Docket #0102 Date Filed: 04/16/2019

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. 10 and 55**

OBJECTION OF CATERPILLAR FINANCIAL SERVICES CORPORATION TO MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING (I) DEBTORS TO PAY PREPETITION TRADE CLAIMS IN THE ORDINARY COURSE OF BUSINESS AND (II) FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS

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 Authorizing (I) Debtors to Pay Prepetition Trade Claims in the Ordinary Course of Business and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 10] (the "Motion"). In support of this Objection, CFSC respectfully states as follows:

[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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PRELIMINARY STATEMENT[2]

1. In addition to seeking authority to pay $8.6 million in what the Debtors believe to be critical prepetition unsecured debt, the Debtors also seek, by the Motion, authority to pay an additional $1.8 million in admittedly non-critical prepetition unsecured debt. CFSC, a prepetition Term Loan Lender, as hereinafter defined, not participating in the DIP financing facility (the "DIP Financing"), objects to the proposed use of its collateral. In the Debtors' efforts to avoid the appointment of an official committee of unsecured creditors, the Debtors and their counsel have portrayed these cases as simple. And yet, as of the date of the first day hearings, the Debtors had yet to decide whether they will pursue an equitizing plan, a sale through a plan, or a § 363 sale.

2. In the Debtors' efforts, they ask this Court to stretch the necessity of payment doctrine far beyond its intended purpose. The necessity of payment doctrine should not be used as a sword to cut off the legs of a statutory watchdog, particularly to the detriment of a non-consenting secured lender.

3. The Term Loan Lenders participating in the DIP Financing, who comprise a majority of the prepetition Term Loan Lenders, cannot cram their purported consent and support of the Debtors' payment of non-critical prepetition unsecured debt upon prepetition Term Lenders, like CFSC, that are not participating in the DIP Financing. Any attempt on the part of the majority Term Loan Lenders participating in the DIP Financing to impair CFSC's rights with respect to "Secured Obligations" under the prepetition Term Loan, must have CFSC's written consent to do so,[3] which is lacking. The Debtors have claimed that they would rather pay their unsecured creditors than a committee's professionals, but that is not a proper reason to relax the standard for

[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.

[3] See Term Loan Agreement at § 12.02.

when a debtor may pay prepetition trade debt in the face of an objection from a secured lender, in this case about to be dwarfed by a $127.5 million new money DIP Financing and a rollup in the same amount.

BACKGROUND

A. The Term Loan Agreement

4. 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 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.

5. 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.

6. 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.

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

8. 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.[4]

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

10. 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

[4] 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 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.

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).

11. While Partnership, as borrower, and the Required Lenders[5] 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 Obligations[6] 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

12. 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

[5] 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.

[6] 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" 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.

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

13. On April 1, 2019, the Debtors filed the Motion, pursuant to which they seek authority to pay the unsecured prepetition claims of various types of critical trade vendors,

including $5,700,000 to Gas Vendors, $500,000 to Safety and Regulatory Compliance Vendors, $1,900,000 to Pipeline Commodity Vendors, and $500,000 to Specialty Material Vendors (collectively, the "Critical Trade Claims").

14. In addition, the Debtors seek authority to pay approximately $1.8 million in prepetition claims of non-critical Residual Trade Creditors (the "Non-Critical Trade Claims," together with the Critical Trade Claims, the "Trade Claims"). While the Debtors assert that a "significant portion" of the Trade Claims would be entitled to administrative expense status under § 503(b)(9) of the Bankruptcy Code, and thus should be paid in the first instance, the Motion does not identify the amount of Non-Critical Trade Claims that would be entitled to administrative expense status under § 503(b)(9) as opposed to Critical Trade Claims or recognize the fact that § 503(b)(9) claims are commonly paid under a plan.

15. The Debtors assert that the "lenders under the prepetition secured facilities," including the Term Loan Lenders, support payment of the Trade Claims, including the Non-Critical Trade Claims, to effectuate the deleveraging of the Debtors' balance sheet with minimal interruption to their operations. *See* Motion at p. 14. The Debtors also submit that paying such claims post-petition and in the ordinary course of business would (a) dramatically reduce the financial burden on the Debtors' estates and (b) maintain goodwill and positive relationships with all trade creditors, thereby maximizing value for the benefit of their estates.

16. On April 2, 2019, the Court held a hearing on the Motion at which the Debtors advised the Court that their request to pay the Non-Critical Trade Claims was an effort to avoid the appointment of an official committee of unsecured creditors in these cases, as a committee would likely have professional fees exceeding the $1.8 million they seek to pay on account of Non-Critical Trade Claims. The Debtors averred that they would rather pay their vendors than use those funds to pay for a committee's professionals.

OBJECTION

17. The Debtors' reliance on § 363 of the Bankruptcy Code and the necessity of payment doctrine as authority to pay the Non-Critical Trade Claims is misguided. As noted by the Debtors in the Motion, the Debtors' decisions to use, sell, or lease assets outside the ordinary course of business must be based upon the sound business judgment of the debtor. *See, e.g.*, *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996). And, under the business judgment rule, the Court should interfere with the Debtors' decisions if it is made clear that those decisions are, *inter alia*, clearly erroneous, made arbitrarily, are in breach of the officers' and directors' fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code." *In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) (citing *In re United Artists Theatre Co.*, 315 F.3d 217, 233 (3d Cir. 2003) (emphasis added).

18. While the Debtors assert that the Term Loan Lenders have consented to the payment of the Non-Critical Trade Claims, as set forth above, the Required Lenders (as defined in the Term Loan Agreement) and the Administrative Agent, simply do not have the contractual authority to impair CFSC's rights in this matter. Written consent of each Term Loan Lender is required in order to affect its rights in, *inter alia*, the Secured Obligations under the Term Loan Agreement.

19. The Debtors are not able to satisfy the evidentiary burden necessary to pay the Non-Critical Trade Claims. To the extent the Debtors establish an evidentiary basis for payment of the Non-Critical Trade Claims, the relief that may be granted is limited to what "is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003. In that regard, Federal Rule of Bankruptcy Procedure 6003 provides that:

> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following:

> * * *
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> (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001.
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> * * *

Fed. R. Bankr. P. 6003.

20. Because the Petition Date was April 1, 2019, the Debtors must show that the requirements of Rule 6003 are met. In that regard, the Debtors must show that they will suffer immediate and irreparable harm if they do not obtain authority for $1.8 million in Non-Critical Trade Claims. However, based on the Debtors' own admission, they are seeking to pay non-critical prepetition unsecured debt. The threat of the Office of the United States Trustee appointing an official committee of unsecured creditors is not the immediate and irreparable harm contemplated by Congress and the courts in approving payment of critical trade claims. As potential recoveries for Term Loan Lenders not participating in the DIP Financing is unknown at this time, any payment of prepetition unsecured claims should be limited to those entities whose services are absolutely critical to the Debtors' operations.

RESERVATION OF RIGHTS

21. 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 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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