UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
COMPLETE HYDRAULIC	)	
SERVICE & SALES, INC.,	)	Case No.: 13-04677-JKC-11
	)	
Debtor.	)	

THE HUNTINGTON NATIONAL BANK'S OBJECTION TO EMERGENCY MOTION FOR AUTHORITY TO PAY PRE-PETITION EMPLOYEE WAGES, *NUNC PRO TUNC* TO PETITION DATE

The Huntington National Bank ("Huntington"), by and through counsel, objects to the *Emergency Motion for Authority to Pay Pre-Petition Employee Wages, Nunc Pro Tunc to Petition Date* [Docket No. 11] ("Motion") and states as follows:

Facts and Background

1. On May 2, 2013 (the "Petition Date"), Complete Hydraulic Service & Sales, Inc. (the "Debtor") filed its a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Indiana (this "Court").

2. In the Motion, Debtor requests authority to pay prepetition wages that the Debtor asserts are presently due and payable for the pay period of April 29, 2013 through May 6, 2013 (the "Prepetition Staff Obligations") to "approximately" nine (9) employees (the "Employees"). The Motion states that each of the Employees is paid on a biweekly basis, in arrears.

3. The Debtor alleges that the "approximate" gross amount of the Prepetition Staff Obligations is $19,700.00.

4. The Prepetition Staff Obligations were scheduled to be drawn from the Debtor's KeyBank payroll account on or about May 13, 2013.

5. The Debtor's schedules show that on the Petition Date the Debtor had $250 in cash and $36.75 spread over five bank accounts.

Grounds for Huntington's Objection

6. The Motion fails to identify the Employees and additionally fails to disclose which, if any, of the nine (9) individuals are insiders of the Debtor.

7. The Motion fails to explain the assigned duties and job descriptions of the Employees, and how the duties of each of these individuals are necessary and essential for a successful reorganization of the Debtor. Without this information it is impossible to determine the tasks and duties performed, and how each Employee will contribute to the reorganization process.

8. The Motion fails to disclose the salary and wages for each of the Employees. Accordingly, it is not possible to determine from the information provided therein whether the requested compensation is appropriate to the services and duties performed by each Employee.

9. The Motion includes only estimates of the Prepetition Staff Obligations. Again, there is no breakdown of the specific amounts owed to each of the presently unidentified Employees, and no assurances that the Prepetition Staff Obligations will not exceed the estimated amounts.

10. The Motion fails to include a cap for requested payments of either the Prepetition Staff Obligations other than to state that "[i]n total" the Debtor would only be making payments that would qualify as a priority claim under section 507(a)(4) of the Bankruptcy Code. However, there is no assurance that payment to any single Employee, which may be an insider of the Debtor, will be limited to the amounts specified in section 507(a)(4) of the Bankruptcy Code.

11. Further, the Debtor has made no showing that it is administratively solvent and

that administrative expense claims under section 507(a)(4) would be paid in full. According to the Debtor's own records, as of the Petition Date, the Debtor did not have sufficient assets to pay but a small fraction of the Prepetition Staff Obligations.

<u>The Motion Fails to Meet the Legal Standard for the Requested Relief</u>

12. The Debtor has identified sections 105(a), 365, 1107 and 1108 of the Bankruptcy Code as the statutory basis for the relief requested in the Motion. None of those sections explicitly authorizes payment of prepetition employee wages. Debtor has not demonstrated or even hinted that the Employees are parties to executory contracts and has not explicitly stated that the Debtor is assuming those contracts, if they exist. Unless the Debtor is assuming an executory contract under section 365 of the Bankruptcy Code, the Employees are not entitled to cure payments.

13. Without knowing the exact details of the missing information identified in paragraphs 6 through 11 above, it is impossible to make an evaluation as to the necessity or appropriateness of satisfying the Prepetition Staff Obligations.

14. Section 105(a) of the Bankruptcy Code provides, in pertinent part, that a court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. Generally courts only permit payment of prepetition claims if the "necessity of payment" doctrine applies. The "necessity of payment" doctrine provides leeway to this Court under section 105(a) to permit the Debtor to pay a claim which arose prior to reorganization if it is determined that payment of the claim is "essential to the continued operation of the [business] during reorganization." *In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3rd Cir. 1981). *See also Pension Benefit Guarantee Corp. v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 159 B.R. 730, 736-37 (Bankr. W.D. Pa. 1993) (finding that debtor

showed that "payment of certain prepetition wages to be necessary to avert a serious threat to the Chapter 11 process"). Similarly, the court in *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989), stated that the "necessity of payment" doctrine "recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.". *In Ionosphere Clubs*, the court permitted Eastern Air Lines to pay its employees' prepetition wages, salaries, medical benefits and business expense claims but not its non-active striking employees. *Id.* at 179. The Debtor has wholly failed to show the necessity of the requested payments and whether such payments are essential to the continued operation of the Debtor.

15. Further, without knowing the facts surrounding payment to insiders, the requested relief could be an end run around the requirements of section 503(c) of the Bankruptcy Code. The Debtor has stated that retention is a critical reason for the relief requested in the Motion. Section 503(c)(1) of the Bankruptcy Code prohibits payments and obligations to insiders for the purpose of inducing those insiders to remain with the debtor's business unless the court finds that the payment obligation meets very specific criteria. No insider should be paid on an alleged prepetition wage claim to the determinate of all other stake holders in the Debtor's estate merely to ensure his retention. Such payments are even more inappropriate in this case since it does not appear that the Debtor is administratively solvent.

WHEREFORE, Huntington respectfully requests that this Court enter an order denying the Motion and for all other relief just and proper under the circumstances

FROST BROWN TODD LLC

/s/ Jeremy M. Dunn

Jeremy M. Dunn
Frost Brown Todd LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46204
P: (317) 237-3270 | F: (317) 237-3900
E: jdunn@fbtlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties through the Court's electronic case filing system. Parties may access this filing through the Court's system.

David R. Krebs
dkrebs@thbklaw.com

U.S. Trustee
joe.mcgonigal@usdoj.gov
ustpregion10.in.ecf@usdoj.gov

/s/ Jeremy M. Dunn
Jeremy M. Dunn

INDLibrary1 0037742.0603420 1119148v1