UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:	)	Chapter 11
MISSISSIPPI CHEMICAL CORPORATION, *et al.*	)	Case Nos. 03-02984-WEE (Jointly Administered)
Debtors.	)	Hon. Edward Ellington

RESPONSE OF HARRIS TRUST AND SAVINGS BANK, AS ADMINISTRATIVE AGENT, TO OBJECTIONS OF BANCORPSOUTH BANK, AS INDENTURE TRUSTEE, TO FINAL FINANCING ORDER

This Response is filed by Harris Trust and Savings Bank, as Administrative Agent (the "*Agent*") for both the Debtors' Amended and Restated Credit Agreement dated as of November 15, 2002 (the "*Pre-Petition Credit Agreement*") and the Post-Petition Credit Agreement (the "*DIP Credit Agreement*") approved on an interim basis by this Court on May 16, 2003, on behalf of the lenders under both the Pre-Petition Credit Agreement (the "*Pre-Petition Lenders*") and the DIP Credit Agreement (the "*DIP Lenders*" and, together with the Pre-Petition Lenders, the "*Lenders*"). This Response is made to the objections filed by BancorpSouth Bank, as successor Indenture Trustee (the "*Trustee*") under an Indenture dated as of November 25, 1997 (the "*Indenture*") pursuant to which Mississippi Chemical Corporation issued $200,000,000 of 7.25% unsecured senior notes due November 15, 2017 (the "*Bonds*"), to entry of a Final Financing Order Authorizing (1) Borrowing with Priority over Administrative Expenses and Secured by Liens on Property of the Estates pursuant to Section 364(c) and (d) of the Bankruptcy Code, (2) the Debtors' Use of Cash Collateral and Granting Adequate Protection Therefor Pursuant to

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Sections 361 and 363 of the Bankruptcy Code, and (3) Modifying the Automatic Stay (the "*Final Financing Order*").

The Trustee's primary basis of objection is really an attempt to piggyback the unsecured claims of the Trustee into superpriority administrative expense claims secured with priming liens on all assets of the Debtors, *pari passu* with the DIP Lenders. For this, the Trustee offers no benefits to the Debtors or their estates, justifying its demand on a "call for collateral" provision in the Indenture (the "*Additional Security Clause*"). The Trustee totally overlooks the policies of the Bankruptcy Code in making this demand. While attempting to improve its position vis-à-vis other creditors, the Trustee assails the bargained-for terms and conditions of the DIP Credit Agreement which will provide liquidity and working capital for the Debtors' reorganization.

If the attempt to usurp collateral were not enough, the Trustee also seeks to have the Debtors pay for the Trustee's fees and expenses in connection with the Debtors' chapter 11 cases as part of the $1,500,000 "Carve-Out" from the priority claims of the DIP Lenders for the payment of allowed fees and disbursements of Court-approved professionals and statutory committees. Just because the Trustee "constitutes the largest creditor, secured or unsecured, in these cases" does not mean that the Trustee is entitled to special treatment not otherwise given to general unsecured creditors.

Overall, it appears that the Trustee's objections are just a guise for its unorthodox and inequitable attempts to raise its claims above those of other unsecured creditors.

The Debtors have begun to reconsider their Business Plan and Budget in connection with a hearing on entry of the Final Financing Order. At the time of filing this Response, the Agent now anticipates that there may be changes to the terms of the DIP Credit Agreement as well as for the use of Cash Collateral. However, the Agent addresses in a general way the issues raised by the Trustee and hopes that these issues will be worked out for the good of the Debtors and all creditors. Continuance of the hearing on the Final Financing Order is necessary and appropriate to give the Debtors time to assess their situation.

Background

1. Prior to filing their Chapter 11 petitions, the Debtors were obligated to the Pre-Petition Lenders pursuant to the Pre-Petition Credit Agreement in the approximate amount of $160,000,000. The Pre-Petition Credit Agreement amended and restated a Credit Agreement dated as of November 25, 1997 (the "*Original Agreement*"). The Original Agreement and the Indenture were dated effective the same date and were entered into concurrently.

2. On February 24, 2000, the Original Agreement was secured with valid, first priority, non-avoidable liens and security interests in essentially all domestic[1] assets of the Debtors[2]. These liens carried forward to the obligations under the Pre-Petition Credit Agreement. The Pre-Petition Credit Agreement also contained modified covenants following upon a deteriorating operating performance as the result of a squeeze between unprecedented increases in raw material costs and oversupplies of end product, including from foreign

1. Mississippi Chemical Corporation has foreign subsidiaries which hold a joint venture interest in an ammonia plant in the Republic of Trinidad and Tobago (collectively, the "*Trinidad Interest*"). These subsidiaries, which are not Debtors in these cases, are prohibited by local law from pledging their assets to foreign entities. Consequently, the Pre-Petition Lenders accepted the Guaranty Agreement (the "*MCHI Guaranty*") of the top-tier foreign subsidiary, Mississippi Chemical Holdings, Inc., a British Virgin Islands corporation, in lieu of security interests in the foreign subsidiaries, subject to restrictions on cash being transferred out of the Trinidad Interest without payment on the MCHI Guaranty. The Pre-Petition Lenders and the Debtors entered a Standstill Agreement dated as of May 16, 2003, pursuant to which the Pre-Petition Lenders agreed not to enforce the MCHI Guaranty provided the Debtors agree to apply the proceeds of any event generating cash from the Trinidad Interest to the Pre-Petition Debt.

2 The liens granted fit within the exclusions to the Additional Security Clause of Section 1006 of the Indenture and did not trigger any call for collateral by the Trustee.

competition. That both of these pincers are largely out of the control of the Debtors only heightens the risk that a lender to the Debtors must reconcile.

3. Despite the recent restatement, the Pre-Petition Credit Agreement was amended only a month before the May 15, 2003 Petition Date to permit the acquisition of Melamine Chemicals, Inc. The Pre-Petition Lenders loaned the Debtors $1,000,000 to finance the acquisition and, consistent with the terms of the established lending arrangements, the Debtors granted the Pre-Petition Lenders liens on all the assets acquired. Nonetheless, as of the Petition Date, the financial terms and conditions of the Pre-Petition Credit Agreement had been breached as a consequence of fluctuating operating profits resulting from volatile gas prices and significant reductions in demand for fertilizer.

A. The "Additional Security Clause" Is of No Practical Force or Effect.

4. Section 1006 of the Indenture provides that the now-Debtors may not incur secured debt under certain circumstances without "equally and ratably" securing the Bonds pursuant to the Additional Security Clause. In attempting to enforce this clause, the Trustee forgets the practical fiction that the debtors-in-possession are treated as separate and distinct entities from their respective predecessor pre-petition entities. *In re N.S. Garrott & Sons*, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986). As such, the Debtors do not have the authority to satisfy this call for collateral.

5. A case squarely on point with, but dismissing, the Committee's argument for entitlement to adequate protection based on the "pari passu" clause in a financing indenture is *In re Allegheny International, Inc.*, 93 B.R. 907 (Bankr. W.D.Pa. 1988). In that case, the debtor had issued sinking fund debentures containing a clause, similar to the "Additional Security Clause," which covenanted that the debtor would not incur secured debt unless the debentures were also

secured equally and ratably with the secured debt. The debentureholders objected to the debtor's request for approval of post-petition financing to be adequately protected with liens on all of the debtor's assets. The debentureholders asserted that they were also entitled to adequate protection because their pari passu clause granted them an equitable lien of equal priority with the post-petition lenders. Judge Cosetti succinctly rejected this argument, stating that whatever lien the debentureholders may have, it "is unperfected and cannot be perfected because of the automatic stay." *Id.* at 909.

6. Following *Allegheny*, even if the Debtors chose to honor the Additional Security Clause, they would be forestalled first by the automatic stay. *Id.* Section 362(a)(3) prohibits any post-petition act to obtain possession or to exercise control over property of the estate. In addition, the transfer would also be subject to avoidance under the "strong-arm" provisions of Section 544(a) of the Bankruptcy Code, as well as under the preferential transfer provisions of Section 547. "Only if an equitable lien would be sufficient to survive an attack under § 544(a), and if the facts of the case made the equitable lien invulnerable to attack as preferential under § 547, would an equitable lien be good in bankruptcy." *Einoder v. Mount Greenwood Bank*, 55 B.R. 319, 328 (N.D. Ill. 1985).

7. Section 544(a) of the Bankruptcy Code provides that the debtor-in-possession has the rights and powers of a hypothetical judicial lien creditor, and therefore may avoid any transfer of property of the debtor that would be junior to the hypothetical lien creditor. 11 U.S.C. § 544(a). Under the non-bankruptcy law of the Uniform Commercial Code, an unperfected security interest is subordinate to the interest of a person who becomes a lien creditor before the security interest is perfected. U.C.C. § 9-317. As an unperfected lien, the equitable lien asserted by the Trustee would be subject to avoidance. *Allegheny*, 93 B.R. at 909-910. *See also In re*

Joliet-Will County Community Action Agency, 847 F.2d 430, 433 (7th Cir 1988)(equitable lien is an unperfected security interest which the trustee in bankruptcy can set aside); *Cherno v. Dutch American Mercantile Corporation*, 353 F.2d 147, 153 (2d Cir.1965)(equitable lien claims are subordinate to claims of the bankruptcy trustee); *O.P.M. Leasing Services, Inc. v. Revlon, Inc,* 23 B.R. 104, 119 (S.D.N.Y. 1982)(the legislative history of the Bankruptcy Code makes clear that Article 9 of the U.C..C. treats equitable liens as "unperfected security interests which the trustee can in any case set aside."); *Einoder*, 55 B.R. at 328 ("The bankruptcy trustee, by virtue of his or her status as a hypothetical lien creditor under § 544(a), can always defeat such an unperfected lien interest in personalty"). The ability of the bankruptcy trustee to exercise the strong-arm power furthers the policies of fairness embodied in the Bankruptcy Code. "A creditor who had failed to take all the steps required to perfect a lien should not be allowed to fall back on an assertion of an equitable lien to frustrate the Bankruptcy Code policy of recognizing only perfected interests in property." *Joliet-Will County,* 847 F.2d at 433.

8. The equitable lien sought by the Trustee would also be subject to avoidance as a preference or, possibly, a fraudulent conveyance. Generally, Section 547 of the Bankruptcy Code makes avoidable as a preference any transfer of the debtor's interest in property to a creditor on account of an antecedent debt within 90 days of the bankruptcy petition while the debtor is insolvent, thereby enabling the creditor to receive more than in a liquidation. 11 U.S.C. § 547. Here, if the Trustee were permitted to participate in the priority security interests of the Post-Petition Lenders, it would almost certainly be benefited beyond its expectable recovery under chapter 7. The Trustee's equitable lien would clearly be subject to avoidance as a preference. *See Sovran Bank v. United States (In re Aumiller)*, 168 B.R. 811 (Bankr. D.C. 1994)(finding that the creation of the equitable lien was a preferential transfer). Alternatively (or in addition), the fact

that the Debtors would receive no consideration for the grant of an equitable lien based on the Additional Security Clause, and would therefore receive "less than reasonably equivalent value," subjects such an equitable lien to avoidance as a fraudulent transfer. 11 U.S.C. § 548.

9. Equitable liens have long been the object of scorn in bankruptcy. *In re Stoecker,* 143 B.R. at 145, citing *Small v. Beverly Bank,* 936 F.2d 945, 949 (7th Cir. 1991). The Trustee here demonstrates the reason for such scorn. Recognition of an equitable lien *pari passu* with the DIP Lenders would both potentially deplete the value of the collateral for which the DIP Lenders are committing new value and work an unreasonable step-up in priority of the Trustee's claims at the expense of all other unsecured creditors. The claim of the Trustee to an equitable lien is neither lawful nor cognizable in equity. The attempt of the Trustee, as an unsecured creditor, to seek adequate protection clearly falls outside the boundaries of equitable treatment of all creditors reflected in the policies underlying the Bankruptcy Code. Entry of the Final Financing Order will only create another default under the Indenture arising from breach of the Additional Security Clause. Under the equities of the Bankruptcy Code, the Additional Security Clause should be given no force or effect.

B. The Trustee Is Not Entitled to Participate in the Carve-Out.

10. Section 330 of the Bankruptcy Code authorizes the Debtors to pay the reasonable compensation for services and reimbursement of expenses of a professional person employed, with the court's approval, either by the debtor or a creditors' committee appointed by the U.S. Trustee. Recognizing the need to conserve assets for the reorganization, the Bankruptcy Code does not allow for the payment of the expenses of other parties in interest from the Debtors' estates. Each such interested party must bear its own costs of representation in the reorganization

process. It is a "basic tenet" for allowance of administrative claims in accordance with Section 503(b) of the Bankruptcy Code that:

> "a creditor's attorney must ordinarily look to its own client for payment, unless the creditor's attorney rendered services on behalf of the reorganization not merely on behalf of his client's interest, and conferred a significant and demonstrable benefit to the debtor's estate and the creditors."

In re Standard Metals Corporation, 105 B.R. 625, 630 (Bankr. D.Colo. 1989) quoting *In re General Oil Distributors*, 51 B.R. 794, 806 (Bankr. E.D.N.Y. 1985). *See also, e.g., Matter of Jack Winter Apparel, Inc.*, 119 B.R, 629, 633 (Bankr. E.D.Wis. 1990)("Incidental benefit to the estate or extensive participation in the case, standing alone, are not sufficient bases for administrative status. (citations omitted) Efforts undertaken solely to further their own self-interest will not be compensable."); *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988)(creditors are presumed to act primarily in their own interest and not for the benefit of the estate as a whole).

11. In acknowledgment of the importance of court-approved professional services necessary to the reorganization process, the DIP Lenders have provided in the Final Financing Order for a "Carve-Out" from their post-petition liens and superpriority administrative expense claims following a Terminating Event, subject to a maximum amount of $1,500,000. This Carve-Out assures the Debtors' and Official Committee's professionals[3] that they may expect to be paid for their costs and services in benefit of the reorganization.

12. The Trustee's bold request that the Debtors pay the fees and expenses of the Trustee in connection with the reorganization and include them in the Carve-Out cannot be countenanced. The Trustee may, to the extent provided by the terms of the Indenture contract,

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3 The Carve-Out extends to the reasonable out-of-pocket costs (but not independent professional representation) of the members of the Official Committee of Unsecured Creditors in recognition of their contribution to the reorganization process. 11 U.S.C. § 503(b)(3)(F).

add its costs to its unsecured claim. It is not entitled to more. Moreover, the Trustee should not be permitted to rewrite the Bankruptcy Code to "exclude from the post-petition collateral at least a few categories of collateral from which unsecured creditors can be paid." There is just no basis on which to honor the Trustee's unsupportable demands.

C. The DIP Credit Agreement and the Pre-Petition Credit Agreement Are Not Cross-Collateralized.

13. It is a fundamental premise of adequate protection that the secured creditor may receive replacement liens on post-petition collateral. *In re TNT Farms,* 262 B.R. 436, 441 (Bankr. D. Id. 1998)(adequately protecting a creditor's lien in cash collateral with replacement liens on property of the bankruptcy estate). When a fully secured creditor, particularly one with blanket liens on all assets of the debtor, assesses his bargain, he fully expects that the liened assets, even though now part of the debtor's estate, will be used to repay his debt before being shared with other creditors.[4] The filing of a petition in bankruptcy neither modifies nor diminishes these expectations (except to the extent that a post-petition lender may be granted a priming lien for making new money financing available).

14. For a secured creditor to improperly enhance his bargain, he would have to access assets which were unintended sources of his repayment. This is possible when the value of the collateral granted to the secured creditor, now as a post-petition lender, is greater than the value of his pre-petition collateral and this differential is permitted to "shore-up" any pre-petition shortfall (i.e., the pre-petition obligations become "cross-collateralized" with the post-petition collateral). This is impossible when pre-petition lenders are fully secured and there is use of pre-petition cash collateral secured by replacement liens on all post-petition collateral, or the value of

4 Essentially, this is the absolute priority rule.

the priming lien granted to the post-petition lender equals the value of the pre-petition lien. Such must be the case when the very same assets serve as both pre-petition collateral (via the replacement liens) and post-petition collateral. This is the case here, where all assets of the Debtors serve to secure both the Pre-Petition Lenders and the DIP Lenders.

15. It should be emphasized that the Pre-Petition Lenders and the DIP Lenders are separate and distinct groups, composed of different (albeit similar) lending institutions, which do not have full commonality of interests.[5] Consequently, the constituents of the DIP Lenders have no interest, and do not intend, to permit the Debtors to refinance any portion of the pre-petition obligations with draws on the DIP Credit Agreement[6] This is reflected in the Debtors' original budget annexed to the Final Financing Order. The budget projects that through August 15, 2003, the Debtors will need to borrow the net aggregate amount of $15.3 million under the DIP Credit Agreement, the vast majority of which is to pay operating expenses.[7] There is simply no provision anywhere for refinancing the Pre-Petition Lenders.

16. Moreover, payment of the pre-petition loan obligations with proceeds of the DIP Credit Agreement would breach the DIP Credit Agreement. The terms of the DIP Credit Agreement itself do not permit that pre-petition obligations be paid unless a Terminating Event has occurred and all post-petition obligations are fully paid. Section 3.4 of the DIP Credit Agreement specifies the application of cash available to the Debtors, none of which allows for

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5 There are twelve Pre-Petition Lenders and seven DIP Lenders.

6 Even if, for the sake of argument, this were to occur, there would be no detriment to the unsecured creditors because the aggregate amount of fully secured claims would remain constant.

7 The Trustee has misread the budget. The line item denoted as "Other [operating expenses]" reflects monthly payments of approximately $4 million (not $40 million).

payment of pre-petition claims other than as detailed in the Paragraph 25 waterfall provision of the Final Financing Order.

17. Neither do the Pre-Petition Lenders enhance the value of their security interests on all assets of the Debtors by being granted replacement liens thereon. The replacement liens do not bootstrap the Pre-Petition Lenders into a better or improved position vis-à-vis other creditors.[8] Neither the replacement liens nor the priming liens cross-collateralize the pre-petition obligations with improper "additional" value.

18. The Trustee complains that it has not had an opportunity to confirm the Debtors' admission that the Pre-Petition Lenders are secured with senior, valid, fully perfected, non-avoidable and enforceable security interests in all assets of the Debtors' estates. In response, the Lenders believe that they are entitled to reach finality regarding the condition of their liens (the "Lien Finding").[9] The Lenders emphasize that the Final Financing Order provides a period of seventy (70) days[10] after the entry of such Order for parties in interest to object to the Lien Finding set forth in Paragraph 9 of the Order. This allows nearly four months from the Petition Date before the Lien Finding will be free from challenge. Moreover, in early June, 2003[11], the

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8 It should be manifest that the Pre-Petition Lenders do not share in the priming lien granted to the Post-Petition Lenders. Moreover, the priming lien extends only to the DIP Credit Agreement; only after that facility is repaid may the Pre-Petition Lenders look to the assets which secured the DIP Credit Agreement as part of their replacement liens.

9 Proceedings to determine the validity, extent and priority of liens are core proceedings under 28 U.S.C. § 157(b)(2)(H) and (K) and, therefore, may be heard and determined by a bankruptcy judge. The Lien Finding serves as a mechanism to reduce the burden on the Court while encouraging interested parties to confirm the Debtors admissions (and contractual intentions) regarding liens and related claims

10 The Interim Financing Order and a draft of the Final Financing Order set the time period at sixty (60) days after the entry of the Final Financing Order. After discussion with the Official Committee of Unsecured Creditors, the Lenders would accept a seventy (70) day time period.

11 On May 31, with follow-up on June 4 and 5, 2003 counsel to the Lenders sent by overnight delivery to counsel for the Official Committee of Unsecured Creditors a draft copy of the Affidavit together with the related documentation. To date, no issue has been raised with respect to the Lien Finding.

Lenders filed with this Court an Affidavit of the Agent attesting to the execution and validity of the Pre-Petition Loan Agreement and related collateral and other documentation on which the claims of the Pre-Petition Lenders are based, all of which were annexed to the Affidavit. The Lenders submit that the period provided in the Final Financing Order is more than adequate time for any party in interest to complete its due diligence in connection with the Lien Finding. In addition, the Lenders note that, at the suggestion of the Official Committee of Unsecured Creditors, they have made several provisions of the Final Financing Order, such as entitlement to post-petition interest, dependent on finalization of the Lien Finding.

19. The Lenders also dispute the Trustee's contention that a successful challenge to the Lien Finding results in cross-collateralization. The Court's failure to overrule any objection to the Lien Finding within 60 days of the filing of the objection will result in a Terminating Event under the Final Financing Order. Obviously, any failure of the Lien Finding would affect the comfort of any Lender with the granted adequate protection as well as with its continuing participation in the DIP Credit Agreement. But the Lien Finding does not affect the application of collateral proceeds according to the waterfall provisions of Paragraph 25 of the Final Financing Order in any way which would permit the Pre-Petition Lenders to be paid out prior to the DIP Lenders from the proceeds of collateral granted only to the DIP Lenders. There is no cross-collateralization.

20. Similarly, the requirement of Section 11.8 of the DIP Credit Agreement that the Debtors pay the costs and expenses of the DIP Lenders, including those of their professionals, in connection with the execution, modification and enforcement of the DIP Credit Agreement does not involve cross-collateralization. Section 11.8 merely provides that such costs and expenses

are part of the DIP Lenders' claim.[12] Under the Bankruptcy Code, the secured lenders are entitled to payment of their reasonable fees, costs and expenses, but only if such lender is fully secured and payment of such fees, costs and expenses is "provided for under the agreement under which such claim arose." 11 U.S.C. § 506(b). The DIP Lenders have provided in the DIP Credit Agreement a basis upon which to claim their reasonable fees, costs and expenses.

D. The Proceeds of Avoidance Actions Should be Subject to the Priming Liens and Replacement Liens.

21. The Committee objects to the inclusion in the collateral pool granted to the DIP Lenders as priming liens and the Pre-Petition Lenders as replacement liens of the proceeds of avoidance actions under Chapter 5 of the Bankruptcy Code, including §§ 544 through 550 and § 553 ("*Avoidance Actions*"). The Committee asserts that the benefit of these causes of action belong to the estate "as a whole" and create a windfall for the secured creditor.

22. The Committee overlooks the true equities of any recovery under an Avoidance Action – that the assets involved in the Avoidance Action were part of the collateral interests of the Pre-Petition Lenders to begin with, so that their recovery should belong to the Lenders. Moreover, Avoidance Actions are a legitimate component of adequate protection belonging to the Lenders. *See In re Ellingsen MacLean Oil Co., Inc.*, 98 B.R. 284 (Bankr. W.D. Mich. 1989)(secured creditors were entitled to recovery proceeds of preferential transfers based on pre-petition liens, post-petition liens in conjunction with a cash collateral order, or superpriority status granted to post-petition financing); *In re Jones Truck Lines, Inc.*, 156 B.R. 608, 614 (W.D. Ark. 1992)(post-petition liens may be extended to avoidance actions). Avoidance Actions may be of particular value in a scenario of reduced operations by the Debtors, where there is

12 Section 11.8 does not include in its coverage any costs and expenses of the Pre-Petition Lenders.

significant use of cash collateral without generation of current replacement collateral. In such situations, the secured creditors may well need to look to all new sources of recovery as adequate protection. Importantly, however, the granting of liens on Avoidance Actions does not mean that the Avoidance Actions will not benefit unsecured creditors, nor it does preclude the bringing of actions for the benefit of unsecured creditors. *See, e.g.*, 156 B.R. at 614.

E. The Debtors May Waive Section 506(c) of the Bankruptcy Code.

23. Section 506(c) of the Bankruptcy Code provides that the "trustee (or debtor-in-possession) may recover from property securing an allowed secured claim the reasonable, *necessary* costs and expenses of preserving or disposing of such property *to the extent of any benefit to the holder of the claim.*" 11 U.S.C. § 506(c)(emphasis added). With a going concern, there should be no distinction between ordinary course of business expenditures and Section 506(c) expenses, particularly when dealing with blanket liens. Consequently, there is no detriment to the Debtors or their estates to waive any Section 506(c) claim.

24. Further, because it is the debtor-in-possession which is granted the recovery right, it is the prerogative of the Debtors, in the exercise of their business judgment, to waive it. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 120 S.Ct. 1942, n. 3 (2000). *See also, e.g., In re Simasko Prods. Co.*, 47 B.R. 444, 449 (D. Colo. 1985)("Business judgments should be left to the board room and not to this Court."). Such waiver offers meaningful assurance to the Lenders that the Debtors will preserve the assets in a responsible manner. It also eliminates potential frivolous claims of third parties against the collateral in connection with administration of the estates. *See In re Molten Technology*, 244 B.R. 515, 527 (Bankr. D. Mass. 2000)(holding that the trustee's waiver of § 506(c) binds creditors). In addition, any funds used to preserve collateral are proceeds of the Pre-Petition Lenders' collateral, to which they are entitled. The

waiver induces the Lenders to offer more favorable financing and adequate protection terms and is reasonable.

F. The DIP Lenders Are Entitled to Terminate the Post-Petition Credit Agreement Upon Confirmation of a Plan or Subsequent Secured Financing.

25. The DIP Lenders have signed on to provide financing for the Debtors during their period of reorganization, subject to the protections offered by the Bankruptcy Code. Once the reorganization period closes with the confirmation of a plan of reorganization, the DIP Lenders are entitled under their bargain to be paid. It is crucial to the bargain struck for post-petition financing that the DIP Lenders have the contractual ability to terminate the post-petition financing upon confirmation of a plan, particularly if take-out exit financing is not provided for in the plan. The same holds true if the Debtors would apply to the Court for any refinancing which would prime their liens. The DIP Lenders have merely put in place a mechanism to protect the benefit of their bargain by including as a potential event of default under the DIP Credit Agreement both the right to consent to a plan of reorganization and to be paid out in the event of a subsequent secured financing. This should not be objectionable.

26. Similarly, the DIP Lenders have not signed on to finance the Debtors either outside the governance of the Bankruptcy Court if the case should be dismissed or after the case may be converted to a chapter 7 proceeding. These situations pose different circumstances and risks that the DIP Lenders have not agreed to accept. These, too, are defaults under the Final Financing Order and DIP Credit Agreement which should not be objectionable as necessary for the DIP Lenders to circumscribe and protect their bargain.

G. The Lenders Do Not Control the Debtors and the Bankruptcy Case.

27. The DIP Credit Agreement contains a default upon a "Change of Control," defined as a change of either more than 20% of the voting power of the stock of the Debtors or a majority of the Board of Directors. The appointment of a trustee or examiner with expanded powers to manage the Debtors also results in a default. The occurrence of any of these situations represents a significant and material departure from both the representations of the Debtors made as part of the DIP Credit Agreement and the expectations of the DIP Lenders in the management of the Debtors. Consequently, the policies and programs upon which the DIP Lenders relied in making their commitments to finance the Debtors could be rendered invalid. The DIP Lenders struck their bargain relying on the business acumen of the existing management, not that of an unknown trustee or examiner. Such changed circumstances commonly result in default of any lending agreement so that the lender has the opportunity to decide whether or not to get on board with the new management. These defaults neither entrench management nor give the DIP Lenders control over the decision making process of the Debtors.

28. The affirmative covenants set forth in Section 7 of the DIP Credit Agreement are conditions and requirements placed on the Debtors to maintain their lending availability. These include, by way of example, that the Debtors maintain insurance, pay taxes, provide financial information, comply with ERISA, and operate within the Budget. The Trustee alleges that failure of the Debtors to comply with the affirmative covenants constitutes a "minor technical default" that should not permit the DIP Lenders to exercise their contractual remedies (which include the rights to terminate the DIP lending commitment and to foreclosure). The DIP Lenders disagree. These provisions of the DIP Credit Agreement are important, common

requirements of most credit arrangements which result in consequences if defaulted,. The fact that this lending arrangement is tailored for debtors-in-possession does not imply that such typical covenants should not apply.

H. Other Objections Should Be Overruled.

29. The contractual agreement to submit to the *nonexclusive* jurisdiction and venue of Illinois courts in connection with enforcing the DIP Credit Agreement does not preclude the Bankruptcy Court from exercising its exclusive jurisdiction over the Debtors and DIP Lenders as to customary Bankruptcy matters. Indeed, Paragraph 35 of the Final Financing Order provides that such Order shall control and supercede any conflicting provisions in the DIP Financing Documents. The jurisdiction and venue provisions of the DIP Credit Agreement permit clarity in referring to state law where such reference is necessary. The exclusive jurisdiction of the Bankruptcy Court is not altered by the DIP Financing Documents.

30. The Lenders have modified the Final Financing Order to provide that the Debtors shall provide reports and information given to the Lenders in connection with the Order to any committee appointed by the U.S. Trustee. The Trustee is represented by the Official Committee of Unsecured Creditors and may request the Committee to provide non-proprietary, non-confidential information to it. In addition, the Trustee may join the Service List to receive copies of public filings made in these cases. The Lenders should not be required to provide any reports or information to the Trustee.

Conclusion

31. The provisions of the Final Financing Order are fair and reasonable under the circumstances and should be approved by this Court as submitted.

Respectfully submitted,

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Administrative Agent for the Lenders

By: __________________________
One of Its Attorneys

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CERTIFICATE OF SERVICE

I do hereby certify that I have this date sent a true and correct copy of the above and foregoing pleading to all parties listed below as we as to all parties on the Fourth amended Shortened Service List, a copy of which is attached hereto:

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SO CERTIFIED, this, the 27th day of June, 2003.

Jetson G. Hollingsworth

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

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In re:	)	
	)	
MISSISSIPPI CHEMICAL	)	
CORPORATION, *et al.*[1]	)	CASE NO. 03-02984WEE BY ______ DEPUTY
	)	Chapter 11
Debtors.	)	**Jointly Administered**
	)	

FOURTH AMENDED SHORTENED SERVICE LIST FILED JUNE 18, 2003

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[1] The Debtors are the following entities: Mississippi Chemical Corporation; Mississippi Nitrogen, Inc.; MissChem Nitrogen, L.L.C., Mississippi Chemical Company, L.P.; Mississippi Chemical Management Company; Mississippi Phosphates Corporation; Mississippi Potash, Inc.; Eddy Potash, Inc.; Triad Nitrogen, L.L.C.; and Melamine Chemicals, Inc.

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