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

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BY_____DEPUTY

In re:	)	
	)	
MISSISSIPPI CHEMICAL CORPORATION, *et al.*	)	CASE NO. 03-02984 WEE
	)	Chapter 11
Debtors.	)	**Jointly Administered**
	)	

OBJECTION OF HSBC BANK USA, AS INDENTURE TRUSTEE, TO DEBTORS' AMENDED MOTION PURSUANT TO § 365 FOR APPROVAL OF ASSUMPTION OF EXECUTORY CONTRACTS

HSBC Bank USA, in its capacity as successor indenture trustee (the "Trustee") with respect to the 7 ¼% Senior Notes due 2017 issued by Mississippi Chemical Corporation ("MCC") hereby objects to the Debtors' Amended Motion Pursuant To § 365 For Approval Of Assumption Of Executory Contracts (the "Motion").

Introduction

The relief sought by the Debtors in the Motion should be denied for a number of reasons. First, the Debtors' Motion is premature. If the alleged contracts that the Debtors seek to assume are executory, the Debtors do not need to assume them now in order to receive their benefits. Under the Supreme Court's decision in NLRB v. Bildisco and Bildisco, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984) and its progeny, discussed below, non-debtor parties to the purported contracts in question are obligated to perform post-petition prior to their assumption or rejection by the Debtors. Assumption of the contracts at this point is unnecessary, and will create significant administrative claims against the estate in the full amount of the contracts, including the arrearages, burdening the Debtors and hampering their reorganization efforts while other parties have little opportunity to evaluate the economic effects of assumption. In addition, some of the alleged contracts that the Debtors seek to assume appear to be consignment

arrangements. As such, the consigned goods may be property of the estate and the consignors, unsecured creditors. Allowing an assumption of these purported agreements at this point could deprive the estate and unsecured creditors of significant assets, while costing the estate dearly in terms of current cash.

Second, to the extent that any of the contracts at issue may not be executory, the Debtors would have to request that the Court approve payment under the "doctrine of necessity," on the grounds that the third-parties are critical vendors. Critical vendor motions seek to prefer certain unsecured creditors ahead of all other creditors in the same class, and are inappropriate under the distribution scheme of the Bankruptcy Code. See, e.g., Capital Factors v. Kmart Corp., 291 B.R. 818 (N.D. Ill. 2003), Memorandum Opinion (J. Grady) (copy attached as Exhibit A). To the extent that the Debtors' Motion seeks payments to critical vendors, it should also be denied.

In support of this objection, the Trustee would show the Court the following:

Statement of Facts

1. On November 25, 1997, MCC issued $200,000,000 of its 7 ¼% Senior Notes due November 25, 2017 (the "Notes") pursuant to an Indenture (as supplemented and amended, the "Indenture"). Initially, Harris Trust and Savings Bank was appointed indenture trustee. On or about February 18, 2000, Harris resigned as indenture trustee and Trustmark Bank was appointed successor indenture trustee. Thereafter, BancorpSouth Bank was appointed successor trustee. On June 20, 2003, the Trustee was appointed successor trustee, in which capacity it currently serves.

2. Per the terms of the Indenture, the Trustee is the holder of the claim under the Notes against MCC and has the sole power to enforce such claim. As the holder of the claim under the Notes, the Trustee holds the largest claim, secured or unsecured, in this case.

3. On June 3, 2003, the Debtors filed the Motion seeking to assume 35 purported contracts that they allege are executory between certain of the Debtors and, for the most part, non-debtor vendors of goods and services. In the exhibits to the Motion, the Debtors provide a general description of each contract, detailing the purported benefits to be gained from dealing post-petition with each non-debtor party listed. Although the Debtors argue that each of the alleged contracts is critical to the on-going operations of the Debtors, the Debtors offer no justification or reason why they must assume these purported contracts at this point in this proceeding.

Argument

I. The Debtors' Motion is premature.

4. It is well established that following the filing of a bankruptcy petition, the debtor is entitled to a "breathing space" during which it can receive the benefits of performance from the non-debtor party accruing under an executory contract pending the debtor's decision to assume or reject that executory contract. Bildisco, 465 U.S. at 531. See also Herod v. Southwest Gas Corporation (In re Gasmark Ltd.), 193 F.3d 371, 374 (5th Cir. 1999); Data-Link Systems, Inc., v. Whitcomb & Keller Mortgage Co., Inc. (In re Whitcomb & Keller Mortgage Co., Inc.), 715 F.2d 375 (7th Cir. 1983); Continental Energy Associates, L.P., v. Hazelton Fuel Management Co. (In re Continental Energy Associates, L.P.), 178 B.R. 405 (Bankr. M.D. Pa. 1995). Assumption and cure of any default under that contract is not required in order for the non-debtor party to be obligated to perform, and pending the decision to assume or reject, the debtor can compel non-

debtors to perform under the contract.[1] Whitcomb, 715 F.2d at 378-79; Continental Energy, 178 B.R. at 406-09.

5. Because the Debtors are not required to assume these alleged executory contracts at this point, the Debtors ought to defer assumption (or rejection) in order to take advantage of the breathing space conferred upon them by the bankruptcy process. Assumption of the alleged contracts at this early point could adversely impact the Debtors and unsecured creditors. Should the Debtors' business plans change during the course of this proceeding, the Debtors may find themselves saddled with contracts they no longer need and can no longer reject without creating large administrative claims. Court approval of a hasty assumption will unnecessarily hamper the Debtors with burdensome administrative cure claims that will reduce the recovery to unsecured creditors should the reorganization fail. Continental Energy, 178 B.R. at 408. Further, the Debtors would nullify any preference actions that the estate might have against the non-debtor parties to these purported contracts, unnecessarily giving up potentially significant assets of this bankruptcy estate at a very early point in this case. Finally, it appears the several of the Debtors' "contracts" that are the subject of the Motion may be consignment arrangements. At this point, there has been no determination by this Court regarding the status of the property that is the subject of those consignment arrangements. If the consigned property was not properly segregated or tagged, or U.C.C. filings with respect to such property were not made by the consignors, that property is now the property of the Debtors and the consignors merely have unsecured claims against the Debtors for the value of such property.

6. The Debtors' bear the burden of proof to demonstrate that their exercise of business judgment in assuming a contract is proper. Richmond Leasing Co. v. Capital Bank, N.A., 762

[1] The Debtors state in their Motion that several non-debtors have refused to finish performance under their contracts absent immediate cure or progress payments from the Debtors. Such refusals are improper under Bildisco.

F.2d 1303 (5th Cir. 1985). In this case, the Debtor cannot carry its burden. Assumption will not add any benefit to the Debtors or the estate at this point in the proceeding, and it is too early to decide whether significant administrative obligations should be incurred. For this reason, the Motion should be denied.

II. To the extent that the Motion seeks payments to critical vendors, it is improper

7. To the extent that any of the contracts at issue are not truly executory (an issue that the Court need not decide today), the Debtors could only seek to pay pre-petition debt under the "doctrine of necessity." That doctrine is sometimes used to pay vendors of goods and services in order to induce them to continue their shipments which are critical to the Debtors' continued operations. The "doctrine of necessity," however, is not recognized by the Bankruptcy Code, and impermissibly allows a debtor to prefer certain unsecured creditors at the expense of others. See, e.g., Capital Factors v. Kmart Corp., 291 B.R. 818 (N.D. Ill. 2003), Memorandum Opinion (J. Grady) (and cases cited therein). Recognition of the "doctrine of necessity" actually prejudices a debtor's ability to reorganize, because it encourages vendors, who might otherwise continue shipping goods, to refuse to do business in hopes they can leverage their way into full payment of pre-petition amounts. These are amounts that debtors can ill-afford to pay early in their proceedings. Accordingly, critical vendor motions should be denied, and the Debtor's Motion, to the extent that it may actually request any relief under the "doctrine of necessity," should be denied as well.

WHEREFORE, for the reasons discussed above, the Trustee respectfully requests that the Court deny the Motion. The Trustee prays that this Court will grant any such additional relief as the Court deems just and proper.

Respectfully submitted:

NEWMAN & NEWMAN

By: _____
Walter Newman

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-and-

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was served via hand delivery on Mississippi counsel and via facsimile and email on out of state counsel on the following this 27th day of June, 2003:

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EXHIBIT A

3 of 6 DOCUMENTS

CAPITAL FACTORS, INC., Appellant, v. KMART CORPORATION, Appellee.

No. 01 C 1264 (CONSOLIDATED WITH 02 C 1265, 02 C 2086, 02 C 1168)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

291 B.R. 843; 2003 U.S. Dist. LEXIS 5937; 41 Bankr. Ct. Dec. 37

April 8, 2003, Decided

April 10, 2003, Docketed

DISPOSITION:
[**1] Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant creditor sought review of a bankruptcy court's orders authorizing appellee Chapter 11 debtor to pay certain prepetition obligations.

OVERVIEW: The debtor was given permission to pay certain vendors in order to maintain relationships that the debtor claimed were essential to its continued operation and reorganization. The debtor also was allowed to pay issuers of prepetition letters of credit. The debtor relied on the "doctrine of necessity" in making the payment requests. The district court found that the doctrine of necessity was not codified anywhere in the Bankruptcy Code. The statutory priority scheme under *11 U.S.C.S. §§ 507* and *507* did not create priority status for prepetition general unsecured claims based on the "critical" or "integral" status of a creditor. The grant of equitable power under *11 U.S.C.S. § 105* could not be used to authorize pre-plan payment of prepetition unsecured claims. The fact that the prepetition claims had been substantially paid did not render the creditor's appeals moot or "practically moot"; it was not unfair to order the monies paid to be returned. The lenders of credit to a debtor could not be up held based on *11 U.S.C.S. § 361*, as the issue of adequate protection was not raised before the bankruptcy court.

OUTCOME: The bankruptcy court's orders were reversed, and the case was remanded.

LexisNexis(TM) HEADNOTES - Core Concepts

Bankruptcy Law > Practice & Proceedings > Appeals
[HN1] On appeal from an order of the bankruptcy court, a district court reviews the bankruptcy court's factual findings under a "clearly erroneous" standard and its conclusions of law de novo. Fed. R. Bankr. P. 8013.

Bankruptcy Law > Practice & Proceedings > Proceedings Under Section 105
[HN2] *11 U.S.C.S. § 105* (a) addresses the equitable powers of bankruptcy courts and provides that the court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11 of the United States Code. No provision of Title 11 providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Bankruptcy Law > Practice & Proceedings > Proceedings Under Section 105
[HN3] The grant of equitable power in *11 U.S.C.S. § 105* is limited in that it allows bankruptcy courts to use their equitable powers only to assure compliance with the provisions of the Bankruptcy Code, not to alter it to fit the Code as they see fit. Any grant of authority given to the bankruptcy courts under § 105 must be exercised within the confines of the Bankruptcy Code.

Bankruptcy Law > Creditor Claims & Adjustments > Types of Claims > Priority Claims
[HN4] The Bankruptcy Code sets forth a priority scheme for the payment of claims. *11 U.S.C.S. §§ 503, 507.* The

EXHIBIT
"A"

Code does not cause cut priority or administrative expense status for prepetition general unsecured claims based on the "judicial" or "integral" aims of a creditor.

Bankruptcy Law > Practice & Proceedings > Proceedings Under Section 105
[HN5] There is a split in the courts regarding whether 11 U.S.C.S. § 105 authorizes bankruptcy courts to permit pre-plan payment of prepetition unsecured claims. Many bankruptcy courts and a handful of district courts have held that bankruptcy courts do in fact have this power. On the other hand, a number of courts of appeals and a few lower courts have held just the opposite. The United States District Court for the Northern District of Illinois, Eastern Division, agrees with the latter courts' view that a court cannot ignore the Bankruptcy Code's statutory scheme of priority in favor of "equity," especially in light of the United States Court of Appeals for the Seventh Circuit's admonition that the fact that a bankruptcy proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.

Bankruptcy Law > Practice & Proceedings > Proceedings Under Section 105
[HN6] Congress has not elected to codify the doctrine of necessity or otherwise permit pre-plan payment of prepetition unsecured claims.

Bankruptcy Law > Practice & Proceedings > Proceedings Under Section 105
[HN7] A bankruptcy court does not have either the statutory or equitable power to authorize the pre-plan payment of prepetition unsecured claims.

Bankruptcy Law > Practice & Proceedings > Appeals
[HN8] A creditor is not required to seek a stay of a bankruptcy court's orders in order to preserve its appellate rights.

Bankruptcy Law > Practice & Proceedings > Appeals
Civil Procedure > Justiciability > Mootness
[HN9] The United States Court of Appeals for the Seventh Circuit has banished the term "equitable mootness" from the (local) lexicon because it is misleading; there is a big difference between inability to alter the circumstances (real mootness) and unwillingness to alter the circumstances ("equitable mootness"). Nonetheless, the "doctrine of equitable mootness" does, and is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties. The basic questions under the doctrine, then, are these: is it prudent and fair to undo what a bankruptcy court did?

Bankruptcy Law > Case Administration > Administrative Powers
[HN10] See 11 U.S.C.S. § 56.

Bankruptcy Law > Practice & Proceedings > Appeals
[HN11] A reviewing court may affirm a bankruptcy court's decision on an alternative ground, but that ground must have been adequately considered by the bankruptcy court.

COUNSEL:
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For KMART CORPORATION, appellee: John Wm Butler, Jr., Skadden, Arps, Slate, Meagher & Flom, Chicago, IL.

JUDGES:
John F. Grady, United States District Judge.

OPINIONBY:
John F. Grady

OPINION:

[*820] MEMORANDUM OPINION

Capital Factors, Inc. appeals from four bankruptcy orders of the bankruptcy court that authorized Kmart, as part of certain prepetition obligations. For the reasons explained below, the bankruptcy court's orders are reversed.

BACKGROUND

On January 22, 2002, Kmart Corporation and certain of its domestic subsidiaries and affiliates, [illegible] debtors-in-possession (collectively "Kmart") filed voluntary petitions for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code. As part of the "first day motions" filed on that date, Kmart sought authority to pay prepetition obligations to some "critical vendors" (the "Critical Vendor Motion") and certain foreign vendors (the "Foreign Vendor Motion"). Kmart contended that both motions were critical to its ongoing [***2] maintain relationships essential to its ongoing operation and reorganization, and, in particular, the "doctrine of necessity" and 11 U.S.C.S. § 105(a) gave the bankruptcy court authority to permit those payments.

The same day, the bankruptcy court held a hearing and heard evidence on Kmart's motions. Capital Factors, Inc. ("Capital") objected to both motions. (Capital is a factoring agent for a number of Kmart's apparel suppliers, and it holds [illegible]

payment of prepetition claims. The court relied on *11 U.S.C. § 105(a)* to authorize the payments. Section 105(a) [HN2] addresses the equitable powers of bankruptcy courts and provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[*822] *11 U.S.C. § 105(a)*. Although the bankruptcy court did not refer specifically to the equitable "doctrine of necessity" when ruling on the motions in open court or in its written orders, n4 Kmart relies on the doctrine. It is derived from the "necessity of payment rule," which was developed and used in railroad reorganizations "as justification for the payment of pre-petition [**7] debts owed to creditors whose continued supplies or services were essential to the continued operation of the railroad." *B & W Enters., Inc. v. Goodman Oil Co. (In re B & W Enters., Inc.), 713 F.2d 534, 537 (9th Cir. 1983)*. The rule has subsequently evolved into the "doctrine of necessity," which has been applied in non-railroad reorganizations to justify the pre-plan payment of prepetition claims of creditors who threaten to withhold goods or services deemed critical to the debtor's continued viability and reorganization. n5 The doctrine is not codified anywhere in the Bankruptcy Code, so the only way to apply it is through *§ 105*.

n4 As noted supra, the bankruptcy court did, however, find that the payments were "necessary," "integral," and that there was "good business justification" for them.

n5 See 2 William L. Norton, Jr., Norton Bankr. L. & Prac. 2d § 42:11 (Supp. 2002), for a good discussion of the doctrine's history.

The Seventh Circuit has stated that [HN3] the grant of equitable [**8] power in *§ 105* is limited in that it "allows [bankruptcy] courts to use their equitable powers only as necessary to enforce the provisions of the Code, not to add on to the Code as they see fit." *In re Fesco Plastics Corp., 996 F.2d 152, 154 (7th Cir. 1993)*; see also *[illegible] v. [illegible], 37 F.3d 295, 300 (7th Cir. 1994)* ("The Supreme Court has taught that any grant of authority given to the bankruptcy courts under *§ 105* must be exercised within the confines of the bankruptcy code.") (citing *Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 99 L. Ed. 2d 169, 108 S. Ct. 963 (1988)*).

[HN4] The Bankruptcy Code sets forth a priority scheme for the payment of claims. See *11 U.S.C. §§ 503, 507*. The Code does not carve out priority or administrative expense status for prepetition general unsecured claims based on the "critical" or "vital" status of a creditor. But the effect of the bankruptcy court's orders was to elevate the claims of the "critical" vendors over those of other unsecured creditors and to subordinate the claims of non-"critical" creditors. The bankruptcy court altered the priority scheme [**9] set forth in the Bankruptcy Code.

[HN5] There is a split in the courts regarding whether *§ 105* authorizes bankruptcy courts to permit pre-plan payment of prepetition unsecured claims. As set forth in Kmart's briefs, many bankruptcy courts and a handful of district courts have held that bankruptcy courts do in fact have this power. See, e.g., *In re Just for Feet, Inc., 242 B.R. 821 (D. Del. 1999)*; *Michigan Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279 (S.D.N.Y. 1987)*; *In re CoServ, L.L.C., 273 B.R. 487 (Bankr. N.D. Tex. 2002)*; *In re Wehrenberg, Inc., 260 B.R. 468 (Bankr. E.D. Mo. 2001)*.

On the other hand, as Capital points out, a number of courts of appeals and a few lower courts have held just the opposite. See, e.g., *Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987)*; *B & W Enters., Inc. v. Goodman Oil Co. (In re B & W Enters., Inc.), 713 F.2d 534 (9th Cir. 1983)*; *Chiasson v. J. Louis Matherne & Assocs. (In re Oxford Mgmt. Inc.), 4 F.3d 1329 (5th Cir. 1993)*; *In re FCX, Inc., 60 B.R. 405 (E.D.N.C. 1986)*; [**10] *In re Timberhouse Post & Beam, Ltd., 196 B.R. 547 (Bankr. D. Mont. 1996)*. We agree with the latter courts' view. We cannot ignore the Bankruptcy Code's statutory scheme of priority in favor of "equity," especially in light of the Seventh Circuit's admonition that "the fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be." *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 791 F.2d 524, 528 (7th Cir. 1986)*.

n6 Cf. *Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.), 963 F.2d 1490 (11th Cir. 1992)* (bankruptcy court had no authority to allow cross-collateralization, a method of paying prepetition debt with postpetition collateral); *Southern Ry. Co. v. Johnson Bronze Co. (In re Johnson Bronze Co.), [illegible]*

Cir. 1989) (bankruptcy court had no authority to grant lien status to a prepetition contractual indemnification claim); Crowe & Assocs., Inc. v. Bricklayers & Masons Union Local No. 2 (*In re Crowe & Assocs., Inc.*), *713 F.2d 211, 216 (6th Cir. 1983)* (dictum).

[**11]

We acknowledge that the application of the "doctrine of necessity" through *§ 105* in this situation is well-intended and may even have some beneficial results, in that pre-plan payment of certain prepetition claims allows the debtor to minimize disruptions in doing business, and thus may further reorganization. Nevertheless, it is clear that however useful and practical these payments may appear to bankruptcy courts, they simply are not authorized by the Bankruptcy Code. [HN6] Congress has not elected to codify the doctrine of necessity or otherwise permit pre-plan payment of prepetition unsecured claims.

Because we hold that [HN7] the bankruptcy court did not have either the statutory or equitable power to authorize the pre-plan payment of prepetition unsecured claims, we need not address the second and third issues Capital raises on appeal.

B. "Equitable Mootness"

Kmart does not persuade us that Capital's appeals are moot due to the fact that the prepetition claims have been substantially paid. Kmart makes much of the fact that Capital did not seek a stay of the bankruptcy court's orders. It is highly unlikely, however, that a motion to stay would have been successful. It would [**12] be inconsistent for the bankruptcy court to enter the orders on the theory that prompt payments were necessary to keep Kmart operational, and then turn around and stay those orders. n7 In any event, [HN3] Capital was not required to seek a stay of the orders in order to preserve its appellate rights.

n7 See Charles Jordan Tabb, Emergency Prefiling Orders in Bankruptcy Reorganizations, *65 Am. Bankr. L.J. 75, 108 (1991)*.

Kmart also argues that the appeals are "equitably moot" because effective relief on appeal has become imprudent and inequitable. The term "equitable mootness" was "smithereenized by Judge Easterbrook" in the case of *In re UNR Industries, Inc., 20 F.3d 766, 768 (7th Cir. 1994)*. [HN9] The Seventh Circuit in UNR "banished the term 'equitable mootness' from the [circuit] lexicon," *20 F.3d at 769*, because it is misleading "[t]here is a big difference between a inability to alter the circumstances (real mootness) and unwillingness to alter the circumstances ("equitable [**13] mootness")." *Id.* Nonetheless, the "now nameless doctrine" lives on and "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief, a court may consider the effects of the relief on innocent third parties." *Envirodyne, 29 F.3d 301 at 304*. The doctrine thus requires courts to ask questions under [**14] the doctrine, then, are these: what is prudent and fair to undo what the bankruptcy court did? n8 See *UNR, 20 F.3d at 769*; *Envirodyne, 29 F.3d at 304*.

n8 *In re Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994)*.

n9 As Capital points out, it is worth noting that most of the cases addressing or applying the doctrine involved appeals of orders confirming bankruptcy plans of reorganization. See, e.g., *UNR, 20 F.3d 766*; *Mac Panel Co. v. Virginia Panel Corp., 283 F.3d 652 (4th Cir. 2002)*. These cases are distinguishable from the instant proceeding because there has not yet been a confirmation of Kmart's plan.

[**14]

Kmart argues that we should not reverse the orders allowing payment of the prepetition claims because the parties receiving the payments have already acted in reliance on them. As noted supra note 3, however, this is not a situation where there has been confirmation of a bankruptcy plan. Accordingly, it is not too late to undo that the monies paid be returned. Kmart's claim that undoing the bankruptcy court's order would "put [the] Kmart by forcing it to 'undergo the [c]ircular [f]low of immediately commencing thousands of [a]ctions to collect hundreds of millions of dollars from literally tens of vendors." (Appellees' Brief at 45-46.) We are not persuaded by Kmart's doom-and-gloom approach. It is evident that Kmart will have to [illegible] payments, and in fact, Kmart cites no cases [illegible] that the bankruptcy court would not have the [illegible] order the return of the monies paid.

C. J.P. Morgan Chase's Brief

J.P. Morgan Chase (JPM) [illegible] "administrative agent for the lenders under the prepetition credit agreement among [illegible] Kmart" (JPM Brief at 1), has filed a separate brief regarding the Letters of Credit issues. JPM expresses

[**15] that, even if the bankruptcy court did not have the authority under § *105* to authorize Kmart to pay the prepetition claims of the issuers of the letters of credit, the court "properly allowed those payments [pursuant to § *361 of the Bankruptcy Code*] on the basis that such payments constituted adequate protection for the Issuers' deemed reimbursement claims under the Letters of Credit." (JPM Exc. at 2.) According to JPM, the issuers had statutory liens in the documents and the proceeds thereof presented by the foreign vendors to obtain payment under the letters of credit, and the issuers were entitled to adequate protection of those liens under § *361* of the Code. [***10]

[***11] Section *361* provides:

[HN10] When adequate protection is required under section *362*, *363*, *or 364* of this title of an interest of an entity in property, such adequate protection may be provided by--

1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under *section 362* of this title, use, sale or lease under *section 363* of this title, or any grant of a lien under *section 364* of this title results in a decrease in the value of such entity's interest in such property;

2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

3) granting such other relief, other than entitling such entity to compensation allowable under *section 503(b)(1)* of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

[***16]

In authorizing the payments to the issuers of the letters of credit, the bankruptcy court did not rely on § *361*. [HN11] We may affirm the bankruptcy court's decision on an alternative ground, but that ground must have been adequately presented in the bankruptcy court. See *Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 473 (7th Cir. 2001)* (citing *Logan v. Caterpillar, Inc., 246 F.3d 912, 924 (7th Cir. 2001)*). Neither Kmart nor the issuers raised the adequate protection issue at the hearing on the Letters of Credit Motion. The bankruptcy court was not presented with evidence as to whether the issuers held valid security interests or whether they were entitled to adequate protection. There is an insufficient basis in the record to allow this court to find that the payments to the issuers constituted adequate protection under § *361* of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the following portions of the bankruptcy court's November 1, 2002 Order Granting Debtors' Motion Pursuant to *11 U.S.C. § 105 (a)* Authorizing the Payment of Prepetition Claims of Certain Critical Trade Vendors; (2) Order Pursuant to *11 U.S.C. § § 105* [illegible] *(a) and 363* Authorizing Payment of Prepetition Obligations Necessary to Obtain Imported Merchandise; (3) Order Pursuant to *11 U.S.C. § § 105(a) and 363* Authorizing the Debtors to Honor Reimbursement Obligations to the Issuers of Pre-Petition Letters of Credit Issued for the Benefit of the Debtors' Foreign Vendors; and (4) Order Under *11 U.S.C. § 105(a)* Authorizing the Payment of Prepetition Claims of Certain Import Vendors.

The case is remanded for further proceedings consistent with this opinion.

DATE: April 8, 2003

ENTER:

John F. Grady, United States District Judge