

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:)
)
CRESCENT OIL COMPANY, INC.,) Case No. 09-20258
)
Debtor.)

**EMERGENCY MOTION AND MEMORANDUM OF
METCALF 136, LLC FOR ORDER COMPELLING DEBTOR TO
PERFORM ITS OBLIGATIONS UNDER LEASES OF NONRESIDENTIAL REAL
PROPERTY, PURSUANT TO 11 U.S.C. § 365(d)(3)**

The Emergency Motion and Memorandum of Metcalf 136, LLC, as provided under 11 U.S.C. § 365(d)(3), respectfully represents:

PARTIES AND JURISDICTION

1. On February 9, 2009, debtor Crescent Oil Company, Inc. (“Debtor” or “Crescent”) filed its Voluntary Petition for Relief under 11 U.S.C. § 1101, *et seq.*, and as provided under 11 U.S.C. §§ 1107 and 1108, has continued in the management and operation of its business and assets as debtor-in-possession.

2. Movant Metcalf 136, LLC (“Metcalf 136”) is the holder of a claim against the Debtor within the meaning of 11 U.S.C. § 101(5)(B) and, accordingly, is a creditor entitled to appear and be heard upon any issue arising herein, as provided under 11 U.S.C. § 1109(b).

3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and venue is proper herein pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested by movant are 11 U.S.C. §§ 105 and 365 and Fed. R. Bankr. P. 6006. Accordingly, this matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2).

FACTUAL BACKGROUND

4. Debtor is engaged in the business of selling motor vehicle fuels and related products at wholesale.

5. In order to secure a reliable market for its products, Debtor owns or leases a substantial number of “filling station”, “filling station and convenience store” and “truck stop” facilities which it leases or subleases to retail “operators” who then purchase Debtor’s fuel and related products for resale to the public.

6. On or about March 6, 2007, Metcalf 136 and Debtor made and entered into a commercial lease agreement, wherein Debtor, as lessee, agreed to the lease non-residential real estate, improvements, fixtures and equipment located at Lot 6, Old Metcalf Center, Fourth Plat, from Metcalf 136, as lessor, for an initial term of fifteen (15) years.

7. A copy of the lease agreement by and between Metcalf 136 and Debtor is attached to this Motion as **EXHIBIT 1**.

8. As provided in the Lease Agreement, Debtor is required to pay an annual Base Rent to Metcalf 136 which Base Rent is to be paid to Metcalf 136 in equal monthly installments of \$18,285.63.

9. As provided in the Lease Agreement, Debtor is required to pay each monthly installment of Base Rent to Metcalf 136 not later than the fifth (5th) day of the month to which it pertains, and any installment of Base Rent that is not paid in thirty (30) days thereafter shall bear interest at the “default rate” specified in such Lease Agreement.

10. In addition, Debtor is responsible under the Lease Agreement:

- a. For the payment to Metcalf 136 of \$2,770.00 per month, as and for real and personal property taxes assessed against the property and premises identified in each such Lease Agreement;

- b. At its sole cost and expense, to perform all repairs and maintenance necessary to keep the demised premises in a clean, neat and sanitary condition, and otherwise in at least as good a condition as existed at the inception of each such Lease Agreement; and
- c. At its sole cost and expense, to maintain, *inter alia*, policies of casualty insurance having an indemnity sufficient to replace all of the improvements, property, plant and equipment located on the demised premises, should they be damaged or destroyed.

11. Paragraph 20 of the Lease Agreement provides that in the event Debtor “fails to pay any installment of monthly Base Rent when due, and such failure continues beyond the fifth (5th) day of the month for which such installment is due”:

- a. Metcalf 136 “may declare” the Lease Agreement to be “terminated;
- b. Debtor shall thereupon “surrender and deliver the” Properties to Metcalf 136;
- c. “All rights and claims of Debtor in and to the use and enjoyment of the” Properties “shall cease and”;
- d. Debtor shall be liable for and pay to” Metcalf 136 “all rent accrued to the date of such repossession plus the present value of all rent” which under the now-terminated Lease Agreement would become due and payable thereafter.

12. Debtor has failed and refused to pay the monthly installment of Base Rent which, under the Lease Agreement, became due for the month of February, 2009.

13. Notwithstanding its failure to pay to Metcalf 136 the monthly installments of Base Rent due upon the Lease Agreement, Debtor continues to use and occupy the demised premise and all of the improvements, plant and equipment located thereon.

14. As a consequence of Debtor’s continuing use thereof, the premises and improvements identified in the Lease Agreement remain subject to loss, casualty or destruction, and there is the continuing potential that liabilities may arise as a result of injury to Debtor’s

agents, employees, customers and invitees which, as the lessor of such premises, could affect Metcalf 136 adversely.

15. The real property described in the Lease Agreement is subject to liens, mortgages or security interests which Metcalf 136 granted to its own financiers at the time it acquired the leased premises and the service of these obligations is dependent upon the timely receipt, by Metcalf 136, of the monthly rentals due and owing to it by Debtor.

16. The premises leased from Metcalf 136 by Debtor have been subleased by Debtor to retail operators who themselves pay rent each month to Debtor.

17. Metcalf 136 is informed and believes that each of the subtenants to whom Debtor has subleased the premises described in the Lease Agreement has paid the subrent due and owing to Debtor for February, 2009, and that it is the intention of such subtenants to continue paying such subrents to Debtor in March, 2009 and thereafter.

18. Debtor continues to use and dissipate the subrents paid to it by its subtenant for the month of February, 2009 and will continue to collect such subrents hereafter notwithstanding that it has failed and refused to pay the sums due and to become due to Metcalf 136 under the "Prime" Lease Agreement.

19. Accordingly, it is essential, for Metcalf 136's protection and for the protection of its interests in and to the premises identified in the Lease Agreement, that Debtor continue to perform its obligations to pay the monthly installments of Base Rent and monthly tax escrow, to properly maintain the premises and to keep and maintain, in full force and effect, the policies of insurance identified in the Lease Agreement.

GROUND FOR RELIEF

I. UNDER 11 U.S.C. § 365(D)(3), THE DEBTOR IS REQUIRED TO PERFORM EACH OBLIGATION THAT ARISES UNDER THE LEASE AGREEMENT DURING THE 60 DAYS NEXT SUCCEEDING THE ORDER FOR RELIEF AND

**THE DEBTOR MAY BE EXCUSED FROM THAT OBLIGATION ONLY FOR
“CAUSE” SHOWN**

20. 11 U.S.C. § 365(d)(3) provides, in relevant part, that the trustee or debtor-in-possession “**shall timely perform all obligations of the debtor ... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding [11 U.S.C. §] 503(b)(1) ...**” and that while “[t]he court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief ... the time for performance shall not be extended beyond such 60-day period”.

21. Similarly, 11 U.S.C. § 365(b)(1) provides, *inter alia*, that where “**there has been a default in an ... unexpired lease of the debtor**”, the trustee or debtor-in-possession “**may not assume such ... lease unless, at the time of assumption**”, the trustee or debtor-in-possession “**cures or provides adequate assurance that**” he or it “**will promptly cure such default**” and “**compensates, or provide adequate assurance that**” he or it “**will promptly compensate**” the non-debtor party “**to such as that lease for any actual pecuniary loss to such party resulting from such default ...**”, 11 U.S.C. § 365(b)(1)(A) and (B).

22. By its terms, § 365(d)(3) is intended to ensure “ongoing timely payment of obligations under an unexpired lease pending a determination whether to assume or reject, notwithstanding the automatic stay protections of bankruptcy”, In re Duckwall-Alco Stores, Inc., 150 B.R. 965, 970 (D. Kan. 1993).

23. To that end, § 365(d)(3) gives “[t]he landlord ... a procedure by which to compel a tenant to either make the payments due under the lease or reject the lease and surrender the property to the landlord”, *Id.* Pending “the decision to assume or reject, the ... debtor-in-possession is generally required to timely perform all lease obligations arising after the order for

relief”, *Id.* It is clear, moreover, that “**rent payments during the first 60 days post-petition are allowed at contractual rate, without notice and hearing**”, that no showing of reasonableness need be made, *Id.* at 971, and that “**lessors, as opposed to typical administrative expense claimants under § 503(b)(1), are not required to establish value or prove a benefit to the estate to establish the amount of their claim, but rather are entitled to current payment of the amounts required under their leases**”, In re Furr’s Supermarkets, Inc., 283 B.R. 60, 65 (10th Cir. BAP 2002).

24. In short, § 365(d)(3) “**require[s] timely payment of the rent due under the lease without regard to the ‘actual, necessary costs’ requirement under § 503(b)(1)(A)**”, In re Dawson, 162 B.R. 329, 332 (Bankr. D. Kan. 1993) (emphasis added) and “**based on the clear language**” thereof, “**§ 365(d)(3) ... creates obligations with priority over § 503 administrative claims**”, In re Duckwall-Alco, 150 B.R. at 971 (emphasis added).

25. Second, while the Court “may extend the time for performance of” this super priority obligation, it may do so only for “cause” and “may not extend the time for performance ... beyond 60 days from the date of the order for relief”, In re Duckwall-Alco, 150 B.R. at 971.

26. Finally, at some point the Debtor will attempt to assume this Lease Agreement as the predicate to assigning it. When it does so, it will be required to “cure any financial lease defaults; compensate or provide adequate assurance that it will promptly compensate” Metcalf 136 “for actual pecuniary loss resulting from the default; and provide adequate assurance” to Metcalf 136 “of future performance under the lease[s]”, In re Kar Development Associates, L.P., 180 B.R. 597, 605 (Bankr. D. Kan. 1994). Therefore, the Debtor either must “pay now, or pay later”.

27. In sum, § 365(d)(3) requires Debtor to pay the February rent due under the Lease Agreement and to perform all other obligations under the lease, immediately, without the necessity of any showing that those payments or any future post-petition payments are “reasonable”, or “actual”, or in any way “necessary” to the preservation of Debtor’s business or estate. This is a super priority obligation arising automatically, by statutory mandate, and the only way that Debtor can avoid compliance is to convince this Court that there is “good cause” to ignore that mandate.

28. In this case, there is no “cause” whether good or otherwise. To repeat: the Debtor has sublet these premises to a retail operator. Necessarily, that sublease pays more to the Debtor each month than the Debtor itself is required to pay to Metcalf 136 under the Lease Agreement. The Debtor’s subtenant has already paid the rent for February, 2009 and has announced its intention to pay all of the rentals which come due under its sublease hereafter. As a result, the Debtor clearly “has the money” to satisfy the mandate of § 365(d)(3) because it is receiving that money and more from its own subtenant. That the Debtor might rather “keep” those maturing payments rather than pay over a portion thereof to Metcalf 136, the prime lessor whose lease makes this windfall possible, is hardly the kind of “cause” contemplated under § 365(d)(3).

II. NO LESS THAN ANY OTHER CREDITOR WHOSE PROPERTY REMAINS IN THE DEBTOR’S POSSESSION AND CONTINUES TO BE USED BY THE DEBTOR, THE LESSOR OF NON-RESIDENTIAL REAL PROPERTY IS ENTITLED TO “ADEQUATE PROTECTION” OF ITS INTEREST IN THAT PROPERTY

29. In the face of objection, the Debtor would not be permitted to use as much as a dollar of the “cash collateral” claimed by its pre-petition financier without an order allowing it to do so. Even then, the order could be entered only after notice and opportunity for hearing, and only upon a showing by the Debtor that the financier’s interest in that collateral was and would remain “adequately protected” against loss or diminution.

30. In contrast and without paying anything, the Debtor continues to use, occupy and divert the rents and profits from the real property which it has leased from Metcalf 136 and which, like the Debtor's hundreds of other leased premises, is the true source of all of its "cash collateral".

31. No less than any creditor having an interest in property of the Debtor, Metcalf 136 is entitled to "adequate protection" within the meaning of 11 U.S.C. § 361. During the period that a debtor-in-possession "is deciding whether to reject or assume" a lease, "it is using an interest in property", In re Attorneys Office Management, Inc., 29 B.R. 96, 98 (Bankr. C. D. Cal. 1983). Every "lessor has an interest in the leased property itself in the form of reserved title" and in exchange for "the use and occupation of the premises prior to assumption or rejection", the Debtor must pay rent. If the Debtor does not, the lessor is entitled to "the protections provided ... under [11 U.S.C.] § 363(e)", *Id.*

32. In this case, the Debtor itself is receiving rents from its subtenant, the monthly amount of which exceeds the rent due to Metcalf 136 for the same month. For this Court to provide "adequate protection" to Metcalf 136, it need only order that the Debtor's subtenant pay all of the rents that become due hereafter directly to Metcalf 136, which would then remit any "overage" to the Debtor. If the Debtor or perhaps its new 11 U.S.C. § 364 post-petition financier object, that objection can be resolved just as easily. All the Court need do is to dissolve the automatic stay, order the Debtor to surrender possession of the leased premises to Metcalf 136 immediately and the "burden" of paying rent, to anyone, ever will be eliminated.

RELIEF REQUESTED

WHEREFORE, and as provided under 11 U.S.C. §§ 105, 365(d)(3), and Fed. R. Bankr. P. 6006, movant Metcalf 136 Acquisition, LLC requests the following relief:

A. That the Court make and enter its order commanding the Debtor to pay all sums and to perform all other obligations now due and owing to Metcalf 136 upon the unexpired Lease Agreement identified hereinabove, and that it do so immediately, without regard, *inter alia*, to 11 U.S.C. § 503(b)(1)(A);

B. That the Court make and enter its order commanding that any and all sums that may become due to the Debtor upon any of the property described in the Lease Agreement be paid directly to Metcalf 136 for the period prescribed in 11 U.S.C. § 365(d)(3); and

C. That the Court grant Metcalf 136 such other and further relief as may be justified in the premises.

Respectfully submitted,

McDOWELL, RICE, SMITH & BUCHANAN

/s/ James F.B. Daniels

James F.B. Daniels, MO Bar #30003

R. Pete Smith, KS Bar #07200

A. Jeffrey Mislner, KS Bar #16383

605 W. 47th Street, Suite 350

Kansas City, MO 64112-1905

Telephone: (816) 753-5400

Facsimile: (816) 753-9996

ATTORNEYS FOR 136 METCALF, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served this 12th day of February, 2009 to the persons requesting electronic notice.

/s/ James F.B. Daniels