UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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| 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 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS 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 limited objections filed by the Official Committee of Unsecured Creditors (the "*Committee*") 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 Sections 361 and 363 of the Bankruptcy Code, and (3) Modifying the Automatic Stay (the "*Final Financing Order*").

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The Committee's primary basis of objection appears to be that the Pre-Petition Lenders,[1] who were granted liens on essentially all of the Debtors' domestic assets several years ago in connection with a Credit Agreement secured in February, 2000, should not be fully and adequately protected for the use and diminution in value of their collateral. In particular, other than post-petition lenders granted super-priority liens because they will not otherwise accept the risk of post-petition financing, no other secured claimants are offered higher or more stringent protections under the Bankruptcy Code than pre-petition lenders for the use of their cash collateral. The reason is clear: once consumed, the value of cash collateral is completely and entirely dissipated. Nonetheless, the Committee would prefer to place the Pre-Petition Lenders in jeopardy for permitting the Debtors to use the Lenders' collateral.

Moreover, the Committee mischaracterizes the terms of the Lenders' willingness to extend credit to the Debtors, either by the use of cash collateral or pursuant to the DIP Credit Agreement, as "onerous," "overreaching," and "improperly confer[ring] almost total control and domination" over the Debtors. The Committee clearly fails to grasp the central issue[2]: What is necessary to allow the Lenders to accept the risk of continuing to finance the Debtors in order to preserve the going concern value of the businesses and estates for the employees and all 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

1 The Committee's Objection often does not distinguish between the Pre-Petition Lenders and the DIP Lenders. These are different lending groups with different claims, collateral and rights.

2 In its Objection, the Committee much laments the Debtors' decision not to negotiate pre-petition with the holders of 7.25% Senior Notes due November 15, 2017. Here once again the Committee's focus is off target.

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 Committee 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*"). On February 24, 2000, the Original Agreement was secured with valid, first priority, non-avoidable liens and security interests in essentially all domestic[3] assets of the Debtors. 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 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 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. 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.

## I. The Adequate Protection Granted to the Pre-Petition Lenders Is Fair and Reasonable.

3. The Final Financing Order recognizes that the Pre-Petition Lenders are entitled to adequate protection for the post-petition use and any diminution in value of the pre-petition collateral. 11 U.S.C. § 363(e). The use of cash collateral, in particular, is entitled to heightened protection, requiring either that the secured party consent to its use or that the court authorize such use after notice and hearing. 11 U.S.C. § 363(c)(2). If the creditor objects to use of cash collateral, the debtor must provide adequate protection of the creditor's interest. *In re Certified Corporation*, 51 B.R. 154, 155 (Bankr. D. Haw. 1985); *In re Sheehan*, 38 B.R. 859, 863 (Bankr. D. S.D. 1984).

4. The requirement of adequate protection "reconciles the competing interests of the debtor who needs time to reorganize free from harassing creditors, and the secured creditor, on the other hand, who is entitled to constitutional protection for its bargained-for property interest." *In re Raymond*, 99 B.R. 819, 821 (Bankr. S.D. Ohio 1989). As discussed in the legislative history supporting adequate protection, the policies underlying the concept of adequate protection offer

guidance for its application: "Secured creditors should not be deprived of the benefit of their bargain.... *Though a creditor might not receive his bargain in kind, the purpose of the section is to ensure that the secured creditor receives in value essentially what he bargained for."* H.R. Rep. No. 595, 95th Cong., 1st Sess 339 (1977), U.S. Code Cong. News 1978, 5787, 5963, 6295 (emphasis added).

5. While adequate protection is not defined in the Bankruptcy Code, Section 361 sets forth a non-exhaustive list of methods by which adequate protection may be provided. The debtor "bears the burden of selecting and structuring a means to adequately protect [the creditor's] interest in any cash collateral to be used." *In re EES Lambert Associates*, 62 B.R. 328, 343 (Bankr. N.D. Ill. 1986). *See also* 11 U.S.C. § 363(o) (the trustee bears the burden of proof on the issue of adequate protection). The important question with respect to determining whether the protection to a secured creditor's interest is "adequate" is whether that interest, whatever it is, is being unjustifiably jeopardized. *In re Aqua Associates*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991). Bankruptcy Code Section 361 thus allows that adequate protection may be provided by periodic cash payments, replacement liens, or relief constituting the "indubitable equivalent" of the creditor's interest. *In re Goode,* 235 B.R. 584, 589 (Bankr. E.D. TX. 1999).

6. As clearly admitted in Paragraph 28 of the Debtors' Motion to authorize the use of cash collateral, grant adequate protection and enter the DIP Credit Agreement, the Debtors believe that the value of the pre-petition collateral fully secures the pre-petition obligations under the Pre-Petition Credit Agreement. Nonetheless, to assure that the Pre-Petition Lenders receive the benefit of their bargain, which was to be indubitably fully secured, the Debtors agreed to grant to the Pre-Petition Lenders replacement liens on all post-petition assets of the Debtors, to recognize any adequate protection claim under the Pre-Petition Credit Agreement as having

allowed superpriority administrative expense status, and to pay the Pre-Petition Lenders, as fully secured creditors, interest on the pre-petition obligations. None of these elements of adequate protection are beyond the expectations of either the Debtors or the Pre-Petition Lenders needed to satisfy the bargain struck years earlier and carried forward to the Petition Date, which was for the Pre-Petition Lenders to be assured that all obligations under the Pre-Petition Credit Agreement would be fully paid, if necessary from the value of the collateral.

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

7. 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).

8. 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

4 Essentially, this is the absolute priority rule.

collateral). This is impossible when the 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 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 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. Further, if the Pre-Petition Lenders are fully secured by the Pre-Petition Collateral, then a replacement lien on all Post-Petition Collateral is appropriate since the Pre-Petition Lenders are entitled to be paid in full from Pre-Petition Collateral or Post-Petition Collateral(for diminution in value or use of Pre-Petition Collateral).

9. 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. This is reflected in the Debtors' original budget[6] 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, $13.1 million of which is for operating expenses and the balance is to pay financing costs. There is simply no provision anywhere for refinancing the Pre-Petition Lenders.

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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.

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

11. 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.[7] Neither the replacement liens nor the priming liens cross-collateralize the pre-petition obligations with improper "additional" value.

12. The Committee complains that they have 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 and emphasize that the Final Financing Order provides a period of seventy (70) days[8] after the entry of such Order for parties in interest to object to the Lien Finding set forth in Paragraph 9 of

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7 It should be manifest that the Pre-Petition Lenders do not share in the priming lien granted to the DIP 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.

8 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 Committee, the Lenders would accept a seventy (70) day time period.

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, the Lenders made available to the Committee[9] and 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 Committee, they have made several provisions of the Final Financing Order, such as entitlement to post-petition interest, dependent on finalization of the Lien Finding.

13. The Committee also objects to the application of proceeds in excess of $1,000,000 from asset sales outside the ordinary course of business to be made 50% each to the DIP Credit Agreement and the Pre-Petition Credit Agreement. This allocation was negotiated with the Debtors to permit liquidity to remain available pursuant to the DIP Credit Agreement in the event of a significant sale of assets, while recognizing the interests of the Pre-Petition Lenders in such assets. The Lenders note that if they are paid down from asset sales, values remaining for unsecured creditors will be clearer and more certain. The Lenders object to the Committee's suggestion to place proceeds which would go to the Pre-Petition Lenders into an escrow account. Such account would needlessly increase the cost of borrowing to the Debtors (through negative arbitrage), delay recovery by the Pre-Petition Lenders and expose such assets to unnecessary challenge once the Lien Finding has been finalized.

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9 On May 31, with follow-up on June 4 and June 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 documents. To date, no issue has been raised with respect to the Lien Finding.

14. Similarly, the Committee misinterprets the agreement of the Pre-Petition Lenders in the Standstill Agreement respecting the Trinidad Interests. In lieu of a direct security interest in assets of these foreign non-Debtors, the Pre-Petition Lenders accepted the MCHI Guaranty, which is an unlimited and full guaranty, from MCHI, which is a non-Debtor. The Standstill Agreement significantly serves to protect the value of the Trinidad Interests by covenanting that the Pre-Petition Lenders will not enforce the MCHI Guaranty so long as no event occurs that would liquify the investment in the Trinidad Interests. Under the Standstill Agreement, the Debtors acknowledge that, as the holder of the MCHI Guaranty, the Pre-Petition Lenders should be permitted to capture any value that would be generated from the Trinidad Interests.

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

15. 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.

16. 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 or business contraction by the Debtors, where there is 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.

**C. The Pre-Petition Lenders Are Entitled to Interest at the Default Rate.**

17. Notwithstanding the amendment and elimination of defaults under the Pre-Petition Credit Agreement in mid-April, 2003, the Debtors were in default of the terms of the Pre-Petition Credit Agreement on the Petition Date just one month later. Pursuant to the terms of the Pre-Petition Credit Agreement, the Pre-Petition Lenders are contractually entitled to interest at the default rate. Courts have been clear in ruling that interest accrued pre-petition is not governed by bankruptcy law, but is instead governed by the applicable contract. *In re Southland Corporation*, 160 F.3d 1054 (5$^{th}$ Cir. 1998). After the filing of the bankruptcy petition, the accrual of interest is governed by § 506(b) of the Bankruptcy Code. Thereunder, interest is allowed on oversecured claims. 11 U.S.C. § 506(b). In determining the appropriate rate of interest to be allowed, many courts apply the contractual default rate unless such rate is demonstrated to be inequitable. 160 F.3d. at 1060. *Accord, In re Vanderveer Estates Holdings, Inc.*, 283 B.R. 122, 134 (Bankr. E.D.N.Y. 2000)(holding that "presumption is in favor of contract default rate subject to equitable considerations"); *In re Route One West Limited Partnership,* 225

B.R. 76, 87 (Bankr. D. N.J. 1998)("The effect of the rebuttable presumption in favor of the contract rate is to impose upon the debtor the burden of proving that the equities favor allowing interest at a different rate."); *In re Terry Ltd. Partnership*, 27 F.3d 241, 243 (7th Cir.), *cert denied*, 513 U.S. 948 (1994)("[w]hat emerges from the post-*Ron Pair* decisions is a presumption in favor of the contract rate subject to rebuttal based upon equitable considerations"); *In re Laymon*, 958 F.2d 72, 75 (5th Cir. 1992)("we hold that when an oversecured creditor's claim arises from a contract, the contract provides the rate of post-petition interest"); *In re Whatley*, 134 B.R. 561, 562 (Bankr. S.D. Miss. 1991)(holding that contract rate was appropriate where contract rate was not greater than market rate).

18. Courts consider a variety of circumstances to test whether the equities rebut the presumption for the default contract rate. Some courts have considered whether the default rate serves as a penalty, which is not the case here. *See, e.g., In re Dixon*, 228 B.R. 166, 174 (W.D. Va. 1998)(ruling that the presumption in favor of the default contract rate is not rebutted where the rate does not violate usury laws or function as a penalty). Other courts have looked at the differential between the default and non-default rates. A small (2%) differential, such as is the case *sub judice*, has been found not to be inequitable. *Southland*, 160 F.3d at 1060 (citations omitted). Still other courts consider the effect payment of the higher default rate might have on other parties in interest. Here, there is no evidence suggesting that the arrangement for accrual and payment of interest presents any hardship, or is otherwise detrimental, to other parties in interest. *See In re Lapiana*, 909 F.2d 221, 223 (7th Cir. 1990)("[T]he idea behind section 506(b), a provision new in the Bankruptcy Code of 1978, is that until the secured creditor's claim plus interest on it has eaten up the entire value of the security the payment of that interest does not infringe the reasonable expectations of any other creditor").

19. As adequate protection, the Pre-Petition Lenders will be paid interest at the non-default rate and will accrue, until confirmation of a plan or a Terminating Event, the difference in interest at the default rate. This arrangement permits the Pre-Petition Lenders to realize some of the return to which they are entitled on their oversecured claims while leaving free cash available to finance the Debtors. This arrangement clearly is not inequitable and has been approved in other Fifth Circuit cases. *See Southland*, 160 F.3d 1058 (receipt of adequate protection payments at the non-default contract rate did not waive the right to assert entitlement to the default rate; "Adequate protection payments are different from § 506(b) interest on oversecured claims.") *citing Financial Sec. Assurance v. T-H New Orleans Ltd. Partnership*, 116 F.3d 790 (5th Cir. 1997). Moreover, the default interest serves equitably "as a means to compensate a lender for the administrative expenses and inconvenience in monitoring untimely payments." *Vandeveer*, 283 B.R. at 134, *quoting In re Vest Associates*, 217 B.R. 696, 701 (Bankr. S.D.N.Y. 1998). *See also, Dixon,* 228 B.R. at 172 (default rates "compensate creditors for both the predictable and unpredictable costs of monitoring the value of collateral in default situatons"); *Southland*, 160 F.3d. at 1060 (lenders need not be deprived of "additional, bargained-for default interest, which compensates them for the unforeseeable costs of default") (citations omitted). The Committee simply has not presented any reasonable grounds for this Court to deny the Pre-Petition Lenders the benefit of their bargain for interest at the contractual default rate.

## II. The Post-Petition Lenders Are Free to Establish the Terms and Conditions of Post-Petition Financing with the Debtors.

20. The Committee asserts that the Pre-Petition Lenders have somehow improved their position "at the expense of other similarly situated constituencies" by seeking adequate protection pursuant to the Final Financing Order. The Lenders are aware of no other party in

interest that has claimed to hold valid, perfected liens on virtually all of the Debtors' assets. The only party in interest remotely close to that of the Pre-Petition Lenders is the DIP Lenders by virtue of their priming liens and superpriority administrative claims. The principal party affected by these liens and claims is the Pre-Petition Lenders, whose secured claims are made junior to those of the DIP Lenders. It is difficult to see how any Lender has "improved its economic returns" because it is entitled to adequate protection. Moreover, the terms and provisions included in the DIP Credit Agreement were the result of arms'-length bargaining in good faith and reflect the conditions of the marketplace. The Lenders emphatically dispute the Committee's allegation that the DIP Credit Agreement and Final Financing Order give the Lenders "sole and absolute" control over the Debtors.

**A. The DIP Lenders Are Entitled to Terminate the Post-Petition Credit Agreement Upon Confirmation of a Plan.**

21. 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 DIP Lenders merely put in place a mechanism to protect the benefit of their bargain by including the right to consent to a plan of reorganization as a potential event of default under the DIP Credit Agreement. This should not be objectionable.

### B. The Debtors May Waive Claims Against the Lenders.

22. The Lenders are entitled to finality regarding a finding that they hold valid and perfected, liens and security interests, whether granted pursuant to the lending documentation or the Final Financing Order, and that their claims are not subject to dispute by the Debtors (the "*Lien Finding*"). Obviously, any contrary finding would affect the decision of any Lender to accept the adequate protection offered by the Debtors as well as its participation in the DIP Credit Agreement. The Debtors have had a great deal of time to consider these issues and are not disadvantaged by any admission or waiver of claim made at this time with respect to these matters. Moreover, the Debtors' admissions and waivers do not preclude any other party in interest from investigating the Lenders' liens and conduct or bringing, in good faith, any action for the benefit of the estates.

### C. 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 actually proceeds of the Pre-Petition Lenders' Collateral, to which the Lenders are entitled. The waiver induces the Lenders to offer more favorable financing and adequate protection terms and is reasonable.

**D. The Lenders Have Revised the Draft of the Final Financing Order to Reflect a Number of Comments of the Committee.**

25. The Lenders have withdrawn from the Final Financing Order the statement that the unofficial committee of bondholders concurred with the Debtors in the Lien Finding.

26. The claims for reimbursement of out-of-pocket expenses of the members of the Committee incurred in connection with Committee service (but not individual member's professional fees) are allowable in the Carve-Out.

27. The Lenders agree that payment of critical tax, vendor and employee claims are to be subject to review and approval of the Court, but the cash management bank should not have any liability for paying items presented in these categories prior to entry of the order.

28. The Lenders do not object to the Committee's right to receive information from the Debtors so long as the Lenders are not responsible for disseminating it.

29. The Lenders have agreed to provide notice of any Terminating Event under the Final Financing Order to the Committee in like manner as provided to the Debtors.

30. The definition of a Terminating Event under the Final Financing Order has been modified to include any Termination Date under the DIP Credit Agreement, thus incorporating all the default and termination events under the DIP Credit Agreement within the definition of a Terminating Event under the Final Financing Order.

**Conclusion**

31. The Lenders are entitled to the means of adequate protection granted in the Final Financing Order and to the terms and conditions of the DIP Credit Agreement on which the DIP Lenders rely to finance the Debtors during the reorganization period. 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: ______________________
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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.

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

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BY ________ DEPUTY

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| In re:<br><br>MISSISSIPPI CHEMICAL<br>CORPORATION, *et al.*[1]<br><br>Debtors. | CASE NO. 03-02984WEE<br>Chapter 11<br>**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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