

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@FSLHlaw.com
FRANKLIN SKIERSKI LOVALL HAYWARD LLP
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (214) 789-9977
Fax: (214) 723--5345

ATTORNEYS FOR SIERRA EQUIPMENT, INC.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	CASE NO. 09-45785-RFN-11
	§	
LEWIS EQUIPMENT COMPANY, INC.,	§	CHAPTER 11
et al,	§	
	§	
Debtors.	§	(Jointly Administered)

MOTION FOR RELIEF FROM AUTOMATIC STAY

NOTICE

THE TRUSTEE (IF ONE HAS BEEN APPOINTED) OR THE DEBTOR SHALL FILE A RESPONSE TO ANY MOTION FOR RELIEF FROM THE AUTOMATIC STAY WITHIN TWELVE (12) DAYS FROM THE SERVICE OF THE MOTION. THE DEBTOR'S RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED. IF THE DEBTOR DOES NOT FILE A RESPONSE AS REQUIRED, THE ALLEGATIONS IN THE CREDITOR'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY SHALL BE DEEMED ADMITTED, UNLESS GOOD CAUSE IS SHOWN WHY THESE ALLEGATIONS SHOULD NOT BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT. UNDER BANKRUPTCY RULE 9006(e) SERVICE BY MAIL IS NOW COMPLETE UPON MAILING; UNDER BANKRUPTCY RULE 9006(f), THREE (3) DAYS ARE ADDED TO THE PERIOD FOR FILING A RESPONSE WHEN NOTICE OF THE PERIOD IS SERVED BY MAIL.

TO THE HONORABLE RUSSELL F. NELMS,
UNITED STATES BANKRUPTCY JUDGE:

Sierra Equipment, Inc. (“Sierra”) files this Motion for Relief from Stay (the “Motion”). In support of the Motion, Sierra would respectfully show as follows:

I.

BACKGROUND FACTS

1. On June 10, 2008, Sierra as Lessor and LWL Management, Inc.¹ (“LWL”) as Lessee entered into that certain Equipment Lease Agreement whereby Sierra agreed to lease certain equipment (the “Equipment”) to LWL for an initial term of thirty six (36) months. A true and correct copy of the Equipment Lease Agreement is attached to the Affidavit of Kirk Lewis² (the “Affidavit”), a true and correct copy of which is attached hereto as Exhibit A, as Exhibit 1 and incorporated herein.

2. Pursuant to the Equipment Lease Agreement, LWL is obligated to pay to Sierra a monthly rental payment in the amount of \$143,581.93 each month, which is due and payable by the tenth (10th) day of each month (the “Rent”). Sierra subsequently agreed to reduce the monthly rental payments of \$143,581.93 to \$131,720.31.

3. On September 18, 2009, LWL and certain other related affiliates (collectively, the “Debtors”) each filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”), commencing these bankruptcy cases (collectively, the “Bankruptcy Cases”), which are being jointly administered in the above-styled proceeding.

4. Postpetition, LWL paid its monthly Rent owed pursuant to the Equipment Lease Agreement to Sierra through December 2009. However, in January 2010, LWL only paid Sierra

¹ LWL Management, Inc. subsequently converted to LWL Management, LLC pursuant to a Certificate of Conversion filed with the Texas Secretary of State on June 4, 2009.

² Kirk Lewis is the brother of the Debtors’ principal, Kyle Lewis.

\$65,000.00 toward its monthly Rent. Neither LWL nor any of the other Debtors has made any Rent payments to Sierra for the month of February 2010.

5. During a hearing on February 19, 2010, the Court ordered the United States Trustee to appoint a Chapter 11 Trustee of the Debtors and terminated the Debtors' ability to use cash collateral. As of the date of this filing, the United States Trustee has not yet appointed a Chapter 11 Trustee over the Debtors.

6. To date, LWL owes Sierra \$198,440.62 for unpaid postpetition Rent that accrued in January 2010 and February 2010.

II.

JURISDICTION

7. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding.

III.

ARGUMENTS AND AUTHORITY

A. Cause exists for this Court to grant relief from the automatic stay.

8. Cause exists for this Court to grant relief from the automatic stay pursuant to Section 362(d)(1) of the Bankruptcy Code. Section 362(d) provides, in relevant part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest....

9. The scope of the automatic stay is not limitless, and parties may be afforded relief from the automatic stay for cause, "including the lack of adequate protection of an interest in

property of such party in interest....”³ The Bankruptcy Code does not define “cause,” and courts generally determine whether cause exists on a case-by-case basis, allowing them to fashion remedies suitable to the particular circumstances of each case.⁴

10. Cause under Section 362(d)(1) is not limited to a lack of adequate protection, and courts consider a multitude of factors, including harm to the creditor, whether any great prejudice to either the bankruptcy estate or the debtor will result from lifting the stay, and whether the hardship to the non-bankrupt party by continuing the stay considerably outweighs the hardship to the debtor.⁵

11. Here, the Court may modify the automatic stay pursuant to Bankruptcy Code Section 362(d) because the automatic stay imposes a substantial burden upon Sierra because the Debtors continue to possess the Equipment, yet they have not been current on their account and have not paid their monthly Rent obligation in full since December 2009. Sierra cannot re-lease the Equipment because the Debtors currently have possession of it, and the automatic stay prevents Sierra from exercising its rights pursuant to the Equipment Lease Agreement and/or state law. Moreover, the Equipment may be declining in value as a result of the Debtors’ use of the Equipment, deterioration, and deferred maintenance. Thus, Sierra has suffered damages, and continues to suffer damages, because the Debtors are not making the required payments under the Equipment Lease Agreement. Sierra will continue to lose money until it can obtain possession the

³ See 11 U.S.C. § 362(d); *Value Recovery Group, Inc. v. Hourani*, 115 F. Supp. 2d 761, 767 (S.D. Tex. 2000); see also 3 COLLIER ON BANKRUPTCY ¶ 362.03[3] (15th ed. rev. 2005).

⁴ See *In re Reitnauer*, 152 F.3d 341, 344 n.4 (5th Cir. 1998); see also *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715, 717 (9th Cir. 1985) (explaining that relief from the stay is discretionary and must be determined on a case-by-case basis).

⁵ See, e.g., *Canal Place Ltd. P’ship v. AETNA Life Ins. Co. (In re Canal Place Ltd. P’ship)*, 921 F.2d 569, 579 (5th Cir. 1991); *In re Fowler*, 259 B.R. 856 (Bankr. E.D. Tex. 2001).

Equipment, and in light of the appointment of a Chapter 11 Trustee and the termination of the Debtors' ability to use cash collateral, Sierra has no assurance of future performance.

12. The factors of Section 362(d)(1) are satisfied, and cause clearly exists to modify the automatic stay to allow Sierra to exercise its remedies under the Equipment Lease Agreement and other applicable laws, to the extent that it desires to do so, including, without limitation, taking possession of the Equipment.

B. Alternatively, the Court should grant relief from the automatic stay pursuant to Section 362(d)(2).

13. Alternatively, the Court should grant relief from the automatic stay pursuant to Section 361(d)(2) of the Bankruptcy Code. Pursuant to Section 361(d)(2), the Court "shall" provide relief from the automatic stay if: (i) the debtor does not have any equity in such property; and (ii) such property is not necessary to an effective reorganization.⁶ The phrase "not necessary to an effective reorganization" in Section 362(d)(2) imposes upon a debtor the burden to demonstrate a reasonable probability of successful reorganization within a reasonable time.⁷ This showing must be based on more than unsubstantiated hope and speculation about future performance, and absent such a showing, the Court must modify the automatic stay.⁸

14. Sierra has leased the Equipment to the Debtors, and as such, the Debtors do not have any equity in the Equipment. Moreover, in light of the Court's recent appointment of a Chapter 11 Trustee and the termination of the Debtors' ability to use cash collateral, there is little hope that the Debtors will be successfully reorganized. Thus, the Court must modify the automatic stay pursuant to Section 362(d)(2) of the Bankruptcy Code to allow Sierra to exercise its remedies under the

⁶ 11 U.S.C. § 362(d)(2).

⁷ See, e.g., *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 375-6 (1988); *In re Sutton*, 904 F. 2d 327, 330 (5th Cir. 1990).

⁸ See *In re Canal Place, Ltd.*, 921 F.2d at 577-79.

Equipment Lease Agreement and obtain possession of the Equipment, to the extent that it desires to do so.

IV.

REQUEST FOR RELIEF

BASED UPON THE FOREGOING, Sierra respectfully requests that the Court enter an order: (i) granting Sierra relief from the automatic stay so that it may exercise, at its option, its remedies pursuant to the Equipment Lease Agreement and other applicable law, including, without limitation, obtaining possession of the Equipment; and (ii) granting such other relief as Sierra may show itself to be justly entitled.

DATED: February 26, 2010.

FRANKLIN SKIERSKI LOVALL HAYWARD LLP

/s/ Melissa S. Hayward

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@FSLHlaw.com
Doug Skierski
Texas Bar No. 24008046
DSkierski@FSLHlaw.com
10501 N. Central Expy., Ste. 106
Dallas, Texas 75231
Tel: (214) 789-9977
Fax: (214) 723-5345

ATTORNEYS FOR SIERRA EQUIPMENT, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was sent either electronically by the clerk of court on February 26, 2010 or via first class United States mail, postage prepaid to all parties appearing on the attached service list.

/s/ Melissa S. Hayward
Melissa S. Hayward

CERTIFICATE OF CONFERENCE

I hereby certify that on February 26, 2010, I left a voicemail for Scott Seidel, who was appointed Chapter 11 Trustee in this Bankruptcy Case late in the afternoon of February 25, 2010, but had not heard back from him as of the time of the filing of this Motion.

/s/ Melissa S. Hayward

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