

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

Case Nos.: 3:09-bk-06247-JAF; 3:09-bk-06250-JAF; 3:09-bk-06252-JAF; 3:09-bk-06254-JAF

M.D. MOODY & SONS, INC., et al.,<sup>1</sup>

Chapter 11

Debtor.

Jointly Administered Under Case No.: 3:09-bk-06247-JAF

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

These proceedings came before the Court on the Debtors' Motion for Use of Cash Collateral (the "Cash Collateral Motion") (Doc. No. 6), and the Motion of Wachovia Bank, National Association ("Wachovia"), for Adequate Protection (the "Adequate Protection Motion") (Doc. No. 71). A preliminary hearing on the Cash Collateral Motion was held July 31, 2009. On August 10, 2009, the Court temporarily authorized the Debtors' use of cash collateral (Doc. No. 51). On August 18, 2009, Wachovia filed the Adequate Protection Motion. On September 1, 2009, the Court again temporarily authorized the Debtors' use of cash collateral and temporarily granted Wachovia adequate protection<sup>2</sup> (Doc. No. 137). The Court subsequently conducted three hearings on the Cash Collateral and Adequate Protection Motions: the first on October 14, 2009, the second on November 6, 2009, and the third on November 10, 2009.<sup>3</sup> At

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<sup>1</sup> These Chapter 11 cases consist of the following four entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): M.D. Moody & Sons, Inc. (2036), Moody Machinery Corporation (5289), Southeast Crane Parts, Inc. (9906), and Moody Fabrication & Machine, Inc. (4900) (collectively, the "Debtors"). The address for all of the Debtors is 4600 Phillips Highway, Jacksonville, Florida 32207.

<sup>2</sup> The Court granted Wachovia a replacement lien and security interest in the Debtors' post-petition inventory, equipment and receivables (Doc. Nos. 51, 137).

<sup>3</sup> The transcripts of the October 14 hearing, the November 6 hearing, and the November 10 hearing are referenced herein as "Tr. 1", "Tr. 2", and "Tr. 3", respectively. Wachovia and the Debtors submitted exhibits into evidence at the hearings and the parties' exhibits are referenced herein as "Cr.'s Ex. \_\_\_" and "Dtrs.' Ex. \_\_\_".

the conclusion of the hearings, the Court elected to take the matters under advisement and directed the parties to submit briefs in support of their respective positions. Upon the evidence and testimony presented and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

## **FINDINGS OF FACT**

### **A. Factual Background**

The Debtors consist of M.D. Moody & Sons, Inc., and three subsidiary companies, Moody Machinery Corporation, Southeast Crane Parts, Inc., and Moody Fabrication & Machine, Inc., all of which are wholly owed by and fully consolidated with M.D. Moody & Sons, Inc. (Tr. 1, pp. 24-25). The Debtors' primary business consists of selling and renting cranes and other heavy equipment, and servicing and selling parts for such equipment. (Tr. 1, p. 11). The Debtors are headquartered in Jacksonville, Florida, and have locations in Fort Myers, Florida, and Fairburn, Georgia. Id. The Debtors employ approximately 60 employees and operate primarily in the southeast United States, with occasional international sales in South America, Europe, and Africa. (Tr. 1, p. 12).

In May, 2006, Wachovia and the Debtors executed two loan agreements: (1) the Amended and Restated Loan and Security Agreement dated May 24, 2006 (the "ABL Loan"); and (2) the Loan Agreement dated May 24, 2006 (the "GBG Loan"). (Cr.'s Exs. 1, 2). The ABL Loan, which Wachovia extended through its asset based loan division, is secured by a first lien on the following:

- (i) real estate located at 13911 Atlantic Blvd. Jacksonville, Florida 32225 (the "Bellinger Property"), as well as all buildings, fixtures, machinery, equipment and all other articles of personal property located on the Bellinger Property;

- (ii) all the Debtors' cranes and other construction related equipment, other than certain equipment financed by various "floor plan" financiers (in which Wachovia has a second priority lien) (the "Equipment Collateral");
- (iii) the Debtors' accounts receivable (the "Accounts Receivable");
- (iv) substantially all of the Debtors' personal property, including the excess crane boom, the inventory of machine parts, and the Debtors' property, plant and equipment (the "Miscellaneous Collateral"); and
- (v) all products, rents, profits, cash, and proceeds of the foregoing collateral ("Cash or Cash Collateral", and collectively with the Bellinger Property, the Equipment Collateral, Accounts Receivable, and the Miscellaneous Collateral, the "Collateral").

(Tr. 3, pp. 210-211; Cr.'s Ex. 1). The GBG Loan, extended by Wachovia through its general bank group, is secured by a second lien on the Bellinger Property and a second lien on the remaining Collateral. (Tr. 3, p. 210; Cr.'s Ex. 2).

On July 24, 2009, Wachovia submitted formal notice to Debtors that one or more covenant defaults existed under the ABL Loan and that it had elected to accelerate all amounts owed thereunder. (Tr. 1, p. 28). Prior to the acceleration, the Debtors had never missed a payment on their loans with Wachovia. Id. Unable to secure an alternative credit relationship or to reach an agreement with Wachovia regarding refinancing, the Debtors each filed voluntary petitions under Chapter 11 of the Bankruptcy Code on July 28, 2009 (the "Petition Date"). The Debtors have continued in the management and operation of their businesses as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

As of the Petition Date, the Debtors owed \$10,010,014.07 on the ABL Loan and \$2,760,916.66 on the GBG Loan. (Tr. 3, p. 212). Hence, as of the Petition Date, the aggregate principal amount owed on both Loan Agreements was \$12,770,930.73. Id.

**B. Wachovia's Collateral**

As the Court previously noted, the Collateral is comprised of the following assets of the Debtors: (i) the Bellinger Property, (ii) the Equipment Collateral, (iii) the Accounts Receivable; (iv) the Miscellaneous Collateral; and (v) Cash.

**1. The Bellinger Property**

The Bellinger Property is located on the north side of Atlantic Boulevard in Jacksonville, Florida, on the Intracoastal Waterway. The overall site land area is comprised of 91½ acres, of which 29½ acres are uplands and 62 acres are wetlands. (Tr. 2, p. 57). There are building improvements on the property, including a 96,000 square foot commercial structure, used for the maritime industry. Id. The Bellinger Property previously was zoned Industrial Waterfront with industrial maritime use. However, the property recently was rezoned, permitting a mixed-use development comprised of 590 multi-family condominium units, a marina with 650 boat slips, and a maximum of 60,000 additional square feet of commercial space. (Tr. 2, pp. 58-59).

The appraisal firm of Broom, Moody, Johnson & Granger performed an appraisal of the Bellinger Property dated October 9, 2009 (the "Bellinger Appraisal"). (Dtrs.' Ex. 42). In rendering its opinion of the value of the Bellinger Property, the Broom firm relied upon a methodology focusing on four recent sales of comparable properties. The sale of all four comparables occurred in 2007, with the most recent sale being September of 2007. (Dtrs.' Ex. 42, p. 48).

With respect to the similarities and differences of the comparables vis-à-vis the Bellinger Property, a principal of the Broom firm testified that two of the four comparable properties provide direct access to deep navigable water, and three of the four comparable properties have

existing rail access or have had access to rail. (Tr. 2, pp. 67-73). The Bellinger Property does not provide access to ocean-going deep-draft vessels and does not provide rail access. (Tr. 2, p. 80).

The methodology used in the Bellinger Appraisal to determine the value of the Bellinger Property uplands, the major source of value of the property, included certain market adjustments and enhancements to the square footage price of the comparables. The price per square foot of all four comparables was raised by 25 to 31 percent to account for the increase in real estate and market values during the last two and one-half years. (Tr. 2, pp. 91-93; Dtrs.' Ex. 42, p. 48). The principal of the Broom firm testified, however, there were no sales which empirically supported the 25 to 31 percent market adjustment. (Tr. 2, p. 93).

Based upon the price of the comparable sales, the Bellinger Appraisal valued the industrial uplands at \$15,000,000, the wetlands at \$180,000, and the building improvements at approximately \$1,900,000, for a total fair market value of \$17,000,000. (Tr. 2, pp. 62-64; Dtrs.' Ex. 42). This value was relatively consistent with a prior appraisal in December, 2008 which valued the Bellinger Property at \$14,925,000.<sup>4</sup> (Tr. 3, p. 180). The 2008 tax assessed value of the Bellinger Property was \$4,979,540. (Dtrs.' Ex. 42, p. 2).

## 2. The Equipment Collateral

The Debtors' construction equipment inventory includes a fleet of crawler cranes, hydraulic truck cranes, conventional truck and rough-terrain cranes, marine equipment, pile equipment, and other general types of construction equipment. (Tr. 2, pp. 100-101). The equipment is generally in good condition. (Tr. 2, pp. 101-102).

Prior to the Petition Date, Hunyady Auction Company ("Hunyady") served as the parties' appraiser of the Equipment Collateral since 2000. (Tr. 2, p. 97). Historically, Hunyady would

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<sup>4</sup> The Court's factual finding as to this issue is based solely on testimony presented at the November 10 hearing. The December 2008 appraisal itself was not entered into evidence in this proceeding.

conduct appraisals of the equipment inventory twice a year. (Tr. 2, pp. 26, 97). The last such regularly scheduled appraisal before the Petition Date occurred in May, 2009 (the “May 2009 Appraisal”) (Cr.’s Ex. 14). On September 4, 2009, in response to a directive from Wachovia, Hunyady produced another full appraisal of the Equipment Collateral (the “September 2009 Appraisal”).<sup>5</sup> (Cr.’s Ex. 15).

There are many measurements of value used in appraising construction equipment; the most recognizable are fair market value, orderly liquidation value, forced liquidation value, net orderly liquidation value, and net forced liquidation value. (Tr. 2, pp. 105-106). Fair market value is the value recognized upon a transaction between a willing seller and willing buyer, all aware of the relevant facts with regard to the asset for sale. (Tr. 2, p. 106). Orderly liquidation value is the value recognized from any manner of sales, provided that the sale occurs within a specific and limited period of time, typically within six to nine months. (Tr. 2, p. 106). Forced liquidation value is similar to orderly liquidation value, except that there is a greater sense of immediacy of the sale, and therefore the time period in which the sale must occur is condensed to 60 to 90 days. (Tr. 2, pp. 106-107). Net orderly and net forced liquidation values are the same as described above, except that such values are discounted to reflect the necessary costs incurred by the creditor for liquidating the collateral. (Tr. 2, p. 115).

The May 2009 Appraisal provided a net forced liquidation value of the Equipment Collateral of \$9,970,065 to \$9,648,450 (the average of which is approximately \$9,800,000), and

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<sup>5</sup> On October 13, 2009, Debtors filed a Motion in Limine to exclude the September 2009 Appraisal. (Doc. No. 193). Prior to the September 2009 Appraisal, Hunyady had traditionally appraised the Equipment Collateral as fully operable. (Tr. 2, p. 108). However, for purposes of the September 2009 Appraisal, Wachovia directed Hunyady to appraise the Equipment Collateral “as is”, meaning that if any equipment were in a state of disrepair, then such equipment would be appraised as inoperable. *Id.* In their Motion in Limine, Debtors argue that it was inappropriate to value the inoperable equipment “as is,” rather than valuing such equipment on the traditional assumption that it could be readily repaired. The Debtors’ argument relates to two pieces of equipment which at the time of the September 2009 Appraisal were in a state of disrepair. After reviewing the arguments of the parties, the Court will

a net orderly liquidation value of approximately \$12,000,000. (Cr.'s Ex. 14). The September 2009 Appraisal provided a net forced liquidation value of \$6,695,100 to \$6,918,270 (the average of which is approximately \$6,800,000), and a net orderly liquidation value of approximately \$8,600,000. (Cr.'s Ex. 15). Neither the May 2009 Appraisal nor the September 2009 Appraisal provided an estimate of the fair market value of the Equipment Collateral.

Max Moody, the Debtors' Chief Executive Officer, Crane Sales Manager and owner of the Debtors ("Mr. Moody"), testified that the Equipment Collateral has a fair market value of \$12,468,500 (Tr. 2, pp. 143-144; Dtrs.' Ex. 35), and an orderly liquidation value of the same amount, although he based his opinion on sales in the ordinary course of business. (Tr. 3, p. 168). Mr. Moody did not opine as to the forced liquidation value of the Equipment Collateral. Id.

### 3. Accounts Receivable

As of the Petition Date, the total amount of the Debtors' Accounts Receivable, including the ineligible receivables, was \$2,378,125. (Cr.'s Ex. 8, Borrowing Base Certificate dated July 28, 2009). After excluding "ineligible" receivables,<sup>6</sup> the aggregate amount of the eligible Accounts Receivable as of the Petition Date was \$821,733. Id. According to the Borrowing Base Certificate dated September 9, 2009 (Cr.'s Ex. 9), the total amount of the Accounts Receivable, including ineligible receivables, was \$2,039,799, and the aggregate amount of the eligible Accounts Receivable was \$715,571. Thus, in the first six weeks after the Petition Date, the total

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enter an order simultaneously herewith denying the Debtors' Motion in Limine. The Court will give the September 2009 Appraisal its proper weight when analyzing the value of the Debtors' equipment.

<sup>6</sup> The bifurcation of eligible and ineligible receivables is a practice commonly used in the lending industry, and is designed to distinguish those receivables which are statistically less likely to be collected given the nature or age of the receivable. (Tr. 2, p. 29). Ineligible receivables under the Borrowing Base Formula included receivables of the Debtors which were substantially past due, receivables from foreign accounts, receivables from affiliates, and receivables which were pledged as collateral for other loans or subject to claims or liens. (Tr. 1, p. 59). Debtors collected over \$480,000 in ineligible receivables in the first two months of their Chapter 11 cases. (Tr. 1, p. 60; Tr. 2, p. 51; Dtrs.' Ex. 16).

balance of the Accounts Receivable declined \$338,326, and the eligible receivables declined \$106,162. Id.

4. Miscellaneous Collateral

The Debtors' Miscellaneous Collateral includes (i) the inventory of excess crane boom, (ii) the inventory of machine parts the Debtors sell and use for repairing equipment, and (iii) the property, plant and equipment which is comprised of the Debtors' tools and the rolling stock (the "PP&E"). (Tr. 1, p. 21).

The boom inventory is comprised of excess sections of crane boom which the Debtors have accumulated over the years from the purchase of cranes or the purchase of excess boom itself, and is utilized primarily to replace damaged boom or provide additional boom for particular cranes. (Tr. 2, pp. 145-146). Debtors' Exhibit 61 provides a sampling of the Debtors' boom sales over the years. The Debtors acknowledged Debtors' Exhibit 61 is not an exhaustive list of all the Debtors' boom sales, and it is not a statistically accurate sample of the Debtors' boom sales. (Tr. 2, pp. 36-37; Dtrs.' Ex. 61). Mr. Moody testified that the fair market value of the excess boom is approximately one-half of the book value, or \$2,000,000. (Tr. 2, p. 147). The Debtors did not proffer an opinion as to the forced or orderly liquidation value of the excess boom. (Tr. 3, pp. 169-170).

The Debtors' inventory of machine parts consists of small pieces of equipment which the Debtors use and sell for repairing their equipment. Although the machine parts inventory has never been formally appraised (Tr. 2, p. 35), Mr. Moody testified that the fair market value of the parts inventory is approximately \$1,500,000 to \$2,000,000 (Tr. 2, p. 148), but did not opine as to the orderly or forced liquidation value. (Tr. 3, pp. 170-171). Contrary to Mr. Moody's



testimony, Mr. Emil Albertini, the Debtors' Chief Financial Officer ("Mr. Albertini") indicated this component of the Miscellaneous Collateral was of "de minimis value." (Tr. 2, pp. 38-39).

The PP&E includes equipment used by the Debtors for daily operations, such as trucks and trailers for hauling cranes and delivering equipment, "overhead" cranes used at the Bellinger Property, tugboats, barges, and tools. (Tr. 2, p. 148). Debtors' Exhibit 40 provides a list of the various assets included within the PP&E, and indicates Mr. Moody's opinion of the fair market value of the PP&E is \$500,000. (Tr. 2, p. 155; Dtrs.' Ex. 40). The Debtors did not provide an opinion of the forced liquidation value of the PP&E. (Tr. 3, p. 171).

#### 5. Cash

As of the Petition Date, the Debtors had approximately \$800,000 cash in the Debtors' bank accounts. (Tr. 1, p. 30). Since the Petition Date, the Debtors have deposited \$230,000 cash from the sale of Equipment Collateral. Id. As a result of the sale, as of the October 14 hearing, the Debtors had approximately \$1,050,000 cash, reflecting a net increase in cash. Id. However, as noted by Wachovia, the Debtors' net increase in cash resulted in part from the sale of Equipment Collateral, which also had the effect of reducing the aggregate amount of Wachovia's Equipment Collateral base. (Tr. 2, p. 15).

According to the Debtors' projected 13-week cash budget commencing on October 9, 2009 (Dtrs.' Ex. 57), the Debtors started with \$830,000, and at the end of the 13-week period, the Debtors projected a cash balance of \$280,000. (Tr. 2, p. 16; Dtrs.' Ex. 57). Thus, according to the Debtors' 13-week cash budget, the Debtors projected a monthly cash burn of approximately \$150,000 per month (and approximately \$550,000 in the aggregate). (Tr. 2, p. 18; Dtrs.' Ex. 57). This projected cash burn does not include the payment of approximately \$300,000 in 2009 real estate and tangible property taxes. (Tr. 2, p. 17).

On October 6, 2009, the Debtors filed a motion to sell certain unencumbered real estate located in Pompano Beach, Florida (the “Pompano Property”) for \$2,350,000 (Doc. No. 187), which the Court granted on October 28, 2009 (Doc. No. 206). The sale of the Pompano Property closed mid-December 2009, and as a result of the Pompano sale, the Debtors’ received approximately \$2,176,909.73 of unencumbered cash.<sup>7</sup> (Doc. No. 255, Debtors’ Report of Sale).

**C. The Borrowing Base**

The Debtors’ available credit under the ABL Loan was subject to and determined by a borrowing base structure designed to value the Collateral and determine the available amount of credit under the ABL Loan (the “Borrowing Base”). The formula for calculating the Borrowing Base was based upon a contractually-agreed methodology wherein a percentage of the value of the Collateral was used to determine the Debtors’ available credit under the Borrowing Base (the “Borrowing Base Formula”). The Borrowing Base Formula provided the asset values would be updated on a periodic basis, allowing the Borrowing Base to be recalculated regularly. The Debtors periodically submitted to Wachovia borrowing base certificates providing the loan-to-value ratio and the Debtors’ corresponding available credit. (Tr. 1, p. 44; Cr.’s Exs. 8, 9.)

Under the Borrowing Base Formula, Wachovia could advance 80% of the net orderly liquidation value of the Equipment Collateral, less accrued depreciation amortized at 1.25% on a monthly basis (Tr. 1, p. 42), the value for which was determined by Hunyady. (Tr. 2, p. 25). Under the original terms of the ABL Loan, Wachovia eliminated the adverse impact of the 1.25% monthly depreciation factor by resetting the value of equipment every six months based on the appraised value of the equipment. (Tr. 1, p. 45). Since June 2008, however, Wachovia has

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<sup>7</sup> The Debtors objected to testimony regarding proceeds of the Pompano sale because the sale of the Pompano Property had not yet closed. The Court sustained the objection, but indicated that if the sale closed, then the testimony regarding the proceeds from the sale of the Pompano Property would be admissible. (Tr. 2, p. 20). The Debtors’ closing of the sale of the Pompano Property was confirmed by its Report of Sale (Doc. No. 255).

not reset the equipment values, resulting in accelerated amortization and a decreased effective advance rate on the equipment. (Tr. 1, p. 50).

The Borrowing Base Formula also provided that Wachovia could advance 85% of the amount of the “eligible” Accounts Receivable (*see* footnote 5 *supra*), as well as 50% of the approximately \$15,000,000 appraised value of the Bellinger Property. (Tr. 1, p. 42; Tr. 3, p. 180). As of the Petition Date, availability under the credit facility was further restricted by a \$500,000 valuation reserve and a \$285,000 environmental reserve on the Bellinger Property. (Tr. 1, p. 43; Tr. 3, p.193). Wachovia did not include the Miscellaneous Collateral in the Borrowing Base and therefore did not advance against it, although such collateral was subject to Wachovia’s Liens. (Tr. 1, p. 42).

**D. The Debtors’ Immediate Plans**

The Debtors’ stated restructuring strategy is to downsize the business on an ongoing basis and become a smaller company. (Tr. 2, p. 21). Consistent with this plan, the Debtors have not purchased any new heavy-equipment inventory to restock the Debtors’ inventory since the first quarter of 2009. (Tr. 2, p. 29). Also, in an effort to raise additional cash for business operations, the Debtors sold two pieces of equipment shortly before the Petition Date for less than orderly liquidation value. (Tr. 2, pp. 27-28). The Debtors plan to file their Chapter 11 plan of reorganization in the summer of 2010. (Tr. 2, p. 21).

In the Adequate Protection Motion (Doc. No. 71), Wachovia seeks, among other things, (a) a \$100,000 monthly payment, (b) all proceeds of the sale of Wachovia’s Collateral outside the ordinary course of business, (c) all proceeds of the sale of Wachovia’s Collateral in the ordinary course of business up to the amount advanced by Wachovia with respect to such

Collateral plus 25% of amounts received in excess of the Wachovia advance amount, and (d) 80% of the proceeds for sales of equipment acquired with Wachovia's Cash Collateral.

## **CONCLUSIONS OF LAW**

### **A. Adequate Protection Analysis**

The operative provisions of the Bankruptcy Code in the Debtors' Cash Collateral Motion and Wachovia's Adequate Protection Motion arise under Sections 362 and 363. Section 362(d)(A) provides that the court shall grant relief from the automatic stay for "cause," which includes the lack of adequate protection of a secured creditor's interest in property of the debtor. 11 U.S.C. § 362(d). Under Section 363(c)(2), a debtor may only use cash collateral with the consent of the secured creditor holding an interest in such cash collateral, or by an order of the court after notice and a hearing. 11 U.S.C. §363(c)(2). Section 363(e) further provides that the court shall prohibit or condition a debtor's use of property, including cash collateral, "as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e).

The focus under Sections 362 and 363 is whether a secured creditor's interest in property of the debtor is adequately protected during the pendency of the case. The concept of adequate protection is a fundamental tenet of the equitable balance between a debtor's right to reorganize and a secured creditor's right to protect its interest in collateral during the course of the bankruptcy case. See Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.), 727 F.2d 1017, 1020 (11th Cir. 1984).

The leading case in the Eleventh Circuit on the issue of adequate protection is Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.), 54 F.3d 722 (11th Cir. 1995). Under Delta Resources, the primary purpose of adequate protection is to protect against any diminution in the value of a secured creditor's collateral while the automatic stay remains in

effect and the debtor is afforded the opportunity to reorganize its affairs. Delta Resources, 54 F.3d at 730; In re Wrecclesham Grange, Inc., 221 B.R. 978, 981 (Bankr. M.D. Fla. 1997) (“[a]dequate protection is designed to assure that a secured creditor does not suffer a decline in the value of its interest in the estate’s property while the automatic stay remains in effect”); In re Immenhausen, 164 B.R. 347, 350 (Bankr. M.D. Fla. 1994) (“[t]he basic purpose of adequate protection is to preserve the status quo and to assure the secured party that its position will not be impaired because of the automatic stay imposed by § 362(a)”).

In order to determine whether a creditor is entitled to adequate protection, the Court must determine the value of the collateral, the creditor’s interest in the collateral, and the extent to which the value of the collateral declines or depreciates during the course of the bankruptcy case. Wrecclesham Grange, 221 B.R. at 981. Where the collateral securing a secured creditor’s claim exceeds the amount of the creditor’s claim, an “equity cushion” exists. If an equity cushion is sufficient in amount to protect the secured creditor from any post-petition depreciation in the value of the collateral, the equity cushion is said to provide sufficient adequate protection to the secured creditor. See In re Mellor, 734 F.2d 1396, 1400 (9th Cir. 1984).

In many cases, the existence of an equity cushion in existing collateral is sufficient in and of itself to provide adequate protection of a secured creditor’s interest in property. In re Megan-Racine Associates, Inc., 202 B.R. 660, 663 (Bankr. N.D.N.Y. 1996) (“[W]here there is a substantial value cushion there may be no need for additional protection”). Equity cushions of 20% or more have often been found to be sufficient for adequate protection purposes. In re Las Torres Dev., LLC, 413 B.R. 687, 697 (Bankr. S.D. Tex. 2009) (20% equity cushion is sufficient); In re San Clemente Estates, 5 B.R. 605, 610 (Bankr. S.D. Cal. 1980) (65% is adequate); In re Nashua Trust Co., 73 B.R. 423, 433 (Bankr. D. N.J. 1987) (50% is adequate); In

re Ritz Theatres, 68 B.R. 256, 260 (Bankr. M.D. Fla. 1987) (38% is adequate); In re Dunes Casino Hotel, 69 B.R. 784, 795-96 (Bankr. D.N.J. 1986) (45% is adequate); In re Helionetics, 70 B.R. 433, 440 (Bankr. C.D. Cal. 1987) (20.4% is adequate); In re Mellor, 734 F.2d 1396, 1401 (9th Cir. 1984) (20% is adequate).

The mere existence of an equity cushion does not constitute adequate protection *per se*, however. See Ukrainian Savings and Loan Assoc. v. The Trident Corp., 22 B.R. 491, 495 (Bankr. E.D. Pa. 1982) (finding that an equity cushion in excess of ten percent of the value of the secured creditor's collateral did not provide adequate protection). Where an equity cushion does not provide sufficient protection against the decline in value of a secured creditor's collateral, other forms of adequate protection may be required to assure that the secured creditor is not prejudiced. See In re Timber Products, Inc., 125 B.R. 433, 440 (Bankr. W.D. Pa. 1990) (finding an equity cushion insufficient because of, among other things, the collateral's depreciation in value over time); In re Sharon Steel Corp., 159 B.R. 165, 171 (Bankr. W.D. Pa. 1993) (finding an equity cushion was insufficient where debtor had the capability of experiencing significant losses in the coming months).

Under Section 362(d), the burden of proof is a shifting one, wherein the party seeking relief from stay or adequate protection must first prove the value of its collateral is declining. The burden then shifts to the debtor to show the secured creditor is adequately protected. Wrecclesham Grange, 221 B.R. at 980. Under Section 363(p), the secured creditor first has the burden of proving that it holds a valid interest in property of the debtor, and the burden shifts to the debtor to prove that the secured creditor is adequately protected while the automatic stay remains in effect. 11 U.S.C. § 363(p); see also In re Grant Broadcasting of Philadelphia, Inc., 75 B.R. 819, 823 (Bankr. E.D. Pa. 1987).

Wachovia has not consented to the Debtors' use of its Cash Collateral, and therefore, the Debtors are not entitled to use Wachovia's Cash Collateral absent the provision of adequate protection to Wachovia. 11 U.S.C. § 363(e). Wachovia first must prove it has a valid interest in the Debtors' property, and the value of its Collateral is declining during the pendency of these Chapter 11 cases. Upon such a satisfactory showing, the burden shifts to the Debtors to prove Wachovia's Collateral is adequately protected and will remain adequately protected while the automatic stay remains in effect. 11 U.S.C. § 363(p)(1); see also Wrecclesham Grange, 221 B.R. at 980.<sup>8</sup>

The Debtors contend Wachovia's equity cushion provides adequate protection of its Collateral. Wachovia agrees it is over-secured, but argues the amount of its equity cushion is far less than represented by the Debtors. Wachovia asserts the uncertain and illiquid nature and extent of its equity cushion is insufficient to protect against the continuing post-petition diminution in the value of its Collateral caused by (i) the Debtors' monthly cash burn, (ii) the reduction of the balance of the Accounts Receivable, (iii) the abatement of Wachovia's Collateral base caused by the Debtors' sale of Collateral, and (iv) the market depreciation of the Equipment Collateral.

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<sup>8</sup> At the conclusion of the November 10 hearing, the Court concluded that relief from the automatic stay was not appropriate, and therefore, the likelihood of a successful reorganization under Section 362(d) is not relevant to issues before the Court. (Tr. 3, p. 326).

**B. Value of the Collateral for Purposes of Adequate Protection**

The determination of whether a secured creditor is adequately protected requires a finding of the value of the secured creditor's collateral. The Debtors argue the Court should use a "fair market" value of Wachovia's Collateral for purposes of determining the adequacy of Wachovia's protection. Wachovia argues the Court should use a "forced liquidation" value for purposes of the Motions.

Section 506(a) defines secured and unsecured claims and provides guidance as to the appropriate measure of value for purposes of adequate protection. Section 506(a) states "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). The determination of the value of property for purposes of an adequate protection analysis is decided on a case-by-case basis. In re James River Assocs., 148 B.R. 790, 796 (E.D. Va. 1992). Factors that enter into the value determination include the nature of the debtor's business, the prospects for reorganization, and the nature of the collateral. In re Shockley Forest Industries, Inc., 5 B.R. 160, 162 (Bankr. N.D. Ga. 1980).

Given Section 506(a)'s grant of discretion to bankruptcy courts, it is not surprising that case law differs significantly regarding the proper measure of value of property for purposes of adequate protection. For example, the court in In re George Ruggiere Chrysler-Plymouth, 727 F.2d at 1020, held the proper measure to be "the amount which the creditor would receive by its customary or commercially reasonable means of disposition." By this logic, Wachovia argues the appropriate measure of value for purposes of determining whether Wachovia's Collateral is adequately protected is the net forced liquidation value of the Collateral, since Wachovia would be forced to quickly liquidate the Collateral and has no expertise in the industry.<sup>9</sup>

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<sup>9</sup> For other cases supporting Wachovia's argument, see also In re Adams, 2 B.R. 313, 313 (Bankr. M.D. Fla. 1980) (car); In re Tenney Village Co. Inc., 104 B.R. 562, 565 (Bankr. D.N.H. 1989) (real estate); In re T.H.B. Corp., 85



Debtors cite to opposing case law, however, which has concluded the value of a debtor's inventory and equipment is to be measured at fair market value in a reorganization context:

[T]he appropriate method of valuation to gauge whether the objecting party is adequately protected *in a reorganization case* is 'going concern' or fair market value.

In re Automatic Voting Machine Corp., 26 B.R. 970, 972 (Bankr. W.D.N.Y. 1983) (Emphasis added). See also In re Winthrop Old Farm Nurseries, Inc., 50 F.3d 72, 74 (1st Cir. 1995) ("Fair market valuation" is the appropriate valuation method if the debtor intends to retain collateral); In re Helionetics, Inc., 70 B.R. at 440 ("[W]here there is a successful Chapter 11 case in progress, going concern value is more appropriate than liquidation value and better reflects the reality of the situation"); In re Roe Excavating, Inc., 52 B.R. 439, 443 (Bankr. S.D. Ohio 1984) ("Since debtor is operating, we hold that the proper standard to be applied in appraising the equipment is fair market value").<sup>10</sup>

After reviewing the applicable case law and evaluating the rationales for each approach, the Court finds the reasoning in Automatic Voting Machine Corp. persuasive and concludes that the proper measure of the value of Wachovia's Collateral for purposes of adequate protection is the fair market value of the Collateral. This is a Chapter 11 reorganization case and the Court finds reasonable prospects for reorganization; consequently, consistent with many bankruptcy courts faced with a similar scenario, the Court concludes a fair market value approach is proper.

Aside from the appropriate measure of the value of a secured creditor's collateral, it is also necessary to determine the relevant date for valuing the amount of a secured creditor's claim

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B.R. 192, 195-96 (Bankr. D.Mass. 1988) (equipment, inventory and receivables); In re Claeys, 81 B.R. 985, 991 (Bankr. D.N.D. 1987) (real property, livestock and farm machinery); In re Cook, 38 B.R. 870, 875 (D. Utah 1984) (car); In re Damron, 8 B.R. 323, 326 (Bankr. S.D. Ohio 1980) (furniture).

<sup>10</sup> For other cases supporting Debtors' argument, see also In re Beker Industries, Corp., 58 B.R. 725, 738-39 (Bankr. S.D.N.Y. 1986) (miscellaneous assets); In re QPL Component, Inc., 20 B.R. 342, 346 (Bankr. E.D.N.Y. 1982)

and the collateral securing the claim. Assets may be valued in accordance with Section 506(a) at different points of time during a Chapter 11 case, depending on the particular context of the valuation. See, e.g., Prudential Ins. Co. v. Monnier (In re Monnier Bros.), 755 F.2d 1336, 1339 (8th Cir. 1985) (for purposes of determining the amount of a secured creditor's claim in the cramdown context, collateral should be valued as of the effective date of the plan); In re Dataair Sys. Corp., 42 B.R. 241, 243 (Bankr. N.D. Ill. 1984) (for purposes of determining adequate protection, collateral should be valued as of the petition date).

While the relevant point of reference for valuing collateral within the context of adequate protection is a subject of some disagreement, courts generally agree that, for purposes of determining the requirement and amount of adequate protection, the secured creditor's position should be valued as of the petition date. See Philadelphia Consumer Discount Co. v. Commercial Credit Bus. Loans, Inc., 37 B.R. 946, 950 (E.D. Pa. 1984) (secured creditor's collateral which must be adequately protected is the value of the collateral as of the commencement of the case); In re Malaspina, 30 B.R. 267, 270 (Bankr. W.D. Pa. 1983) ("the value of its secured position as it existed at the commencement of the case is to be protected throughout the case when adequate protection is required"); La Jolla Fund v. Rancho El Cajon Assocs., 18 B.R. 283, 287 (Bankr. S.D. Cal. 1982) ("[w]hile there is some debate as to the operative date for making the necessary calculation of the amount of the claim entitled to adequate protection, it appears that the value on the date, on which the petition commencing the case is filed, should be the benchmark for this purpose"). Hence, for purposes of determining whether Wachovia is entitled to adequate protection, and if so, the amount and form of such protection, the Court concludes that the proper point of reference for the valuation of the Collateral is the Petition Date.

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(inventory); First Nat'l Bank of McDonough v. Shockley Forest Industries, Inc. (In re Shockley Forest Industries, Inc.), 5 B.R. 160, 162 (Bankr. N.D. Ga. 1980) (real estate).

**C. Wachovia's Interest in the Collateral**

Under Section 363(p), Wachovia must first prove that it has a valid interest in the Debtors' property. Based upon the undisputed evidence, the Court concludes that Wachovia's liens, with the exception of certain maritime assets of the Debtors,<sup>11</sup> were properly perfected prior to ninety (90) days preceding the Petition Date, and such liens are valid, enforceable, nonavoidable, and of first priority on the Collateral, except with respect to certain "floor plan" equipment financed by certain other lenders, in which case Wachovia's liens are of second priority.

**D. Post-Petition Diminution in Value of the Collateral**

In order to be entitled to adequate protection, Wachovia must also demonstrate that the Collateral is declining in value during the Debtors' Chapter 11 cases. See Wrecclesham Grange, 221 B.R. at 980. With respect to its burden of proof in this regard, Wachovia contends that the Collateral is declining in value as a result of (i) the Debtors' monthly cash burn, (ii) the reduction of the balance of the Accounts Receivable, (iii) the abatement of Wachovia's Collateral base caused by the Debtors' sale of Wachovia's Collateral, and (iv) the market depreciation of the Equipment Collateral.

**i. Cash Burn**

According to the Debtors' projected 13-week cash budget commencing on October 9, 2009 (Dtrs.' Ex. 57), the Debtors projected a cash burn of approximately \$150,000 per month, which does not include the payment of approximately \$300,000 in 2009 real estate and tangible property taxes. The Debtors argue projected cash burn is not dispositive, however, as their "actual" business operations reflect a net increase in cash since the Petition Date. Nonetheless,

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<sup>11</sup> Wachovia acknowledges that it does not hold a valid, properly perfected security interest in certain of the Debtors' maritime assets, the description of which assets is not in dispute.

the Debtors' increase in cash resulted from the sale of Equipment Collateral, causing a corresponding reduction in the amount of Wachovia's Collateral base.

ii. Decline in the Accounts Receivable

With respect to the Accounts Receivable, as of the Petition Date, the total amount of the Accounts Receivable, including the ineligible receivables, was \$2,378,125, and as of September 9, 2009, the total balance was \$2,039,799, a decline of \$338,326. (Cr.'s Exs. 8, 9). The total amount of the eligible Accounts Receivable as of the Petition Date was \$821,733, and as of September 9, 2009, the balance of the eligible receivables was \$715,571, a decline of \$106,162. Id. Thus, the balance of both the eligible and ineligible receivables has decreased since the Petition Date.

iii. Abatement of the Collateral Base

As a consequence of current market conditions, the Debtors plan to downsize the business and become a smaller company. As part of their restructuring strategy, the Debtors have not purchased any new equipment inventory since the first quarter of 2009. Prior to the Petition Date, the Debtors sold two pieces of equipment in order to raise additional cash to fund operations. As a consequence of the Debtors' liquidation of Collateral and election to use the proceeds to fund operations as opposed to replenish its inventory, the aggregate amount of Wachovia's Collateral diminished in size. Although Wachovia holds a lien on the cash proceeds of the sale of such Collateral, the cash proceeds are used to fund the business operations of the Debtors, the net effect of which reduces the aggregate value of Wachovia's Collateral base.

iv. Market Depreciation of Equipment Collateral

Wachovia contends that the May 2009 and the September 2009 Hunyady Appraisals demonstrate the Equipment Collateral has recently declined in value by approximately

\$3,000,000. (Cr.'s Exs. 14, 15). While it is difficult to predict changes in property values attributable to fluctuations in the market, based upon the alleged decline in value between the May and September 2009 Appraisals, Wachovia assumes at least some portion of that decline occurred after the Petition Date.

The Court finds the Debtors' monthly cash burn, the decrease in the Accounts Receivable, and the abatement of Wachovia's Collateral base caused by the Debtors' liquidation of Collateral to fund business losses establish that Wachovia's Collateral likely has declined in value since the Petition Date and likely will continue to decline in value during the pendency of these Chapter 11 cases.

**E. The Value of the Collateral and the Amount of Equity Cushion**

Based upon the finding that Wachovia's Collateral is declining in value, the Debtors must prove that Wachovia is and will remain adequately protected while the automatic stay remains in effect. Wreclesham Grange, 221 B.R. at 980. The Debtors maintain Wachovia's equity cushion is sufficient to adequately protect Wachovia against prejudice from the Collateral's post-petition diminution in value. Wachovia contends the amount of its equity cushion is far less than represented by the Debtors, and while it may be over-secured to some extent, the uncertain and illiquid nature and extent of its equity cushion fails to provide sufficient protection of its interests.

With respect to the Equipment Collateral, Wachovia obtained an appraisal of the Equipment Collateral in close proximity to the Petition Date. The September 2009 Appraisal valued the Equipment Collateral to have a net forced liquidation value of approximately \$6,800,000 and a net orderly liquidation value of approximately \$8,600,000. (Cr.'s Ex. 15). However, the September 2009 Appraisal did not appraise the Equipment Collateral on a fair

market value basis. As set forth above, the Court will use the fair market value of the Collateral as of the Petition Date in its adequate protection analysis. The Debtors offered Mr. Moody's opinion of the fair market value of the Equipment Collateral of \$12,468,500. (Tr. 2, 143-144; Dtrs.' Ex. 35). While a precise calculation of fair market value is difficult to ascertain, the Court will assume the value would fall somewhere between the net orderly liquidation value and Mr. Moody's estimation of fair market value. Consequently, for the purpose of its adequate protection analysis, the Court will assume the fair market value of the Equipment Collateral is between \$9,000,000 and \$12,000,000.

With respect to the Accounts Receivable, according to the Borrowing Base Certificate dated July 28, 2009, the gross balance of Accounts Receivable as of the Petition Date was \$2,378,125, and the balance of the eligible receivables was \$821,733. (Cr.'s Ex. 8). Eligible receivables clearly would be included in fair market value; the question is what portion of the ineligible receivables should count towards fair market value. Debtors collected over \$480,000 in ineligible receivables in the first two months of their Chapter 11 cases (Tr. 1, p. 60; Tr. 2, p. 51; Dtrs.' Ex. 16), so it is clear a portion of the ineligible receivables are in fact collectible and should count towards fair market value. Again, a precise calculation of fair market value is difficult to ascertain, so the Court will assume the value would fall somewhere between the balances of the total accounts receivable and the eligible accounts receivable as of the Petition Date. Consequently, for the purpose of its adequate protection analysis, the Court will assume the fair market value of the Accounts Receivable is between \$1,000,000 and \$2,000,000.

With respect to the Miscellaneous Collateral, the Debtors offered Mr. Moody's lay opinion of fair market value of the excess boom at \$2,000,000, the machine parts inventory at approximately \$1,500,000, and the PP&E at \$500,000, for a total of \$4,000,000. (Tr. 2, pp. 147-

148, 155). However, on cross-examination, Mr. Albertini indicated the machine parts inventory had de minimus value. (Tr. 2, pp. 38-39). Wachovia argues the fact that the Miscellaneous Collateral was excluded from the Borrowing Base demonstrates the nominal value of the Miscellaneous Collateral. Wachovia contends that the Miscellaneous Collateral essentially should be disregarded for purposes of determining Wachovia's entitlement to adequate protection. The Court notes that the Debtors' list of excess boom sales (Dtrs.' Ex. 61) helps substantiate Mr. Moody's opinion as to the fair market value of the excess boom, but it is not statistically accurate and does not reflect the average value of the Debtors' boom sales. Also, while the Court is mindful that the Miscellaneous Collateral was excluded from the Borrowing Base, this does not mean that the collateral is worthless. Again, a precise calculation of the fair market value is difficult to ascertain, so the Court will assume the fair market value of the Equipment Collateral is approximately \$2,500,000.

Based upon the foregoing, the aggregate fair market value of the Equipment Collateral (between \$9,000,000 and \$12,000,000), the Accounts Receivable (between \$1,000,000 and \$2,000,000), and the Miscellaneous Collateral (approximately \$2,500,000) is between approximately \$12,500,000 and \$16,500,000. The total amount owed under the ABL and GBG Loans as of the Petition Date (excluding the accrued and unpaid interest, fees, and expenses incurred after the Petition Date) was \$12,770,930.73. (Tr. 3, p. 212). As a result of the post-petition cash burn, decline in the Accounts Receivable, and abatement of Wachovia's Collateral Base, the current fair market value of these assets may well be closer to the Court's lower estimate than the higher. Therefore, the Court must determine whether the value of the Bellinger Property is sufficiently substantial to adequately protect against the threat of diminution in the value of Wachovia's Collateral.

The Debtors base their value of the Bellinger Property upon the Bellinger Appraisal, which provided a fair market value of \$17,000,000 as of October, 2009. (Dtrs.' Ex. 42). This value was relatively consistent with a prior appraisal in December, 2008 which valued the Bellinger Property at \$14,925,000. (Tr. 3, p. 180).<sup>12</sup> The 2008 tax assessed value of the Bellinger Property was \$4,979,540. (Dtrs.' Ex. 42, p. 2). Wachovia argues the methodology used in the Bellinger Appraisal was flawed, and asserts the Bellinger Property is highly illiquid and likely would sell at a price far below the appraised value, and perhaps as low as its tax assessed value.

The Court agrees with Wachovia that there are significant differences between the Bellinger Property and several of the comparable properties used in the Bellinger Appraisal. Several of the comparable properties have deep-water access and rail access, while the Bellinger Property does not. Additionally, the Bellinger Appraisal utilized market adjustments and enhancements to the square footage price of the comparable sales, but did not cite any recent sales, whether comparable or not, to support empirically the upward adjustments and enhancements. Given the current state of North Florida's real estate market and these deficiencies in the Bellinger Appraisal's methodology, the Bellinger Property's fair market value may not be quite as high as the Bellinger Appraisal's estimate.

Nonetheless, it is clear to the Court the Bellinger Property is of substantial value. As the multiple appraisals indicate, it is certainly worth significantly more than the 2008 tax assessed value. In fact, under the Borrowing Base Formula, Wachovia was willing to advance 50% of the appraised value of the Bellinger Property. Since 50% of the appraised value was approximately \$7,500,000, the Court assumes Wachovia estimated the value of the Bellinger Property to be worth more than \$7,500,000. As with the other types of Collateral, however, a precise

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<sup>12</sup> See footnote 4, supra.



calculation of the fair market value is difficult to ascertain. The Court will assume the fair market value of the Bellinger Property is between \$10,000,000 and \$17,000,000.

Consequently, even if the Court were to use its lowest estimates of the fair market value of the Collateral, the resulting value of the Collateral securing Wachovia's liens totals approximately \$22,500,000. Again, the total amount owed under the ABL and GBG Loans as of the Petition Date (excluding the accrued and unpaid interest, fees, and expenses incurred after the Petition Date) was \$12,770,930.73, meaning Wachovia is over-secured by at least \$9,729,069.27, which yields an equity cushion of approximately 76%. The Court finds such an equity cushion provides sufficient adequate protection to ensure any post-petition diminution in the value of Wachovia's collateral will not prejudice Wachovia's secured claim during the pendency of the Debtors' Chapter 11 cases. The Debtors should be entitled to use Wachovia's Cash Collateral and equipment without monthly adequate protection payments.

### **CONCLUSION**

Wachovia argues the value of the Collateral, especially the Bellinger Property, in today's market is so speculative as to provide no certain or predictable measure of protection. Wachovia argues in the absence of a quantifiable level of protection afforded by the Bellinger Property, the decline in value of its non-Bellinger Property Collateral warrants periodic adequate protection payments by the Debtors. However, the Court finds Wachovia's approximately 76% equity cushion provides sufficient adequate protection to ensure any post-petition diminution in value of Wachovia's collateral will not prejudice Wachovia's secured claim during the pendency of the Debtors' Chapter 11 cases.

The fact that Wachovia is over-secured and adequately protected is not surprising. Wachovia protected itself from declines in market value by extending credit to the Debtors on a

conservative “percentage of value” basis. The conservative Borrowing Base Formula created a significant equity cushion with respect to each Collateral type. Given the adequate protection provided by the Bellinger Property and the other Collateral, the Debtors should be entitled to use Wachovia’s Cash Collateral and equipment without monthly adequate protection payments.

A separate order shall be issued consistent with the Findings of Fact and Conclusions of Law set forth herein.

DATED this 5 day of March, 2010, in Jacksonville, Florida.

/s/ Jerry A. Funk

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JERRY A. FUNK  
United States Bankruptcy Judge

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Local Rule 1007-2 Parties in Interest List