

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

**FIRST DAY MOTION REQUESTING
AUTHORITY TO PAY EMPLOYEE
COMPENSATION AND BENEFITS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

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

A. JURISDICTION

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. 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).

3. The statutory predicates for relief are §§103, 105(a), 363(b)(1), 363(c)(1), 507(a)(4), 507(a)(5), 1106, 1107(a), 1108 and 1129(a)(9) of the of the Bankruptcy Code, codified at 11 U.S.C. §101, *et seq.* (the “Code”).

B. BACKGROUND

4. Since the Petition Date, the Debtor has continued in the possession of its property pursuant to 11 U.S.C. §§ 1107 and 1108, and is a debtor-in-possession. No trustee or examiner has been appointed in this case. No committees have been appointed or designated.

5. The Debtor is in the business of renting, repairing, and selling heavy equipment, primarily to contractors, and mining overburden and aggregate, on contract, for major aggregate companies.

6. The Debtor operates from corporate headquarters located at 5925 Stockberger Place, Indianapolis, Indiana, 46241 and at two other locations, one located at a second site in Indianapolis, Indiana and the other located in Louisville, Kentucky. The Debtor recently ceased operations at its Cincinnati, Ohio location.

7. The Debtor generated approximately \$17,767,703.00 in gross revenue in 2008 and anticipates it will generate approximately \$10,600,000.00 in gross revenue in 2009.

8. The Debtor intends to reorganize in this proceeding.

9. The Debtor's records show that there are 37 full-time, non-officer/non-director/non-owner employees of the Debtor (the "Employees"). None of the Employees are "insiders" or "equity security holders" of the Debtor, as those terms are defined in the Code. As of the Petition Date, the Employees were owed by the Debtor, or had accrued in their favor: (i) wages; (ii) salaries; (iii) commissions; (iv) reimbursements for business expenses; (v) vacation pay; and (vi) mileage reimbursement, (the "Compensation"). In addition to the Compensation, the Debtor also provides some or all of its Employees with the following benefits: (i) health, dental and life insurance and (ii) vehicle allowance, (the "Benefits"). As of the Petition date, the Benefits were paid and current.

10. The Employees may receive health, life and dental insurance as a Benefit of their employment with the Debtor. The Employees pay a portion or percentage of their health insurance coverage. The percentages of the insurance premium, paid by the Employees, increases as the Employees add additional family members to their insurance coverage. The percentage paid by the Employees and Red Top each month is as follows: (i) Employee only, Employee 25% or \$95.30 and Red Top 75% or \$285.89; (ii) Employee and Spouse, Employee 44.31% or \$355.33 and Red Top 55.69% or \$446.58; (iii) Employee and Children, Employee 38.52% or \$264.33 and Red Top 61.48% or \$421.84; and (iv) Entire family, Employee 48.21% or \$533.00 and Red Top 51.97% or \$572.55. The Debtor pays for life insurance, in full with no contribution from the Employees. The life insurance policy benefit, for each Employee, is in the amount of \$20,000.00. Dental coverage is paid 100% by the Employees. The Employees have the option as to whether or not they will opt for the health, life, and dental insurance through by the Debtor. All of the insurance which is the Debtor's responsibility is paid by the Debtor as invoiced and in the Debtor's ordinary course of business. As of the Petition Date, all insurance is paid and current.

11. The Debtor pays some of its Employees on an hourly basis, as wages, and some of its Employees on salary. The Debtor pays its hourly Employees' wages weekly and its salaried Employees bi-weekly. All wages and salaries paid to Employees have accrued by the payroll date. As of any payday when the hourly Employees are compensated for their wages, these Employees are paid one week in arrears. As of any payday when the salaried Employees are compensated, these Employees are paid salary current on said payday. Debtor issues payroll checks by direct deposit to some Employees while other are issued paper checks. The Employees are paid on Fridays.

12. Employees also receive vacation pay, which accrues as follows on each Employee's hiring date anniversary: (i) After working one year for Debtor – 1 week of vacation; (ii) After working 3 years for Debtor – 2 weeks of vacation; (iii) After working 7 years for Debtor – 3 weeks of vacation; (iv) After working 15 years for Debtor – 4 weeks of vacation. As of the Petition Date, there is vacation pay due and owing the Employees in the total amount of \$118,490.57.

13. Some of the Employees (i.e. those Employees who are in sales) are paid commissions in addition to their salary. These Employees accrue commissions on a "pay when paid basis." This means that the commissions accrue for the Employees on the day when the customer pays for the rental or purchase of the equipment. The Employees are paid their commissions one month in arrears, and the commissions are paid with the second pay check for the month. For example, all commissions which accrued in March 2009 are paid with the second paycheck issued to the Employees in the month of April 2009. As of the Petition Date, there are pre-petition commissions due and owing to the Employees for the period of April 1, 2009 through April 20, 2009 in the approximate total amount of \$4,500.00. All of the pre-petition commissions will be paid to the Employees on May 8, 2009 in the Debtor's ordinary course of business.

14. As part of the Compensation, the Employees are reimbursed for their business expenses and mileage which are paid to the Employees one month in arrears. The business expenses and mileage reimbursements accrue when the Employees turn in their expense reports to management. The reimbursements are paid with the first paycheck of the month. For example, all business expenses and mileage reimbursements which accrued in April 2009 are paid with the first paycheck issued to the Employees in the month of May 2009. As of the Petition Date, there are pre-petition business expenses and mileage reimbursements due and owing to the Employees for the period of April 1, 2009 through April 20, 2009 in the approximate total

amount of \$2,500.00. All of the pre-petition business expenses and mileage reimbursements will be paid to the Employees on May 1, 2009 in the Debtor's ordinary course of business.

15. Some of the Employees receive a vehicle allowance, in addition to their salary, as a Benefit. The vehicle allowance is a pre-established amount paid with the first pay check of each month to the Employee. The total amount of the vehicle allowance, which is paid by the Debtor each month as an Employee Benefit, is \$4,351.76. As of the Petition Date, all payments for the vehicle allowance are current and there are no pre-petition payments for the vehicle allowance Benefit due and owing to the Employees.

16. The Debtor uses Pay.com Incorporated ("Pay.com") as its payroll processor, and the Debtor processes and funds the payroll on the Thursday immediately preceding the Friday payroll date.

17. Some of the Compensation due certain of the Employees is subject to garnishment orders and child support orders which the Debtor is legally obligated to honor. Child support payments are paid via the Debtor's payroll service, Pay.com, and electronically transferred on the Thursday preceding a Friday payday. Garnishments are processed internally and paper checks are issued on the Monday immediately following a Friday payday.

18. In addition to the payroll, the Debtor also pays to Pay.com the following taxes which are also funded on the Thursday immediately preceding a Friday payday: (i) Federal withholding; (ii) State withholding; (iii) Local withholding; (iv) FICA (social security); (v) SUTA (state unemployment tax); and (vi) FUTA (federal unemployment tax). Pay.com then pays the funds to the appropriate taxing authority on the date on which said taxes are due and owing. The taxes will be paid in the Debtor's ordinary course of business.

19. Benefits are processed internally by the Debtor. Health, dental, and life insurance are paid as invoiced. As previously stated, all benefits are current, and there are no Benefits due and owing to the Employees.

C. CURRENT COMPENSATION AND BENEFITS

20. The Debtor's most recent payroll was paid to Employees on Friday, April 17, 2009, for the period April 4, 2009 through April 10, 2009 for the hourly wage Employees, and the period of April 4, 2009 through April 17, 2009 for the salaried Employees (the "April 17 Payroll"). The April 17 Payroll was paid prior to the filing of the petition in this case.

21. As of the Petition Date, there are pre-petition wages and salary due and owing to the Employees. The Employees paid a salary are due pre-petition wages of \$5,510.47 and the Employees paid hourly are due pre-petition wages of \$8,658.13 for total wages due and owing to the Employees of \$14,168.60. The Debtor's next payroll is scheduled for Friday, April 24, 2009. On that date, only the hourly wage Employees will be paid for the period of April 11, 2009 through April 18, 2009 (the "April 24 Payroll"). The Debtor's next pay for its salary Employees is on May 1, 2009 (the "May 1 Payroll"), and the May 1 Payroll will compensate the Employees primarily for April 18, 2009 through May 1, 2009 (the only pre-petition Compensation to be paid is for one day of wages for all Employees, unpaid business expense reimbursements, and mileage reimbursements). The Employees due pre-petition commissions will be paid these commissions on May 8, 2009.

22. The Compensation for the April 17 Payroll has been mostly paid prior to the filing of the petition by automatic deposit and accordingly, is not a priority claim; however, some of the Compensation for the April 17 Payroll is issued by paper checks, some of which may only be

processed after the filing of the petition. This will be determined merely by the date and time the Employee deposits or cashes the payroll check.

23. The wage Compensation for the April 24 Payroll and a portion of the May 1 Payroll was due and owing on the Petition Date because the Chapter 11 petition was filed in the middle of the Debtor's regular and customary hourly wage payroll period, and Employees have not yet been paid all their wages for services previously rendered to the Debtor.

24. As previously discussed, the Compensation for the Employees in the form of monthly reimbursement for employee business expenses has not been reimbursed for business expenses previously advanced and paid by them on behalf of the Debtor. As of the Petition Date, the business expenses and mileage reimbursements are due to the Employees from April 1, 2009 through the Petition Date.

25. Employees, as of the Petition Date, will have accrued vacation owed to them in varying amounts. The amount of vacation due and owing to any one Employee depends on the years of employment with the Debtor, and whether any particular Employee has already taken vacation in 2009, prior to the Petition Date.

26. The Benefits owed as of the Petition Date are paid at the beginning of each month in advance for that month. Prior to the Petition Date, the Debtor paid the Benefits for the month of April. As of the Petition Date, it can be said there are no pre-petition benefits due and owing to the Employees.

D. INSIDER COMPENSATION AND BENEFITS

27. The insiders (as that term is defined in the Code) of the Debtor as of the Petition Date are John Dowden, John Dowden II, and Cindy Dowden (collectively, the "Insiders").

28. As of the Petition Date, the Insiders were owed Compensation in the form of accrued vacation pay as follows: a) John Dowden, 3 weeks of vacation in the amount of \$32,756.02; b) John Dowden II, 3 weeks of vacation in the amount of \$5,192.31; and c) Cindy Dowden, 3 weeks of vacation in the amount of \$2,769.23. As of the Petition Date, the Insiders' salaries are current. The Insiders' annual salaries are as follows: 1) John Dowden \$200,000.00 plus commission; 2) John Dowden II \$89,999.78; and 3) Cindy Dowden \$47,999.90. John Dowden and John Dowden II both receive a vehicle allowance in the amount of \$541.82 each for a total vehicle allowance to Insiders of \$1,083.64. However, as of the Petition Date, the vehicle allowance was current.

29. As of the Petition Date, there were no Benefits owed the Insiders. The vehicle allowance and all insurance are current, because both require payment for both Benefits on the 1st day of the month. The insiders are not owed any other Compensation besides the accrued vacation. The Insiders are not owed any salary, commissions, business expenses reimbursements, or mileage reimbursement.

E. CASH COLLATERAL

30. The money to be used to fund all payments of Compensation and Benefits is the cash collateral of M&I Bank ("M&I"). M&I has agreed to allow the use of cash collateral for the payment of the Compensation and Benefits.

F. ANALYSIS

31. To the best of Debtor's knowledge, the total Compensation¹ due and owing by the Debtor to all but one Insider, John Dowden, on the Petition Date, does not exceed the sum of

¹ Including any and all accrued wages, salary, commissions, for the April 24 Payroll, May 1 Payroll and for any and all accrued vacation pay, business expense reimbursement, and mileage reimbursement.

\$10,950.00, the limitation mandated by §507(a)(4) of the Code, which grants a priority claim for each individual for wages earned within 180 days before the Petition Date for:

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual . . .
11 U.S.C. §507(a)(4).

The Debtor is not seeking to pay said Employee (including Insiders) more than the statutory limit of \$10,950.00 with this Motion. The Debtor is only seeking authority to pay each Employee and Insider the amount earned on the Petition Date, but not to exceed the statutory limitation of \$10,950.00. Additionally, the Debtor does not intend to pay any Employee or Insider for his or her accrued vacation pay in cash. Instead, the Debtor will allow the Employees to use the vacation pay accrued pre-petition for post petition paid days off from work.

32. To the best of Debtor's knowledge, the total contributions for Benefits due and owing by the Debtor to Employees does not exceed the statutory limitation established by § 507(a)(5) of the Code. Moreover, as of the Petition Date, there are no benefits due and owing to any Employee. Section 507(a)(5) of the Code, grants a priority claim for contributions to an employee benefit plan--

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, but only

(B) for each such plan, to the extent of--

(i) the number of employees covered by each such plan multiplied by \$10,950; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan. 11 U.S.C. §507(a)(5).

33. The Debtor submits that good cause exists for authorization of the payment of Compensation and Benefits as described herein to all of its Employees and Insiders in the normal course of the Debtor's business, in that the Employees and Insiders are essential and vital to the Debtor's continuing operations, and one missed payroll will likely result in many Employees leaving the employment of Debtor. Any delay in paying the Compensation and Benefits will severely disrupt the Debtor's relationship with its Employees and irreparably impair their morale at the very time when their dedication, confidence and cooperation are most critical. There is no justifiable reason Insiders should not be paid as well because they work along with Employees.

34. The Debtor must continue its corporate policy of permitting certain of its Employees to incur business related expenses and thereupon seek reimbursement thereof by submitting an expense report containing the appropriate invoices or vouchers evidencing said out-of-pocket disbursements. Finally, were the relief requested herein not to be granted, the Employees would suffer great hardship and, in many instances, financial difficulties, since the monies are needed to enable them to meet their own personal obligations.

35. The Debtor seeks authorization to pay the Compensation and Benefits that accrued in the normal course of the Debtor's business prior to the Petition Date, but are due in the normal course of the Debtor's business only after the Petition Date. This includes continuing to honor all garnishments and child support orders and paying Pay.com for its payroll processing services. It also includes continuing to honor accrued vacation pay up to the maximum amount allowed by §507(a)(4) of the Code. Further, this includes seeking an order clarifying that any payment of Compensation or Benefits, so long as it is detailed herein and the Debtor is authorized to pay it, that accrued prior to the Petition Date and was paid prior to the Petition Date, but only processed after the Petition Date or was paid and processed after the Petition Date is not a preference under §547, a

transfer under §548 or a post petition payment under §549; otherwise, Employees must worry about paying back their Compensation or Benefits.

36. In order to maintain the continuity of the Debtor's business, and to preserve the morale of the continuing labor force, it is essential that the Debtor be permitted to pay to the Employees the Compensation and Benefits which have accrued but which remain unpaid as set forth herein. It cannot be over-emphasized that the Employees are being asked to apply their time and energies to the efforts to continue operation of the business with renewed and even greater vigor. It is clearly in the best interests of the Debtor and its creditors that approval of the payments sought herein for Compensation and Benefits be made so as to avoid hardship to the Employees and also to maintain and preserve the viability of the Debtor's ongoing business.

37. Courts have recently granted similar relief to the relief requested in this Motion in other cases in the Seventh Circuit². The Seventh Circuit's decision In re Kmart Corporation, 359 Fed. 3d 866 (7th Cir. 2004), is distinguishable, and does not prohibit the Debtor from being permitted to pay payroll as requested herein. In Kmart, the Seventh Circuit upheld a district court ruling denying the Debtor permission to make critical vendor payments. The Court found that §105(a) of the Code, by itself, does not provide authority to make critical vendor payments, as the bankruptcy Court had solely relied on. The Court left open the issue of whether §363(b)(1), in conjunction with §105(a) of the Code could provide support for paying critical vendors.

38. The holding of the Kmart decision is not binding on the particular relief being sought in this Motion and moreover is easily distinguishable from this case, both on its facts and

² See, for example, In re Buehler Foods, Inc., Cause No. 05-70961-BHL-11 (Bankr. S.D. Ind. 2005); In re ATA Holdings Corp. et al., Cause No. 04-19866-BHL-11 (Bankr. S.D. Ind. 2004); In re Paul Harris Stores, Inc., Cause No. 00-12467-BHL-11 (Bankr. S.D. Ind. 2000); In re Jays Foods, L.L.C., Case No. 04-08681 (Bankr. N.D. Ill., 2004); In re FV Steel and Wire Company, et al., Case No. 04-22421 (SVK) (Bankr. E.D. Wis., 2004); In re National Equipment Services, Inc., Case No. 03-27626 (PSH) (Bankr. N.D. Ill. 2003); In re Eagle Food Centers, Inc., Case

on the law. It is not binding because the Debtor in Kmart relied solely upon §105(a) as the statutory basis for relief whereas here the Debtor relies upon §105(a) in conjunction with other Code sections, including §§103, 363(b)(1), 363(c)(1), 507(a)(4), 507(a)(5), 1106, 1107(a), 1108 and 1129(a)(9).

39. 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.” § 105(a). The purpose of §105(a) is “to assure the Bankruptcy Court’s 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, §105(a) of the Code essentially codifies the Bankruptcy Court’s inherent equitable powers.

40. Section 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). Section 363(c)(1) of the Code provides a mechanism for the debtor to use property of the estate in the ordinary course (of distribution under the Code). Debtor submits the relief requested herein is within the ordinary course. Sections 507(a)(4) and 507(a)(5) of the Code provide for payment of employee wages and benefits on a priority basis. Sections 1106, 1107 and 1108 of the Code 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)). Section 1129(a)(9) reinforces the priority scheme of §507 that provides a priority under the Code for the payment of Compensation and Benefits.

No. 03-15299 (PSH) (Bankr. N.D. Ill. 2003); In re UAL Corp., Case No. 02-48191 (ERW) (Bankr. N.D. Ill. 2002); In re Kmart Corp., Case No. 02-02474 (SPS) (Bankr. N.D. Ill. 2002).

41. Kmart is further distinguishable in that this Motion seeks Court authority to pay employee payroll and benefits (which are accorded priority status under the Code), not “critical vendors” (which are not accorded priority status under the Code). Succinctly stated by a recent bankruptcy Court, which analyzed the Kmart decision, and nonetheless granted a first day motion to pay employee payroll in a chapter 11 case:

[t]hus, there has evolved a rule for the payment of prepetition wages and benefits which is based on both common sense and the express provisions of the Bankruptcy Code. If employees are not paid, they will leave. If they leave the Debtor’s business, the bankruptcy case fails shortly after the filing. No one will benefit from the process. The Code gives employees a statutory priority that elevates the claims above the general unsecured claims, and, in fact, most claims in the bankruptcy case. To the extent that the existing holders of claims of higher priority than the wage claims consent or do not timely object, such priority claims may be made during the pendency of the bankruptcy case. The treatment and payment of such claims before confirmation does no violence to the Code or existing case law in this Circuit. In fact, such orders are usually “necessary” and “appropriate” to implement a debtor’s reorganization under Chapter 11. CEI Roofing, Inc., 315 B.R. at 61.

42. **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.

43. 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 for all just and proper relief in the premises.

Respectfully submitted,

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