

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

CONEXANT SYSTEMS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 13-10367 (MFW)

(Jointly Administered)

Hearing Date: April 10, 2013 at 11:30 a.m.

Objection Deadline: April 3, 2013 at 4:00 p.m.

MOTION OF COMERICA BANK FOR RELIEF FROM THE AUTOMATIC STAY

Comerica Bank, a Texas banking association ("Comerica" or the "Bank"), by and through its undersigned counsel, hereby files this motion (the "Motion") seeking entry of an order, pursuant to section 362(d) of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), and Rules 4001(a) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), terminating the automatic stay under section 362(a) of the Bankruptcy Code to permit Comerica to exercise its rights in a certain deposit Account (as defined below) held at the Bank which secures all existing and future indebtedness of debtor Conexant Systems, Inc. under certain letter of credit Agreements (as defined below) with regard to five Letters of Credit outstanding as of the Petition Date. In support of this Motion, Comerica submits the Declaration Of Melanie Dovano In Support Of The Motion Of Comerica Bank For Relief From The Automatic Stay (the "Dovano Declaration"). A true and correct copy of the Dovano Declaration is attached hereto and incorporated herein by reference as **Exhibit 1**. In further support of the Motion, Comerica respectfully states as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer identification number, are: Conexant Systems, Inc. (9439); Brooktree Broadband Holding, Inc. (5436); Conexant, Inc. (8218); Conexant Systems Worldwide, Inc. (0601); Conexant CF, LLC (6434).

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue 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)(G). The predicates for the relief requested herein are sections 362 and 553 of the Bankruptcy Code.

BACKGROUND

2. On February 28, 2013 (the "Petition Date"), the above-captioned debtors and debtors in possession (the "Debtors") filed their respective voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors' chapter 11 cases have been consolidated and are being jointly administered for procedural purposes only.

3. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. Under a Standby Letter of Credit Application and Agreement dated December 5, 2005, executed by debtor Conexant Systems, Inc. (the "Debtor"), Comerica issued a \$3,000,000 letter of credit on account of that debtor for the benefit of NAEH Scranton Road, LLC c/o GBAM, Inc. (the "Scranton Road Agreement"). A true and correct copy of the Scranton Road Agreement is attached to the Dovano Declaration as **Exhibit A**.

5. To induce Comerica to issue the Scranton Road Letter of Credit, the Debtor pledged its interest in that certain Business Money Market Account No. 1851-480234 in the name of Conexant Systems, Inc. maintained at Comerica (the "Account"). See ¶ 10 of Exhibit A. Thus, the existing and future indebtedness of the Debtor under the Scranton Road Agreement is secured by the cash held in the Account and all proceeds thereof as more particularly described

in the Security Agreement dated December 5, 2005 executed by the Debtor in favor of Comerica (the "Scranton Road Security Agreement"). A true and correct copy of the Security Agreement is attached to the Dovano Declaration as **Exhibit B**. True and correct copies of the Scranton Road Letter of Credit, No. 615453, in the amount of \$3,000,000.00 and amendment are attached to the Dovano Declaration as **Exhibit C**.

6. Under a Standby Letter of Credit Application and Agreement dated April 30, 2008, executed by the Debtor, Comerica issued a \$1,563,188.00 letter of credit on account of the Debtor for the benefit of Self Insurance Plans State of California (the "Self Insurance Plan Agreement"). The Self Insurance Plan Letter of Credit has been amended to an amount of \$953,450.00. A true and correct copy of the Self Insurance Plan Agreement is attached to the Dovano Declaration as **Exhibit D**.

7. To induce Comerica to issue the Self Insurance Plan Letter of Credit, Debtor pledged its interest in the Account. See ¶ 10 of Exhibit D. Thus, the existing and future indebtedness of the Debtor under the Self Insurance Plan Agreement is secured by the cash held in the Account and all proceeds thereof as more particularly described in the Security Agreement dated May 1, 2008 executed by the Debtor in favor of Comerica (the "Self Insurance Plan Security Agreement"). A true and correct copy of the Self Insurance Plan Security Agreement is attached to the Dovano Declaration as **Exhibit E**. True and correct copies of the Self Insurance Plan Letter of Credit, No. 635577, in the amount of \$953,450.00, and amendments are attached to the Dovano Declaration as **Exhibit F**.

8. Under a Standby Letter of Credit Application and Agreement and Pledge Agreement dated January 14, 2010, executed by the Debtor, Comerica issued a \$169,173.00 letter of credit on account of the Debtor for the benefit of San Diego Gas & Electric Company

(the "San Diego Gas & Electric Agreement"). A true and correct copy of the San Diego Gas & Electric Agreement is attached to the Dovano Declaration as **Exhibit G**. The San Diego Letter of Credit has been amended to an amount of \$110,000.00.

9. To induce Comerica to issue the San Diego Gas & Electric Letter of Credit, Debtor pledged its interest in the Account and granted Comerica a first priority security interest in the Account. See ¶ 13 of Exhibit G. Thus, the existing and future indebtedness of the Debtor under the San Diego Gas & Electric Agreement is secured by the cash held in the Account, and all proceeds thereof as more particularly described in the San Diego Gas & Electric Agreement. True and correct copies of the San Diego Gas & Electric Letter of Credit, No. 644789, in the amount of \$110,000.00, and amendments are attached to the Dovano Declaration as **Exhibit H**.

10. Under a Standby Letter of Credit Application and Agreement dated September 24, 2004, executed by the Debtor and Comerica, Comerica issued a \$53,970.00 letter of credit on account of the Debtor for the benefit of Southern California Edison Company (the "SoCal Edison Agreement"). The SoCal Edison Letter of Credit has been amended to an amount of \$37,715.00. A true and correct copy of the SoCal Edison Agreement is attached to the Dovano Declaration as **Exhibit I**.

11. To induce Comerica to issue the SoCal Edison Letter of Credit, Debtor pledged its interest in the Account. See ¶ 10 of Exhibit I. Thus, the existing and future indebtedness of the Debtor under the SoCal Edison Agreement is secured by the cash held in the Account and all proceeds thereof as more particularly described in the Security Agreement dated September 27, 2004 executed by the Debtor in favor of Comerica (the "SoCal Edison Security Agreement"). A true and correct copy of the SoCal Edison Security Agreement is attached to the Dovano Declaration as **Exhibit J**. True and correct copies of the SoCal Edison Letter of Credit, No.

595628 in the amount of \$37,715.00, and amendments are attached to the Dovano Declaration as **Exhibit K**.

12. Under a Standby Letter of Credit Application and Agreement and Pledge Agreement dated April 30, 2011, executed by the Debtor, Comerica issued a \$45,918.75 letter of credit on account of the Debtor for the benefit of Stony Brook Associates c/o Boston Properties LP² (the "Stony Brook Agreement³"). A true and correct copy of the Stony Brook Agreement is attached to the Dovano Declaration as **Exhibit L**.

13. To induce Comerica to issue the Stony Brook Letter of Credit, Debtor pledged its interest in the Account and granted Comerica a first priority security interest in the Account. See ¶ 13 of Exhibit L. Thus, the existing and future indebtedness of the Debtor under the Stony Brook Agreement is secured by the cash held in the Account and all proceeds thereof as more particularly described in the Stony Brook Agreement. A true and correct copy of the Stony Brook Letter of Credit, No. 650154 in the amount of \$37,750.00 is attached to the Dovano Declaration as **Exhibit M**.

14. A chart summarizing the Letters of Credit is below:

² NAEH Scranton Road, LLC c/o GBAM, Inc., Self Insurance Plans State of California, San Diego Gas & Electric Company, Southern California Edison Company and the Stony Brook Associates c/o Boston Properties LP are collectively referred to as the "Beneficiaries" and individually, as a "Beneficiary."

³ The Scranton Road Agreement, the Scranton Road Security Agreement, the Self Insurance Plan Agreement, the Self Insurance Plan Security Agreement, the San Diego Gas & Electric Agreement, the SoCal Edison Agreement, the SoCal Edison Security Agreement and the Stony Brook Agreement are collectively referred to herein as the "Agreements".

L/C No.	Beneficiary	Date	Orig. Amount	Remaining Undrawn	Unreimbursed Draws (1)	Fees Owing
615453	NAEH Scranton Road LLC	12/5/2005	\$3,000,000.00	\$1,966,222.64	\$1,033,777.36	\$2,629.44
635577	Self Insurance Plans CA	4/30/2008	\$1,563,188.00	\$953,450.00		
644789	San Diego Gas and Electric	1/14/2010	\$169,173.00	\$22,641.85	\$87,358.15	\$545.00
595628	Souther CA Edison	9/24/2004	\$53,970.00	\$35,715.00		
650154	Stony Brook Assoc.	1/27/2011	\$45,918.75	\$45,918.75		
			\$4,832,249.75	\$3,023,948.24	\$1,121,135.51	\$3,174.44

(1) The L/C applications provide that interest at the rate of Prime + 3%, currently 6.25%, will accrue on all amounts drawn until reimbursed.

15. As of the Petition Date, the Account had a balance of \$4,170,954.64 (the “Cash Collateral”).⁴ As of the Petition Date, the aggregate undrawn face amount of the letters of credit equaled \$4,145,083.75. Dovano Declaration at ¶ 18.

16. On March 6, 2013, NAEH Scranton Road, LLC c/o GBAM, Inc. drew down on the Scranton Road Letter of Credit in the amount of \$1,033,777.36 which was paid by Comerica post-petition. Id. at ¶ 19.

17. On March 12, 2013, San Diego Gas & Electric Company drew down on the San Diego Gas & Electric Letter of Credit in the amount of \$87,358.15 which was paid by Comerica post-petition. Id. at ¶ 20.

18. Upon a proper draw request by any of the Beneficiaries, Comerica is obligated to pay to the Beneficiary the face amount as stated in the letter of credit. Id. at ¶ 22. The Bank anticipates that the Beneficiaries will make further draws. Id. at 21.

19. In addition to the reimbursement obligations owed to Comerica in connection with funds drawn by the Beneficiaries, the Debtor is required to pay Comerica interest, fees, costs and expenses, including reasonable attorneys’ fees incurred in connection with the facility.

⁴ To the extent that the Cash Collateral is insufficient to provide adequate protection to Comerica, nothing contained herein shall be construed as a waiver of Comerica’s right to initiate an administrative freeze upon any of the funds held in any account of the Debtors maintained by Comerica to immediately secure Comerica’s right of setoff or recoupment.

Id. at ¶ 23. Letter of Credit fees currently outstanding total at least \$3,174.44. Legal fees continue to accrue. Id.

20. Upon draws by the Beneficiaries, the Debtor will owe interest from the date of the draw to the date Comerica is reimbursed from the Cash Collateral at the Bank's prime rate (currently 3.25%) plus an additional three percent (3%). See pg. 2, ¶ 2 of Exhibits A, D, and I to Dovano Declaration; pg. 3, ¶ 3 Exhibit G to Dovano Declaration; and pg. 2, ¶ 3 Exhibit L to the Dovano Declaration. The balance on the Account earns interest at a rate of 0.10%. Dovano Declaration at ¶ 24.

RELIEF REQUESTED

21. By this Motion, Comerica seeks entry of an order, substantially in the form annexed hereto as **Exhibit 2** (the "Proposed Order"), granting it relief of the automatic stay with respect to Comerica's interest in the Account so Comerica may (i) reimburse itself from funds in the Account with respect to any draws on the Letters of Credit, and (ii) pay or reimburse itself, from funds in the Account, any of its fees and expenses relating to the facility.

BASIS FOR RELIEF REQUESTED

A. *Comerica Is Entitled To Relief From The Automatic Stay*

22. Section 362(d) of the Bankruptcy Code provides the basis for terminating the automatic stay and states, in pertinent part, that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization. . .

11 U.S.C. § 362(d). The decision to lift the automatic stay is within the discretion of the bankruptcy court. In re Kaplan Breslaw Ash., LLC, 264 B.R. 309, 321 (Bankr. S.D.N.Y. 2001).

23. The standards for granting relief under section 362(d)(1) and (d)(2) are in the disjunctive. Thus, if a court finds either that (i) there is cause, including a lack of adequate protection; or (ii) that the debtor lacks equity in the property and has no need for the property to effectively reorganize, then the court must lift the stay. See In re Diplomat Elec. Corp., 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988).

24. The term “cause” under section 362(d)(1) is not defined in the Bankruptcy Code. Rather, it is a broad and flexible concept, and must be determined on a case-by-case basis. See In re Rexene Prods. Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992), citing In re Fernstrom Storage and Van Co., 938 F.2d 735 (7th Cir. 1991). See also Baldino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3d Cir. 1997) (noting that section 362(d)(1) “does not define ‘cause,’ leaving courts to consider what constitutes cause based on the totality of the circumstances in each particular case.”).

25. “Cause is broadly construed but generally involves consideration of both ‘the balance of the harm to the parties if the stay is denied and the interest of efficient administration of bankruptcy cases.’” Rocco v. J.P. Morgan Chase Bank, 2006 U.S. Dist. LEXIS 12850, *7 (W.D. Pa. Mar. 24, 2006) (citation omitted). Further, under section 362(d)(1), “cause” is not limited to a lack of adequate protection. In re Madison Hotel Corp., 175 B.R. 94, 97 (Bankr. N.D. Ala. 1994) (“Although Congress singled out lack of adequate protection as sufficient cause for modification of the automatic stay, it also made clear that cause under Section 362(d)(1) was

not limited to lack of adequate protection.”). Once the movant shows that cause exists, the burden is on the debtor to prove that it is entitled to protection of the automatic stay. See In re M.J. & K. Co., Inc. 161 B.R. 586, 590-91 (Bankr. S.D.N.Y. 1993) (internal citations omitted).

26. Cause clearly exists here to grant Comerica relief from the automatic stay. First, Comerica holds a valid, first priority security interest in the Cash Collateral, which is perfected by possession and such interest is unavoidable.

27. Further, two of the Beneficiaries have already drawn upon their letters of credit. In the past two weeks, both NAEH Scranton Road, LLC c/o GBAM, Inc. and San Diego Gas & Electric Company have drawn down on their respective letters of credit in the combined amount of \$1,121,135.51. Comerica paid those draws pursuant to its obligations under the Agreements. Thus Comerica now has a claim of over \$1.1 million, and cannot reimburse itself from the Account which serves as its collateral, due to the automatic stay. The other Beneficiaries are sure to draw on their respective letters of credit as well, thereby increasing the Bank’s exposure.

28. Meanwhile, Comerica’s equity cushion continues to erode rapidly. The Cash Collateral grows at an interest rate of 0.10% in the Account. However, pursuant to the Agreements, the Debtor will owe Comerica interest of 6.25% on unreimbursed draws under the letters of credit which are paid by Comerica. As a consequence, Comerica now has a matured, liquidated claim over \$1.1 million for which interest is accruing at a significantly higher rate than what the Cash Collateral is currently earning in the Account. This difference (along with fees and expenses) will quickly consume any equity cushion in the Account.

29. Therefore, Comerica will be greatly harmed without relief from the automatic stay to reimburse itself from the Account. See In re Inwood Heights Hous. Dev. Fun Corp., Case No. 11-13322 (MG), 2011 WL 3793324, *9 (Bankr. S.D.N.Y. Aug. 25, 2011) (“An equity cushion

exists if the value of the collateral available to the creditor exceeds *by a comfortable margin* the amount of the creditor's claim") (emphasis added); In re Elmira Litho, Inc., 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994) (an equity cushion "provides adequate protection if it is sufficiently large to ensure that the secured creditor will be able to recover its entire debt from the security at the completion of the case"); see also In re Balco Ltd., 312 B.R. 734, 750 (Bankr. S.D.N.Y. 2004) (lifting stay "for cause" notwithstanding "slight" equity cushion); In re Fortune Smooth (U.S.) Ltd., Case No. 93-40907 (JLG), 1993 WL 261478, *6 (Bankr. S.D.N.Y. Jul. 6, 1993) (lifting stay "for cause," notwithstanding an equity cushion of 14.89%); In re Tucker, 5 B.R. 180, 183-84 (Bankr. S.D.N.Y. 1980) (creditor was not adequately protected where, among other things, the cost of aggregate liens and charges against the collateral caused the equity cushion to decrease).

30. On the other hand, the Debtors will suffer no prejudice if the stay is lifted. The funds in the Account are to secure Comerica's obligations under the Agreements. The Debtors cannot use the funds in the Account for another any other purpose. Similar relief has been granted in other bankruptcy cases in this and other districts. See e.g. In re School Specialty, Inc., Case No. 13-10125 (KJC) [D.I. 277] (Bankr. D. Del. Feb. 25, 2013) (entering a consent order granting relief from the automatic stay to allow bank to reimburse itself from its collateral account in connection with draws on letters of credit); In re Evergreen Solar, Inc., Case No. 11-12590 (MFW) [D.I. 667] (Bankr. D. Del. Jan. 17, 2012) (granting motion for relief from the automatic stay to permit bank to reimburse itself for draws on letter of credit and pay itself related fees from cash collateral); In re Compania Mexicana De Aviacion, S.A. de C.V., Case No. 10-14182 (MG) [D.I. 222] (Bankr. S.D.N.Y. Oct. 6, 2010) (entering a stipulation and order

for relief from stay to the extent necessary to permit bank to reimburse itself for draws on letter of credit and pay itself related fees from cash collateral).

31. Accordingly, relief should be granted permitting Comerica to pay or reimburse itself from the Account.

B. Comerica Is Entitled To Exercise Its Right Of Setoff⁵

32. In order to establish a right of setoff under section 553 of the Bankruptcy Code (1) a debt must exist from the creditor to the debtor that arose prior to the commencement of the debtor's bankruptcy case; (2) the creditor must have a claim against the debtor that arose prior to the commencement of the debtor's bankruptcy case; and (3) the debt and the claim must be mutual obligations. Official Comm. of Unsecured Creditors v. Mfrs. & Traders Trust Co., 212 B.R. 206 (B.A.P. 2d Cir. 1997), aff'd 146 F.3d 136 (2d Cir. 1997). Both the issuance of the letters of credit on account of the Debtor and the granting of the security interest in the Cash Collateral occurred pre-petition. Furthermore, there is mutuality between the Debtor's indebtedness under the letters of credit and Comerica's obligation to fund draws and the resultant claim against the Debtor. For the reasons stated, Comerica should be entitled to setoff the debtor's obligations to reimburse Comerica for the sum of any draw, plus interest, costs, and fees, against the Cash Collateral.

CERTIFICATION OF CONFERENCE UNDER DEL. BANKR. L.R. 4001-1(d)

33. Pursuant to Del. Bankr. L.R. 4001-1(d), the undersigned certifies that, prior to filing the Motion, he contacted Debtors' counsel concerning the issues raised in the Motion.

⁵ Comerica believes that it possesses a right of recoupment. Pursuant to sections 553 and 362 of the Bankruptcy Code, the stay is inapplicable respecting recoupment. Nevertheless, out of an abundance of caution, Comerica seeks relief from the stay to setoff claims as they mature and are liquidated as a result of draws.

REQUEST FOR WAIVER OF THE STAY PROVIDED BY BANKRUPTCY RULE 4001

34. Bankruptcy Rule 4001(a)(3) provides that “[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 4001(a)(1). The Cash Collateral is subject to rapid depreciation once the Beneficiaries draw. Any delay in allowing Comerica to exercise its rights in the Account could cause irreparable harm to Comerica. Accordingly, Comerica respectfully requests a waiver of the 14-day stay period.

NOTICE

35. Notice of this Motion will be given to (a) counsel to the Debtors, (b) counsel to the Official Committee of Unsecured Creditors, (c) the Office of the United States Trustee, and (d) all parties entitled to receive notice pursuant to Bankruptcy Rule 2002 and Local Rule 2002-1. In light of the nature of the relief requested herein, the Bank submits that no other or further notice need be given.

NO PRIOR REQUEST

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

CONCLUSION

WHEREFORE, Comerica respectfully requests that the Court enter an order, substantially in the form of the Proposed Order (a) granting relief from the automatic stay with respect to Comerica’s interest in the Account so Comerica may (i) reimburse itself from funds in the Account in connection with any draws on the Letters of Credit, and (ii) pay or reimburse itself, from funds in the Account, any of its fees and expenses relating to the letters of credit, and

(b) granting such other and further relief in favor of Comerica as the Court may deem just and proper.

Dated: March 20, 2013

BUCHANAN INGERSOLL & ROONEY PC

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