

John H. Maddock III  
McGUIREWOODS LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

AND

Marshall Beil  
Shawn R. Fox  
McGUIREWOODS LLP  
1345 Avenue of the Americas  
New York, New York 10105  
(212) 548-2100

*Counsel for CSX Transportation, Inc.*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
In re: ) Chapter 11  
)  
Chrysler LLC, et al., ) Case No. 09-50002 (AJG)  
)  
Debtors. ) Jointly Administered  
-----X

**MOTION OF CSX TRANSPORTATION, INC. FOR ADEQUATE PROTECTION**

CSX Transportation, Inc. (“CSX”), by counsel, pursuant to sections 361, 362(b)(3), 363(e), and 546(b)(1)(B) of Title 11 of the U.S. Code (the “Bankruptcy Code”), hereby moves (the “Motion”) for adequate protection of its common carrier liens on certain property of the above-captioned debtors (collectively, the “Debtors”). In support of the Motion, CSX respectfully states as follows:

**PRELIMINARY STATEMENT**

Pursuant to applicable nonbankruptcy law, CSX possesses common carrier liens in and on certain of the Debtors’ property to secure various shipping and freight charges owing to CSX

(as described fully herein). These liens are perfected by CSX's continued possession of the Debtors' property, and any relinquishment of this possession could extinguish CSX's liens. Pursuant to sections 362(b)(3) and 546(b)(1)(B) of the Bankruptcy Code, CSX is authorized to maintain possession of this property in order to preserve and continue the perfection of its liens. By this Motion, CSX requests that the Debtors provide CSX with adequate protection of CSX's interest in the property—as the Debtors are *required* to do under section 363(e) of the Bankruptcy Code—before the Debtors can use, sell, or lease the property subject to CSX's liens.

### **JURISDICTION AND VENUE**

1. On April 30, 2009 (the “Petition Date”), Chrysler LLC and 24 of its domestic direct and indirect subsidiaries each filed their respective voluntary petitions under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) initiating the above-captioned cases. The Debtors continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b).

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are sections 361, 362(b)(3), 363(e), and 546(b)(1)(B) of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **FACTUAL BACKGROUND**

5. CSX is a common carrier for purposes of Title 49 of the United States Code.

6. On or about September 28, 2008, CSX and the Debtors executed Rail Carrier Transportation Contract No. CSXT 84315 with an effective date of July 1, 2007 (the “Contract”) pursuant to which CSX agreed to provide rail transportation services to the Debtors involving the shipment of certain of the Debtors’ manufactured automobiles from specified origins to various specified destinations at certain rates.

7. At the Debtors’ request in accordance with the Contract, on the Petition Date, CSX was in the process of shipping or otherwise had in its possession approximately 4,597 of the Debtor’s automobiles and a small number of parts (collectively, the “Collateral”). Of the Collateral, approximately 1,303 automobiles are in CSX's possession and are being stored at destination, with the remaining 3,294 automobiles located on CSX railcars in transit. A listing of certain of the Collateral is attached hereto as Exhibit A.<sup>1</sup> Freight and related charges associated with CSX’s prepetition shipment of the Collateral totals \$1,174,974 (the “Outstanding Balance”).<sup>2</sup> Exhibit A lists each of the freight bills comprising the Outstanding Balance.

8. CSX continues to maintain possession of the Collateral.

9. On April 30, 2009, the Debtors filed their Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, for an Order Authorizing Them to Pay the Prepetition Claims of Certain Potential Lien Holders (the “Critical Vendor Motion”). In support of the Critical Vendor Motion, the Debtors filed a Declaration of Frank J. Ewasyshyn (the “Ewasyshyn Affidavit”). Pursuant to the Critical Vendor Motion, the Debtors request authority to pay prepetition claims of certain prepetition creditors who may hold “a potential lien on, security interest in or other possessory rights to property of the Debtors’

---

<sup>1</sup> CSX is still in the process of reviewing its records to determine if it is in possession of any additional Collateral. CSX reserves the right to amend or supplement the description of the Collateral as further investigation warrants.

<sup>2</sup> CSX’s total prepetition claim is approximately \$2.3 million.

estates.” Critical Vendor Motion, ¶ 14. Specifically, the Debtors, in paragraph 22 of the Critical Vendor Motion, and Mr. Ewasyshyn in paragraphs 30 and 35 of the Ewasyshyn Declaration, acknowledge that common carriers hold possessory liens on the Debtors’ goods that were in the possession of the common carrier on the Petition Date. The Debtors state that on the Petition Date, Shippers (as defined in the Critical Vendor Motion) were in possession of approximately \$510 million worth of the Debtors’ raw materials and parts. See Critical Vendor Motion, ¶ 22; Ewasyshyn Declaration, ¶ 33. The Debtors further acknowledge that common carrier liens on goods in the common carriers’ possession are generally superior to existing security interests. Critical Vendor Motion, ¶ 19. Further, the Debtors acknowledge that many of the Lienholders (as defined in the Critical Vendor Motion) will be oversecured and therefore, under section 506 of the Bankruptcy Code, entitled to have their prepetition claims paid in full, with postpetition interest. *Id.* Lastly, the Debtors acknowledge that Shippers, in order to maintain perfection of their liens, will most likely retain possession of the Debtors’ goods until their liens have been extinguished. See Ewasyshyn Declaration, ¶ 35.

10. Immediately following the filing of the Debtors’ bankruptcy petitions, CSX contacted the Debtors to inform the Debtors of CSX’s common carrier lien. CSX further offered to immediately discuss satisfaction of CSX’s common carrier lien and has continued that offer through the date of filing of the instant Motion. Although CSX has responded to numerous of the Debtors’ requests for information, the Debtors have not satisfied or provided adequate protection of CSX’s common carrier lien. As a result, CSX has filed the instant Motion seeking adequate protection of its common carrier lien.

**RELIEF REQUESTED**

11. By this Motion, CSX requests adequate protection pursuant to section 363(e) of the Bankruptcy Code of its interest in the Collateral in the form of indefeasible payment in full of the Outstanding Balance.

**BASIS FOR RELIEF REQUESTED**

**A. Background Regarding Common Carrier Liens.**

12. In order to ensure payment of freight charges, common carriers such as railroads and motor carriers are provided with a lien on the goods in their possession that are being shipped, often referred to as a common carrier lien. While common carrier liens originated under the common law, today, in most instances, common carrier liens are a function of statute. *See, e.g.*, 49 U.S.C. § 80109; Uniform Commercial Code § 7-307(a). Regardless of the underlying legal basis, all common carrier liens share a critical characteristic: they are possessory in nature. In other words, the lien is generally only perfected and enforceable while the common carrier is in possession of the debtor's goods. When the common carrier delivers the goods and relinquishes possession, the lien is generally extinguished.

**B. CSX's Right to Maintain Possession of the Collateral Is Expressly Permitted Under the Bankruptcy Code.**

i Sections 362(b)(3) and 546(b)(1)(B) Expressly Permit Common Carriers to Maintain Possession of Collateral to Preserve Possessory Liens.

13. Pursuant to section 362(a)(3) of the Bankruptcy Code, creditors generally may not take any act "to exercise control over property of the estate" on account of a prepetition claim. 11 U.S.C. § 362(a)(3). However, this general rule is subject to the various statutory exceptions set forth in section 362(b) of the Bankruptcy Code.

14. Under section 362(b)(3) of the Bankruptcy Code, the filing of a bankruptcy petition does not stay "any act to perfect, or to maintain or continue the perfection of, an interest

in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title . . . ." 11 U.S.C. § 362(b)(3). Thus, to the extent the Debtors' rights and powers are subject to perfection of an interest under section 546(b) of the Bankruptcy Code, the automatic stay does not prohibit any acts to maintain or continue perfection of that interest.

15. Section 546(b)(1)(B) of the Bankruptcy Code provides that "[t]he rights of the trustee . . . are subject to any generally applicable law that . . . provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation." 11 U.S.C. § 546(b)(1)(B). As one court noted, this provision means that "if state law provides that a creditor's security interest is superior to the rights of any entity obtaining its interest in the property prior to the date the creditor takes action to maintain or continue perfection of its, the creditor's post-petition act to maintain or continue perfection of the lien does not violate the automatic stay." Hayden v. Wells (In re Hayden), 308 B.R. 428, 432 (9th Cir. B.A.P. 2004).

16. Like many other possessory liens, common carrier liens arising under 49 U.S.C. § 80109 and under Article 7 of the Uniform Commercial Code, which secure the costs of storage, transportation, and delivery, generally "prime" and have priority over preexisting liens on the goods in common carrier's possession. *See* 49 U.S.C. § 80110(c); *see also* U.C.C. § 9-333 (possessory liens generally have priority over previously perfected security interests in goods). Accordingly, a common carrier's statutory lien falls within the exception to the Debtors' powers set forth in section 546(b)(1)(B) of the Bankruptcy Code, and section 362(b)(3) of the Bankruptcy Code thus ensures that the automatic stay does not prevent a common carrier from taking action to maintain or continue perfection of its possessory lien in the goods.

17. In other words, the act of maintaining possession of collateral does not violate the automatic stay where possession of such collateral is necessary to continue perfection of a lien with priority over preexisting liens in the collateral. See Boggan v. Hoff Ford, Inc., 251 B.R. 95 (9th Cir. B.A.P. 2000) (maintaining perfection of possessory lien through continued post-petition possession of collateral falls within exception to automatic stay under section 362(b)(3)).

ii. CSX Is Authorized to Maintain Possession of the Collateral.

18. Under applicable nonbankruptcy law, while the Debtors' Collateral remains in CSX's possession, CSX's common carrier liens in and on the Collateral "prime" and have priority over any preexisting liens in the Collateral. 49 U.S.C. § 80110(c); U.C.C. § 9-333. As stated, the priming nature of CSX's common carrier liens is expressly acknowledged by the Debtors in their Critical Vendor Motion. See Critical Vendor Motion ¶ 19. As such, any action by CSX to maintain and continue CSX's lien in such Collateral after the Petition Date—including the act of continued possession—is expressly authorized under sections 362(b)(3) and 546(b)(1)(B) of the Bankruptcy Code.

**C. The Debtors Must Provide Adequate Protection of CSX's Interest in the Collateral Before the Debtors Can Use, Sell, or Lease the Collateral.**

19. Pursuant to section 363(e) of the Bankruptcy Code:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in the property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e). The use of the mandatory term "shall" in section 363(e) makes clear that adequate protection is not optional—upon request, it *must be* provided. Given CSX's request herein for adequate protection of its interest in the Collateral, pursuant to section 363(e), the Debtors cannot use sell, or lease the Collateral until such adequate protection is provided.

20. The Bankruptcy Code does not define “adequate protection,” but section 361 provides certain examples (including a cash payment) that may constitute adequate protection, depending on the circumstances of the case. *See* 11 U.S.C. § 361. Under section 363(p)(1) of the Bankruptcy Code, the Debtors bear the burden of proving that CSX’s interest in the Collateral is adequately protected. *See* 11 U.S.C. § 363(p)(1).

21. Here, if the Debtors are to use, sell, or lease the Collateral, the only means of adequately protecting CSX’s possessory liens in the Collateral is the payment in full of the value of CSX’s liens, *i.e.*, the Outstanding Balance, prior to CSX’s release of the Collateral. Anything short of full payment of the Outstanding Balance would be insufficient given that relinquishment of the Collateral may render CSX an unsecured creditor. Indeed, the Debtors expressly recognize in the Critical Vendor Motion that payment in full may be necessary with respect to property in the possession of common carriers. *See* Critical Vendor Motion ¶ 19 (stating that Shippers may be oversecured and entitled to payment in full plus interest). Accordingly, CSX requests that the Court order payment of the Outstanding Balance.

#### **NO PRIOR REQUEST**

22. No prior request for the relief sought in this Motion has been made to this or any other Court.

#### **WAIVER OF MEMORANDUM OF LAW**

23. Because the Motion does not raise any novel issues of law and is supported by case authorities contained herein, the requirement of Local Rule 9013-1(b) that a separate memorandum of law be filed is satisfied by the Motion.

WHEREFORE, CSX Transportation, Inc. respectfully requests that the Court enter an Order: (i) authorizing CSX to continue possession of the Collateral to allow CSX to maintain perfection of its common carrier lien in the Collateral, (ii) requiring the Debtors to provide CSX with adequate protection of CSX's interest in the Collateral in the form of cash payment of the Outstanding Balance as a condition of the Debtors' right to use, sell, or lease the Collateral, and (iii) granting CSX such other and further relief as the Court deems just and proper.

Dated: May 5, 2009

Respectfully submitted,

S/ John H. Maddock III  
John H. Maddock III  
McGUIREWOODS LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

AND

Marshall Beil  
Shawn R. Fox  
McGUIREWOODS LLP  
1345 Avenue of the Americas  
New York, New York 10105  
(212) 548-2100

*Counsel for CSX Transportation, Inc.*