

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

**In re: MISSISSIPPI PHOSPHATES
CORPORATION**

Case No. 14-51667-KMS

Debtor.

Chapter 11

**MOTION FOR RELIEF FROM THE AUTOMATIC STAY AND FOR ABANDONMENT
OR, IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION**

COMES NOW, Caterpillar Financial Services Corporation ("Cat Financial"), a creditor and party-in-interest in the above-captioned bankruptcy case, and brings this its *Motion for Relief from the Automatic Stay and for Abandonment or, in the Alternative, for Adequate Protection* (the "Motion") and moves this Court pursuant to 11 U.S.C. § 362(d)(1) for relief from the automatic stay such as terminating, annulling, modifying or otherwise conditioning the stay, and to compel abandonment pursuant to 11 U.S.C. § 554(b), so that Cat Financial may take any and all action necessary to preserve, protect, and foreclose its interest in and to certain Equipment (as described herein). In the alternative, Cat Financial requests that the Debtor's continued use and possession of the Equipment be conditioned on the Debtor providing Cat Financial with adequate protection, as mandated by 11 U.S.C. § 363(e). In support of its Motion, Cat Financial states as follows:

Procedural Posture and Jurisdiction

1. On October 27, 2014, (the "Petition Date"), Mississippi Phosphates ("Debtor"), filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, § 101, et seq. (the "Bankruptcy Code").

2. Cat Financial brings this Motion under Sections 362(d)(1), 363(e) and 554(b) of the Bankruptcy Code, Bankruptcy Rule 4001(a)(1), and Uniform Local Rule 4001-1(a).

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding under 11 U.S.C. § 157(b)(2).

4. Venue of this matter is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409(a).

Facts

5. Cat Financial extended credit to Debtor in the amount of \$230,000.00 pursuant to that certain *Security Agreement and Promissory Note*, dated August 22, 2012 (the "Security Agreement"). *See* Exhibit "A". Pursuant to the Security Agreement, Debtor became obligated to make 60 monthly payments of \$4,015.97 plus interest and other charges each month to Cat Financial. Exhibit "A".

6. Pursuant to the Security Agreement, Debtor granted Cat Financial a security interest in a 950H Caterpillar Medium Wheel Loader, serial number MAS01356 (the "Equipment").

7. Pre-Petition, Cat Financial had perfected its security interests in the Equipment by an *UCC Financing Statement*. *See* Exhibit "B".

8. The Security Agreement is in default, for, among other things, Debtor's failure to make payments when due, including without limitation, pre-petition and post-petition payments (collectively, the "Events of Default").

9. As of the Petition Date, the balance due under the Security Agreement was \$136,374.05 with a per diem of \$17.27 plus late fees, attorneys' fees, costs, and charges which continue to accrue. *See Exhibit "C"*.

Count I – Relief from Automatic Stay and Abandonment

10. Section 362(d)(1) of the Bankruptcy Code provides that relief shall be granted for cause.

11. The Debtor bears the ultimate burden of proof on the issue of cause. 11 U.S.C. § 362(g)(2).

12. Once Cat Financial makes a *prima facie* case that cause exists to lift the stay, the burden shifts to Debtors to show that Cat Financial is adequately protected. *In re Aardvark, Inc.*, 1997 WL 129346 at *4 (D. Del. 1997); *In re Continental Airlines, Inc.*, 154 B.R. 176, 181 (D. Del. 1993).

13. While cause under Section 362(d)(1) includes "the lack of adequate protection of an interest in property" as grounds for relief from the automatic stay, such is not the exclusive grounds for finding "cause" to lift the automatic stay. Because "cause" is not further defined in the Bankruptcy Code, relief from stay for cause is a discretionary determination made on a case-by-case basis. *In re Laguna Associates Ltd. Partnership*, 30 F.3d 734, 737 (6th Cir. 1994); *In re Zick*, 931 F.2d 1124, 1129 (6th Cir. 1991) (stating that "cause" for relief from the automatic stay is not defined under the Bankruptcy Code).

14. "Cause" under the Bankruptcy Code is an intentionally broad and flexible concept which must be determined on a case-by-case basis. *In re Holly's, Inc.*, 140 B.R. 643, 687 (Bankr. W.D. Mich. 1992).

15. Cat Financial asserts that "cause" exists to terminate the automatic stay pursuant to section 362(d)(1), because the Debtor has not made any post-petition payments. *See e.g. In re Elmira Litho, Inc.*, 174 B.R. 892, 900 (Bankr. S.D.N.Y. 1994) (citing *In re Hinchliffe*, 164 B.R. 45, 49 (E.D. Pa. 1994) (holding that Debtor's failure to make any post-petition payments constitutes "cause" under Section 363(d)(1)); *In re Ocasio*, 97 B.R. 825, 826 (Bankr. E.D. Pa. 1989) (holding that absence of Debtor having tendered any post-petition payments to secured creditor constituted cause for stay relief under Section 363(d)(1)); *In re Winslow Center Associates*, 32 B.R. 685, 687 (Bankr. E.D. Pa. 1983) (holding that Debtor's failure to make monthly mortgage and tax payments constituted "cause" for stay relief pursuant to Section 363(d)(1)).

16. Each month the Debtor is in bankruptcy the Equipment depreciates. Upon information and belief, Debtor has continued to use the Equipment, thereby further diminishing its value due to ongoing wear and tear.

17. Debtor has also failed to provide proof of insurance on the Equipment. Debtor's failure to insure the Equipment constitutes "cause" for stay relief under Section 362(d)(1), in that the lack of insurance coverage places the Equipment securing Cat Financial's claims at risk of loss, thereby denying Cat Financial the adequate protection to which it is entitled.

18. Further, in determining whether a secured creditor's interest is adequately protected, "most courts engage in an analysis of the property's 'equity cushion' - the value of the property after deducting the claim of the creditor seeking relief from the automatic stay and all senior claims". *In re Las Torres Dev., LLC*, 413 B.R. 687, 697 (Bankr. S.D. Tex. 2009) (quoting *In re Mendoza*, 111 F.3d 1264, 1272 (5th Cir. 1997)). An "equity cushion" (which is a

recognized form of adequate protection) is "the value of the property, above the amount owed to the creditor with a secured claim, that will shield that [creditor's] interest from loss due to any decrease in the value of the property during the time the automatic stay is in effect". *In re Baytown Navigation, Inc.*, 2012 WL 1123047 (S.D. Tex. April 3, 2012) at *2, n.2.

19. Courts within the Fifth Circuit recognize that "case law has almost uniformly held that an equity cushion of **20%** or more constitutes adequate protection". *In re Mendoza*, 111 F.3d 1264, 1272 (5th Cir. 1997)(quoting *In re Kost*, 102 B.R. 829, 831 (Bankr. D. Wyo. 1989)); *In re Las Torres Dev., LLC*, 413 B.R. 687, 697 (Bankr. S.D. Tex. 2009) (utilizing 20% equity cushion test to determine whether secured lender was adequately protected); *In re Knight Energy Corp.*, 2009 WL 1851739 (Bankr. N.D. Tex. June 26, 2009) (employing 20% equity cushion test to conclude that secured lender was not adequately protected).

20. There is no such equity cushion in this case; the equipment is worth less than the amount owed. Exhibit "D".

21. Accordingly, cause exists for terminating the automatic stay because Cat Financial's interest in the Equipment is not adequately protected. 11 U.S.C. § 362(d)(1).

22. The concept of adequate protection is meant to preserve the creditor's position. *In re Nixon Machinery, Co.*, 9 B.R. 316, 317 (Bankr. E.D. Tenn. 1981). Valuation and depreciation of the Equipment as well as Debtor's ability to provide periodic payments are fundamental to the analysis of the preservation of creditor's position.

23. Cat Financial's interest in the Equipment is not adequately protected due, in part, to the Equipment depreciating in value while Cat Financial is prevented by the automatic stay from exercising its possessory rights and remedies under applicable state law and the Security

Agreement. Therefore, cause exists under Section 362(d)(1) to grant Cat Financial relief from the automatic stay.

24. In light of the foregoing reasons, Cat Financial is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(1) so as to permit Cat Financial to protect its interests in the Equipment under applicable state law, including, without limitation, permitting Cat Financial to foreclose its security interests in the Equipment.

25. In addition to relief from the Section 362 automatic stay, Cat Financial requests that the Trustee be compelled, pursuant to 11 U.S.C. § 554(b), to abandon the Equipment. The Equipment is of inconsequential value and benefit to the Estate (in that the Debtor has no equity in the Equipment), and to retain such Equipment (including providing insurance coverage and/or adequate protection payments) would be burdensome to the Estate.

26. Cat Financial further requests that any order granting relief from the Section 362 automatic stay expressly waive the fourteen (14) day stay of order that is otherwise provided for by Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.

Count II – Adequate Protection Payments

27. The Debtor continues to use, possess and depreciate the Equipment post-petition, without providing Cat Financial with the adequate protection mandated by 11 U.S.C. §363(e).

28. Although what constitutes "adequate protection" is not expressly defined in the Bankruptcy Code, Section 36 states that a Debtor can provide adequate protection by making periodic cash payments. 11 U.S.C. § 361(1).

29. Accordingly, should the Court find that the automatic stay presently protecting Debtor's interests in the Equipment should not be lifted, Cat Financial respectfully requests the

entry of an order mandating that Debtor's continued use and possession of the Equipment be conditioned upon Debtor providing Cat Financial with monthly cash payments in an amount sufficient so that Cat Financial's security interests in the Equipment are adequately protected.

WHEREFORE, PREMISES CONSIDERED, Cat Financial respectfully requests that this Court enter an Order pursuant to 11 U.S.C. § 363(d), lifting, terminating, annulling, or modifying the automatic stay imposed by Section 362(a), and to compel abandonment pursuant to 11 U.S.C. § 554(b), so as to permit Cat Financial to take any and all actions permitted under the Security Agreement and applicable state law to take possession of, preserve, protect, and foreclose its interests in the Equipment, with any such Order granting relief from the automatic stay expressly waiving the fourteen (14) day stay of order that is otherwise provided for by Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure. In the alternative, Cat Financial respectfully requests that Debtor's continued use and possession of the Equipment be conditioned upon the Debtor tendering adequate protection payments to Cat Financial, as mandated by Section 363(e) of the Bankruptcy Code. Cat Financial also respectfully requests all such other, different, and further relief as to which it may be entitled.

This, the 16th day of March, 2015.

Respectfully submitted,

CATERPILLAR FINANCIAL, INC.

By Its Attorneys,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

By: /s/ D. Sterling Kidd
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CERTIFICATE OF SERVICE

I, D. Sterling Kidd, do hereby certify that on this day the foregoing paper was filed electronically with the Clerk of the Court using the Court's ECF system, which served a true and correct copy of such paper electronically on all parties enlisted to receive service electronically as of the date hereof, including the following:

BMC Group, Inc.

Corby Davin Boldissar on
behalf of Creditor Brock
Services, LLC

Karl D. Burrer on behalf of
Creditor STUW LLC, as
Administrative Agent

Robert Alan Byrd on behalf of
Creditor STUW LLC, as
Administrative Agent

James S Carr on behalf of
Interested Party BP Energy
Company

J Mitchell Carrington on behalf
of Debtor Ammonia Tank
Subsidiary, Inc.

J Mitchell Carrington on behalf
of Debtor Mississippi
Phosphates Corporation

J Mitchell Carrington on behalf
of Debtor Sulfuric Acid Tanks
Subsidiary, Inc.

Allison Cecile Carroll on behalf
of Creditor United States of
America on behalf of its Agency
the Internal Revenue Service

Bess M. Parrish Creswell on
behalf of Creditor Committee
Official Committee of
Unsecured Creditors of
Mississippi Phosphates
Corporation

Hovey Slayton Dabney, Jr. on behalf of Interested Party Phosphate Holdings, Inc.

Paul J. Delcambre, Jr on behalf of Creditor Mississippi Power Company

Douglas Scott Draper on behalf of Interested Party Phosphate Holdings, Inc.

Karl Fingerhood on behalf of Interested Party US Dept. Of Justice, Env. Enf. Sec

Roy Hendee Furrh on behalf of Interested Party Mississippi Department of Environmental Quality

Richard Mark Gaal on behalf of Creditor Flexicrew Staffing, Inc.

Jerome C Hafter on behalf of Interested Party Trammo, Inc., f/k/a Transammonia, Inc.

Leslie C. Heilman on behalf of Creditor E. I. du Pont de Nemours and Company

Kasee S. Heisterhagen on behalf of Creditor Committee Official Committee of Unsecured Creditors of Mississippi Phosphates Corporation

James Lawson Hester on behalf of Creditor E. I. du Pont de Nemours and Company

Thomas M Hewitt on behalf of Debtor Ammonia Tank Subsidiary, Inc.

Thomas M Hewitt on behalf of Debtor Mississippi Phosphates Corporation

Thomas M Hewitt on behalf of Debtor Sulfuric Acid Tanks Subsidiary, Inc.

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Roger Adam Kirk on behalf of Creditor Brock Services, LLC

Ted Lampton on behalf of Interested Party Mississippi Department of Environmental Quality

William J. Little, Jr. on behalf of Creditor HC2 Holding Inc.

Kenneth Gordon Long on behalf of Interested Party US Dept. Of Justice, Env. Enf. Sec

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Matthew Ward McDade on behalf of Creditor Mississippi Power Company

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Shield of Mississippi

Marcus M. Wilson on behalf of
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I further certify that I have this day caused to be mailed via United States mail, first-class postage prepaid, a true and copy of the foregoing paper to the following:

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This, the 16th day of March, 2015.

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/s/ D. Sterling Kidd

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