tax payments are also made from the Disbursement Account for any and all taxes due. All of the above constitutes the cash management system of the Debtor (the “Cash Management System”). The Debtor and M&I Bank have negotiated at length the Cash Management System, are familiar with it and have operated successfully together under it for a number of months. The Debtor and M&I Bank expect to use the Cash Management System under the cash use and DIP loan agreements negotiated between the parties during the course of this case.

11. The Debtor believes this process is appropriate given the current situation, anticipates this situation will continue as part of a cash collateral order in this case and feels any change to this process will be disruptive and difficult to the Debtor and its primary secured creditor, M&I Bank.

12. The Debtor seeks a waiver of the UST's requirement that the Bank Accounts be closed and new postpetition bank accounts be opened. Given reliance upon it by the Debtor and M&I Bank, if enforced in these cases, compliance would cause substantial disruption in the Debtor's businesses and would impair its efforts to preserve going concern value.

13. Maintenance of the Bank Accounts would greatly facilitate the Debtor's transition to postpetition operations. To avoid delays in payment of debts incurred postpetition, and to ensure as smooth a transition into chapter 11 as possible, the Debtor should be permitted to continue to maintain the existing Bank Accounts.

14. Closing the Bank Accounts and transferring the funds in those accounts to newly created postpetition accounts would be disruptive and time consuming. In cases in this district and others, courts have waived the strict enforcement of bank account closing requirements and replaced them with alternative procedures that provide the same protection.¹

15. To guard against improper transfers resulting from postpetition honoring of prepetition checks, courts have ordered banks, with limited court-approved exceptions, not to honor any checks drawn on the accounts before the petition date. A similar waiver of the account closing requirement is necessary here. Subject to a prohibition against honoring prepetition checks without specific authorization from this Court, the Debtor requests that the Bank Accounts be deemed debtor-in-possession accounts and that the debtor be authorized to maintain and continue the use of these accounts in the same manner and with the same account numbers, styles and document forms as those employed during the prepetition period.

¹ See In re ATA Airlines, Inc., No. 04-19866-BHL-11 (Bankr.S.D. Ind. 2004); In re American Commercial Lines, LLC, No. 03-90305-BHL-11 (Bankr.S.D. Ind. 2003); In re Trans World Airlines, Inc., No. 01-00056 (PJW) (Bankr. D. Del. 2001); In re AmeriServe Food Distrib., Inc., No. 00-358 (PJW) (Bankr. D. Del. 2000).

16. If the relief requested herein is granted, the Debtor will not pay, and each of the banks where the Bank Accounts are maintained will be directed not to pay, any debts incurred before the Petition Date other than as specifically authorized by this Court.

17. The Debtor has a store of checks on hand and other supplies of existing business forms, including invoices and receipts, which would last a number of months under normal circumstances (the “Business Forms”). To minimize expense to their estate, the Debtor also requests authority to continue to use all Business Forms. Because of the nature of the Debtor’s businesses, parties doing business with the Debtor will be aware of the Debtor’s status as a chapter 11 debtor-in-possession. Changing Business Forms would be unnecessary and burdensome to the estate, as well as expensive and disruptive to the Debtor’s business operations. For this reason, the Debtor requests authority to use their checks and business forms without placing the label “Debtors-in-Possession” on such checks or forms.

18. The Debtor hereby seeks authority to continue utilizing their current Cash Management System. Given the size of the Debtor’s operations, as well as the preservation and enhancement of their going concern value, a successful reorganization of the Debtor’s businesses will be inhibited if there is substantial disruption in the Debtor’s cash management procedures. It is essential, therefore, that the Debtor be permitted to continue to consolidate the management of its cash as needed and in the amounts necessary to continue the operation of its businesses.

19. The basic structure of the Cash Management System described herein constitutes the Debtor’s ordinary, usual and essential business practice. The Cash Management System is similar to those commonly employed by corporate enterprises comparable in size and complexity to the present case. The widespread use of such systems is attributable to the numerous benefits they provide, including the ability: (i) to tightly control corporate funds; (ii) to

ensure cash availability; and (iii) to reduce administrative expenses by facilitating the movement of funds and the development of timely and accurate account balance and presentment information.

20. In addition, given the corporate and financial structure of the Debtor, it would be difficult, if not impossible, for it to establish an entirely new system of accounts and a new Cash Management System. If the Debtor was required to open separate accounts as debtors-in-possession and rearrange its Cash Management System, there would be delays in the Debtor's ability to operate its businesses. Thus, under the circumstances, maintenance of the Debtor's Cash Management System is not only essential, it is also in the best interests of the estate and creditors. Furthermore, preserving the usual business atmosphere and avoiding the distractions that would inevitably be attendant with any disruption in the Cash Management System will facilitate the Debtor's chapter 11 efforts. If the Debtor is not permitted to continue to utilize its Cash Management System in its current form, its operations will be severely, and perhaps, irreparably, impaired. Accordingly, the Court should authorize the Debtor's continued use of the existing Cash Management System.

21. Section 105(a) of the Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of §105(a) is "to assure the bankruptcy courts' power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." 2 Collier, Bankruptcy ¶ 105.02, at 105-4 (15th rev. ed. 1988). Thus, Code §105(a) essentially codifies the Bankruptcy Court's inherent equitable powers.

22. In conjunction with §105(a), §363(b)(1) of the Code provides a mechanism for the debtor to use property of the estate out of the ordinary course (of distribution under the Code).

Sections 1106, 1107 and 1108 provide that a debtor in possession has the powers of a trustee to operate on ongoing business, including “an implied duty of the debtor-in-possession to ‘protect and preserve the estate, including an operating business’ going-concern value” In re CEI Roofing, Inc., 315 B.R. 50, 59 (Bankr.N.D. Tex 2004) (citing In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr.N.D.Tex.2002)).

23. Bankruptcy courts routinely grant chapter 11 debtors authority to continue utilizing existing cash management systems and treat requests for such authority as a relatively “simple matter.” In re Baldwin-United Corp., 79 B.R. 321, 327 (Bankr. S.D. Ohio 1987). See also In re Charter Co., 778 F.2d 617, 621 (11th Cir. 1985) (affirming decision denying a creditor’s motion for leave to appeal the bankruptcy court’s cash management order, holding that authorizing the Debtors to utilize their prepetition “routine cash management system” was “entirely consistent” with applicable provisions of the Code).

24. Likewise, in another context, a bankruptcy court explained that a cash management system “allows efficient utilization of cash resources and recognizes the impracticabilities of maintaining separate cash accounts for the many different purposes that require cash.” In re Columbia Gas Sys., Inc., 136 B.R. 930, 934 (Bankr. D. Del. 1992), aff’d in part and rev’d in part, 997 F.2d 1039 (3d Cir. 1993). The Third Circuit agreed, emphasizing that a requirement to maintain all accounts separately “would be a huge administrative burden and economically inefficient.” Columbia Gas, 997 F.2d at 1061. See also In re Southmark Corp., 49 F.3d 1111, 1114 (5th Cir. 1995) (cash management system allows Debtors “to administer more efficiently and effectively its financial operations and assets”); and In re UNR Indus., Inc., 46 B.R. 25, 27 (Bankr. N.D. Ill. 1984) (discussing court-approved cash management system).

25. It is critical both to the continued operation of the Debtor's business and to the preservation of the value of those businesses that the Debtor continue to utilize its existing Cash Management System without disruption. Accordingly, it is appropriate and consistent with applicable provisions of the Code and case law for the Court to approve the Cash Management System in its current form.

26. The Debtor, through its internal financial controls, is able to provide a detailed, accurate reporting of all cash, checks, deposits, receipts, credit card transactions, and other moneyed transactions that existed or were in process before the Petition Date and after the Petition Date, thus providing a clear demarcation of the pre-petition assets and debts of the estate. Such detail will be provided in the schedules filed by the Debtor in this case.

27. **Statement pursuant to L.R. B-9013-3(b).** Prior to filing this Motion, below signed counsel emailed a copy of this Motion (or a substantially similar version of this Motion) to counsel for the United States Trustee. Since then, below signed counsel and counsel for the UST have discussed its contents. Additionally, below signed counsel has contacted the senior courtroom deputy to advise that a case with first day motions will be filed. The only other party arguably effected by this motion, M&I Bank, also received a copy of this Motion prior to its being filed.

28. Attached hereto as **Attachment A** is an order the Debtor has drafted regarding this Motion. The Debtor requests this order be used by the Court to grant the relief requested herein.

Request for Relief

The Debtor respectfully requests the Court grant this Motion and all just and proper relief in the premises.

Respectfully submitted,

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