

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SOUTHCROSS ENERGY PARTNERS, L.P.,
et al.,¹
Debtors.

Chapter 11

Case No. 19-10702 (MFW)

Hearing Date: May 7, 2019 at 11:00 a.m. (ET)

Objection Deadline: April 16, 2019 at 4:00 p.m. (ET)

Re: Docket Nos. 14 and 59

**OBJECTION OF CATERPILLAR FINANCIAL SERVICES CORPORATION TO
MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS,
PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, AND 507, (I)
AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED
SUPERPRIORITY POST-PETITION FINANCING, (II) GRANTING LIENS AND
SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III)
AUTHORIZING THE USE OF CASH COLLATERAL, (IV) GRANTING
ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI)
SCHEDULING FINAL HEARING, AND (VII) GRANTING RELATED RELIEF**

Caterpillar Financial Services Corporation (“CFSC”), by and through undersigned counsel, hereby submits this objection (the “Objection”) to the *Motion of Debtors for Entry of Interim and Final Orders, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, and 507, (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Post-Petition Financing, (II) Granting Liens And Superpriority Administrative Expense Claims, (III) Authorizing the Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling Final*

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective Employer Identification Numbers, are as follows: Southcross Energy Partners, L.P. (5230); Southcross Energy Partners GP, LLC (5141); Southcross Energy Finance Corp. (2225); Southcross Energy Operating, LLC (9605); Southcross Energy GP LLC (4246); Southcross Energy LP LLC (4304); Southcross Gathering Ltd. (7233); Southcross CCNG Gathering Ltd. (9553); Southcross CCNG Transmission Ltd. (4531); Southcross Marketing Company Ltd. (3313); Southcross NGL Pipeline Ltd. (3214); Southcross Midstream Services, L.P. (5932); Southcross Mississippi Industrial Gas Sales, L.P. (7519); Southcross Mississippi Pipeline, L.P. (7499); Southcross Gulf Coast Transmission Ltd. (0546); Southcross Mississippi Gathering, L.P. (2994); Southcross Delta Pipeline LLC (6804); Southcross Alabama Pipeline LLC (7180); Southcross Nueces Pipelines LLC (7034); Southcross Processing LLC (0672); FL Rich Gas Services GP, LLC (5172); FL Rich Gas Services, LP (0219); FL Rich Gas Utility GP, LLC (3280); FL Rich Gas Utility, LP (3644); Southcross Transmission, LP (6432); T2 EF Cogeneration Holdings LLC (0613); and T2 EF Cogeneration LLC (4976). The debtors’ mailing address is 1717 Main Street, Suite 5300, Dallas, TX 75201.



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Hearing, and (VII) Granting Related Relief [Docket No. 14] (the “Motion”). In support of this Objection, CFSC respectfully states as follows:

PRELIMINARY STATEMENT²

1. By the Motion, the Debtors seek approval of a \$127.5 new money debtor in possession financing facility, which also contemplates a roll up of prepetition secured obligations in the same amount, dollar for dollar (the “DIP Financing”). While the Debtors are offering CFSC, a prepetition Term Loan Lender (hereinafter defined), adequate protection in the form of monthly interest payments at the default rate, replacement liens, and subordinated § 507(b) claims, the proposed adequate protection is inadequate in protecting CFSC and the benefit of its bargain. Unless the Debtors can show that they have a sufficient equity cushion, the proposed replacement liens are insufficient and the requested priming of CFSC’s first position lien should be denied.

BACKGROUND

A. The Term Loan Agreement

2. On or about August 4, 2014, Debtor Southcross Energy Partners L.P. (“Partnership”), as borrower, Wells Fargo Bank, N.A., as Administrative Agent (the “Term Loan Agent”), UBS Securities LLC and Barclays Bank PLC as Co-Syndication Agents, and the lenders thereto (the “Term Loan Lenders”) entered into the Term Loan Agreement. The other Debtors herein, other than Southcross Energy Partners GP, LLC (“General Partner”), are guarantors of Partnership’s obligations under the Term Loan Agreement. The term loan (the “Term Loan”) is a seven-year \$450 million term loan facility due on August 4, 2021. Interest on the Term Loan

² All capitalized terms not otherwise defined herein shall have the meaning set forth in the Motion or the Interim Order, as may be appropriate.

accrues at LIBOR plus 4.25% per annum and is due quarterly along with amortization of 1.0% per annum. According to the Debtors, due to amortization, as of the Petition Date, the outstanding principal amount of the Term Loan was \$430.87 million.

3. On or about August 20, 2014, the Term Loan Agent and CFSC entered into an Assignment and Assumption, pursuant to which the Term Loan Agent sold and assigned its rights and obligations in its capacity as a Term Loan Lender in the amount of \$2.5 million, as well as any and all claims, suits, causes of action and other rights of the Term Loan Agent in its capacity as a Term Loan Lender.

4. On or about October 22, 2014, the Term Loan Agent and CFSC entered into a second Assignment and Assumption, pursuant to which the Term Loan Agent sold and assigned its rights and obligations in its capacity as a Term Loan Lender in the amount of \$3 million, as well as any and all claims, suits, causes of action and other rights of the Term Loan Agent in its capacity as a Term Loan Lender.

5. As of the Petition Date, CFSC was owed approximately \$5.5 million under the Term Loan Agreement and related loan documents.

6. As of the Petition Date, the obligations under the Term Loan Agreement were secured by first-priority liens on substantially all of the Debtors' real, personal, and other property described in the relevant security documents (the "Prepetition Collateral"), which includes processing and other facilities, pipelines, cash, contracts, accounts, inventory, general intangibles, fixtures and various other assets.³

³ The Term Loan Lenders' interests in the Debtors' property under the Term Loan Agreement are *pari passu* to those of the respective lenders under the Third Amended & Restated Revolving Credit Agreement (the "Revolving Credit Agreement"), dated as of August 4, 2014, and amended six times through August 10, 2018. The Revolving Credit Agreement is a five-year revolving credit facility due August 4, 2019 (the "Revolving Credit Facility"). According to the Debtors, the Revolving Credit Facility was originally a \$200 million facility with a \$75 million sublimit for letters of credit (L/Cs); however, the lenders have reduced their commitments over time to \$115 million, with a sublimit of \$50 million for L/Cs. Approximately \$81.1 million in principal of loans and \$25.9 million of undrawn

7. On March 3, 2016, Wilmington Trust, N.A. replaced Wells Fargo Bank, N.A. as Administrative Agent under the Term Loan Agreement.

8. As set forth in the Term Loan Agreement, if the Term Loan Agent receives insufficient funds to pay all amounts of principal, interest and fees then due under the Term Loan Agreement, funds must be applied ratably, first toward payment of interest and fees, then to payment of principal. Term Loan Agreement, ¶ 4.01(b). Moreover, if any Term Loan Lender obtains payment of principal or interest on any of its loans resulting in such Term Loan Lender receiving payment of a proportion of the aggregate amount of its loans and other such obligations greater than its *pro rata* share, then the Term Loan Lender receiving such greater proportion shall either purchase participations in the Term Loan or make such other adjustments as shall be equitable so the benefit shall be shared by the Term Loan Lenders ratably. *Id.*, ¶ 4.01(c).

9. While Partnership, as borrower, and the Required Lenders⁴ may amend or modify the Term Loan Agreement, no such amendment or modification may, *inter alia*, without the written consent of each Term Loan Lender adversely affected thereby: (i) reduce any Secured Obligations⁵

letters of credit are currently outstanding under the Revolving Credit Facility. Additionally, Southcross's obligations under three interest-rate caps with a notional value of \$275 million are secured under the Revolving Credit Facility. Interest on money borrowed under the Revolving Credit Facility accrues at LIBOR plus a margin between 2.0% and 7.5% and is due quarterly.

⁴ The term "Required Lenders" is defined as "at any time [Term Loan] Lenders holding [Term] Loans representing more than fifty percent (50%) of the aggregate outstanding principal amount of [Term] Loans of all [Term Loan] Lenders. The [Term] Loans held by any Defaulting [Term Loan] Lender shall be disregarded in determining "Required Lenders" at any time.

⁵ The term "Secured Obligations" is defined as "any and all obligations of and amounts owing or to be owing (including interest accruing at any post-default rate and interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to the Borrower, any of its Subsidiaries or any other Loan Party, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding) by the Borrower, any Subsidiary or any other Loan Party (whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising): (a) to the Administrative Agent, any trustee or any Lender under any Loan Document; (b) to any Secured Hedging Agreement Counterparty under any Secured Hedging Agreement, including any Secured Hedging Agreement in existence prior to the date hereof, but excluding any additional transactions or confirmations entered into (i) after such Secured Hedging Agreement Counterparty ceases to be a Lender or an Affiliate of a Lender or (ii) after assignment by such Secured Hedging Agreement Counterparty to another Person that is not a Lender or an Affiliate of a Lender; (c) to any Bank Products Provider in respect of any Bank Products; and (d) all renewals, extensions and/or rearrangements of any of the above; *provided* that, solely with respect to any Loan Party that is not an "eligible contract participant"

thereunder; (ii) postpone the scheduled date of payment or prepayment of the principal amount of any Term Loan (excluding mandatory prepayments) or any interest thereon, or any fees payable thereunder, or any other Secured Obligations under the Term Loan Agreement; (iii) reduce the amount of, waive or excuse any such payment, or postpone or extend the Termination Date or Maturity Date (as such terms are defined in the Term Loan Agreement) of any Term Loan; or (iv) change Section 4.01(b) or Section 4.01(c) of the Term Loan Agreement in a manner that would alter the *pro rata* sharing of payments required thereby.

C. The Second Amendment to Term Loan Agreement

10. On March, 31, 2019, one day before the Petition Date, Partnership, as borrower, and those Term Loan Lenders participating in the DIP Financing, as lenders, entered into the Second Amendment to Term Loan Credit Agreement (the “Second Amendment”). The purpose of the Second Amendment was to “clarify the treatment of the ‘roll up’ of certain [Term] Loans held by certain [Term Loan] Lenders or Affiliates of certain [Term Loan] Lenders in connection with the DIP Financing.” Second Amendment, p. 1. In that regard, the Second Amendment added the following new sections to the Term Loan Agreement:

3.04(d). Upon the occurrence of a DIP Financing, 100% of the proceeds thereunder that comprise “Roll-Up Loans” as defined in the agreement governing such DIP Financing shall be required to be sued by the Borrower to prepay certain Loans hereunder, in accordance with Section 3.04(e).

3.04(e). Each prepayment of Borrowings pursuant to Section 3.04(d) shall be applied ratably to the Loans held by those Lenders who are (or whose Affiliates are) lenders under a DIP Financing.

4.05(a). Any refinancing of the Secured Obligations constituting Refinancing Debt Pursuant to a DIP Financing (the “Refinancing”), whether in whole or in part, shall not constitute a realization of proceeds; and

under the Commodity Exchange Act, Excluded Hedging Obligations of such Loan Party shall in any event be excluded from “Secured Obligations” owing by such Loan Party.

4.05(b). The Refinancing shall not change any of the requirements of Section 4.01(b) or Section 4.01(c) in respect of the pro rata sharing payments required by such sections.

Second Amendment, §§ 1.2 and 1.3. The new provisions to the Term Loan Agreement purport to, albeit unsuccessfully, allow the roll up of the prepetition Term Loans of those Term Loan Lenders participating in the DIP Financing without triggering the obligation to pay all of the Term Loan Lenders on a *pro rata* basis. CFSC reserves all of its respective rights against the Administrative Agent and the Term Loan Lenders participating in the DIP Financing for violations under the Term Loan Agreement.

D. The Motion and Interim Order

11. On April 1, 2019, the Debtors filed the Motion. The Motion is supported, in part, by the *Declaration of Michael B. Howe in Support of Debtors' Chapter 11 Proceedings and First Day Pleadings* [Docket No. 2] and the *Declaration of Avinash D'Souza in Support of the Debtors' Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, and 507, (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Post-Petition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing the Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling Final Hearing, and (VII) Granting Related Relief* [Docket No. 14-2].

12. On October 23, 2018, the Court entered the *Interim Order, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, and 507, (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Post-Petition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing the Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling Final Hearing, and (VII)*

Granting Related Relief [Docket No. 59] (the “Interim Order”). As set forth therein, “[t]he Prepetition Secured Parties are entitled, pursuant to sections 361, 362, 363(e), 364(d)(1), and 507 of the Bankruptcy Code, to adequate protection of their respective interests in the Prepetition Collateral, for and equal in amount to the aggregate diminution in the value of the Prepetition Secured Parties’ prepetition security interests in the Prepetition Collateral from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code...” Interim Order at ¶ 14.

13. Under the Interim Order, and the proposed final order for the Motion (the “Final Order”), the Prepetition Secured Parties are, and will be granted, as adequate protection: (i) replacement security interests and liens upon the DIP Collateral subject and subordinate to the Carve-Out, the DIP Liens, and the Permitted Senior Liens;⁶ (ii) allowed superpriority administrative expense claims pursuant to § 507(b) of the Bankruptcy Code, subject to the Carve-Out, the DIP Liens, the DIP Superpriority Claims, and the Permitted Senior Liens; and (iii) cash payments in an amount equal to the sum of all post-petition unpaid interest accruing on all outstanding principal, interest, fees, and other amounts owing under the applicable Prepetition Secured Debt (as of the Petition Date), at the applicable default rate.

OBJECTION

14. CFSC objects to the entry of the Final Order to the extent that it attempts to prime CFSC’s first priority lien on its collateral without providing CFSC with sufficient adequate protection, and to the extent that it violates CFSC’s contractual rights.

15. Section 364(d)(1) of the Bankruptcy Code provides that the bankruptcy court may authorize post-petition financing supported by a superpriority lien only if “there is adequate

⁶ Included in the definition of “Permitted Senior Liens” are the liens in favor of the DIP L/C Issuers in respect of the Cash Collateral Accounts, securing the Loan Parties’ obligations under the DIP Letters of Credit.

protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.” Thus, to approve the Debtors’ proposed financing on a superpriority basis, the Court must find that CFSC’s interests are adequately protected. *See Resolution Trust Corp. v. Swedeland Dev. Group (In re Swedeland Dev. Group)*, 16 F.3d 552, 564 (3d Cir. 1994).

16. The Debtors have the burden to establish that CFSC’s lien, which they seek to have subordinated, is adequately protected. *See id.* (citations omitted). *See also* 11 U.S.C. § 363(o)(1); *In re LTAP US, LLLP*, 2011 Bankr. LEXIS 667, *9 (Bankr. D. Del. Feb. 18, 2011) (J. Gross) (holding that “[p]riming is extraordinary relief requiring a strong showing that the loan to be subordinated is adequately protected.”).

17. The Bankruptcy Code does not expressly define adequate protection, but § 361 of the Bankruptcy Code states that it may be provided by (1) periodic cash payments; (2) additional or replacement liens; or (3) other relief resulting in the “indubitable equivalent” of the secured creditor’s interest in such property. 11 U.S.C. § 361. The last possibility is regarded as a catch all, allowing courts discretion in fashioning the protection provided to a secured party. Therefore, a determination of whether there is adequate protection is made on a case by case basis. *See Swedeland*, 16 F.3d at 564.

18. “The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.” *Id.* (citation omitted). Accordingly, a proposal depending upon a prepetition lender having adequate protection, no matter its form, ““should as nearly as possible under the circumstances of the case provide the creditor with the value of his bargained for rights.”” *Id.* (citation omitted). Whether protection is adequate “depends directly on how effectively it compensates the secured creditor for loss of value” caused

by the superpriority given to the post-petition loan. *See id.* In other words, the proposal should provide the prepetition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing. *See id.*

19. Under the Final Order, Term Loan Lenders shall receive adequate protection in the form set forth in the Interim Order and as described above. Ultimately, other than the monthly interest payments, the Debtors are proposing to provide adequate protection to CFSC in the form of a junior lien on its own collateral and a junior lien on avoidance actions, the value of which are unknown at this point, if they have any value at all for CFSC.

20. The Debtors have failed to meet their steep burden of showing that the proposed adequate protection provides CFSC with the value of its bargained-for rights. In particular, the Debtors have not met their burden of proving that there is a sufficient equity cushion to allow the proposed subordination of CFSC's secured first lien on Debtors' assets. Priming is extraordinary relief requiring a strong showing that the loan to be subordinated is adequately protected. *See In re LTAP US, LLLP*, 2011 Bankr. LEXIS 667, *8-9 (Bankr. D. Del. Feb. 18, 2011) (citing *In re Swedeland Development Group, Inc.*, 16 F.3d 552 (3d Cir. 1994)). Bankruptcy judges are required to grant Section 364(d) financing only upon a tangible demonstration of adequate protection. *Id.* at 567. The Court must be cautious in assuring that CFSC has received genuine adequate protection, and the facts simply do not support the conclusion that the DIP Financing protects CFSC's security interest.

21. Providing CFSC with a replacement lien on assets against which it already has a lien is illusory and monthly interest payments at the default rate in and of themselves are insufficient in providing CFSC with adequate protection when CFSC's lien and claim are proposed

to be behind \$127.5 million in new money loans and a roll up in the same amount as requested by the Debtors, which is excessive, unnecessary, and which provides no benefit to the estate.

RESERVATION OF RIGHTS

22. CFSC reserves its right to supplement this Objection (whether before or at the final hearing) to address additional issues raised in the Motion, the Interim Order and the proposed Final Order. CFSC further reserves all of its rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, and to raise additional objections during the final hearing on the Motion.

CONCLUSION

WHEREFORE, CFSC objects to entry of the Final Order and respectfully requests (A) that the Court approve the entry of the Final Order only if it grants the relief requested in this Limited Objection and (B) that the Court grant such other relief as the Court deems just and proper.

Dated: April 16, 2019
Wilmington, Delaware

Respectfully submitted,

/s/ Stephen B. Gerald

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