This opinion is intended for full publication

Dated: May 03, 2019
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

BLANKENSHIP FARMS, LP,	**Case No. 16-10840**
Debtor.	**Chapter 7**

MEMORANDUM OPINION RE: CHAPTER 11 TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AS TO CNH INDUSTRIAL CAPITAL AMERICA, LLC'S AMENDED MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM

This matter is before the Court on the chapter 11 trustee's ("Trustee") motion for summary judgment as to CNH Industrial Capital America, LLC's ("CNHi") amended motion for allowance of an administrative expense claim. The Trustee asserts she is entitled to summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56. The Court conducted a hearing on the Trustee's summary judgment motion on May 1, 2019.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant

to 28 U.S.C. § 157(b)(2)(B). This Court has subject matter jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1)(A). This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

I. FACTS

The parties in this matter filed a Joint Pre-trial Stipulations of Fact on April 10, 2019. These stipulations are as follows:

1. On April 27, 2016 (the "Petition Date"), James Trent Blankenship and Wendi Deann Blankenship (the "Blankenships") filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the Western District of Tennessee, Case No. 16-bk-10839 (the "Blankenships' Case"). Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Blankenships operated and managed their farming business as debtors-in-possession during the bankruptcy case.

2. On or about July 25, 2017, the Blankenships' Case was converted to a Chapter 7 case under the Bankruptcy Code.

3. This Court appointed Marianna Williams as Chapter 7 Trustee for the Blankenships on or about July 26, 2017, and the Trustee has served as Chapter 7 Trustee from and since July 26, 2017.

4. As the Chapter 7 Trustee, Ms. Williams is vested with the exclusive ability to exercise control over property of the estate and manage the business of the Blankenships pursuant to Sections 541 and 704 of the Bankruptcy Code.

5. In the Blankenships' Petition and bankruptcy schedules (the "Blankenships Schedules"), the Blankenships listed certain farm equipment, described below in Stipulation No. 13, in which CNHi had a security interest (the "Collateral"), as having a value of $1,202,000.00.

6. CNHi did not request a separate/independent valuation of the Collateral on or after the Petition Date to assess the Blankenships' valuation.

7. Also on the Petition Date, Blankenship Farms L.P. (the "Farms Debtor") filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the Western District of Tennessee, Case No. 16-bk-10840 (the "Farms Case"). Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Farms Debtor operated and managed its farming business as debtor-in-possession during the bankruptcy case.

8. This Court appointed Marianna Williams as Chapter 11 Trustee for the Farms Debtor on or about March 9, 2017, and the Trustee has served as Chapter 11 Trustee from and since March 9, 2017.

9. As the Chapter 11 Trustee, Ms. Williams is vested with the exclusive ability to exercise control over property of the estate and manage the business of the Farms Debtor pursuant to Sections 541, 1107, and 1108 of the Bankruptcy Code.

10. In the Farms Debtor's Petition and bankruptcy schedules (the "Farms Schedules"), the Farms Debtor listed the Collateral, described below in Stipulation No. 13, in which CNHi had a security interest, as having a value of $1,202,000.00.

11. CNHi filed proofs of claim evidencing its prepetition claim in the amount of $519,089.16, secured by nine (9) pieces of farming equipment described below (the "Collateral") in the Blankenships' Case as Claim No. 6 and in the Farms' Case as Claim No. 12.

12. The Blankenships operated as family farmers, both before and after the Petition Date, and generated revenue through the use of the Collateral of CNHi.

13. During the pendency of the Blankenships' Case and the Farms Case, the Blankenships and Farms used the following Collateral of CNHi:

    a. two (2) 2208 Case IH Combine Headers, Serial No. CBJ030111 and Serial No. HAJ035217;

    b. one (1) 8230 Case IH Combine, one (1) 2162 Case IH Combine Head and one (1) 9250 Unverferth Grain Cart, Serial No. YCG215997, Serial No. YCZN17892 and Serial No. B30170128;

    c. two (2) 1245 Case IH Planters, Serial No. YDS042613 and Serial No. YDS042551;

    d. one (1) 290 Case IH Magnum Tractor, Serial No. ZERD02119; and

    e. one (1) True Tandem 3 Case IH Soil Preparation vertical tillage machine, Serial No. YED072229.

14. CNHi filed a Motion for Relief from the Automatic Stay or, in the Alternative, for Adequate Protection, on May 27, 2016 [D.E. 35] (the "Motion") in the Blankenships' Case. In that Motion, CNHi asserted that (a) the Blankenships purchased the Collateral and financed that purchase through CNHi and (b) CNHi was entitled to adequate protection for the use of the Collateral during the bankruptcy case.

15. The Blankenships filed their objection to CNHi's Motion on June 14, 2016 [D.E. 70], and asserted that the Collateral securing the claim of CNHi had "a value of $1,202,000 as of April 27, 2016." The Blankenships opposed the relief requested by CNHi "because (A) CNHi's secured claim is adequately protected, (B) the farming equipment securing CNHi's claims has a significant equity cushion in excess of CNHi's claims, and (C) the farming equipment securing CNHi's claims is necessary to an effective reorganization." *Id*. at page 4. The Debtors further asserted that "an enormous equity cushion exists to adequately protect CNHi. CNHi is not entitled to additional adequate protection." *Id*. at page 5. The Blankenships also asserted that the Collateral had been transferred to and was owned by the Farms Debtor.

16. The Blankenships opposed CNHi's Motion, asserting that "Farming long ago progressed past hand labors, and, now, farming equipment is necessary to conduct substantial farming operations. All of CNHi's equipment is essential for farming operations of the Debtors and Blankenship Farms LP." *Id*.

17. The Motion for Relief was originally set for hearing on June 16, 2016. The hearing on the Motion for Relief was continued seven times between June 16, 2016 and March 23, 2017.

18. The Collateral was used to conduct the farming operations of the Blankenships and of Blankenship Farms.

19. After CNHi filed the Motion for Relief in the Blankenships' case, the Blankenships, the Farms Debtor, and CNHi entered into negotiations wherein the Blankenships and the Farms Debtor offered to make periodic payments to CNHi as adequate protection for the continued use of the Collateral. Specifically, in October 2016, the Blankenships and the Farms Debtor offered to pay CNHi $6,000.00 per month as adequate protection, *nunc pro tunc* to the Petition Date, if CNHi would agree (a) to apply those payments to the principal balance of the debt, and (b) to forego any claim to post-petition interest and attorneys' fees.

20. CNHi did not accept this offer.

21. CNHi subsequently filed a second Motion for Relief from the Automatic Stay or, in the Alternative, for Adequate Protection in the Farms Case on February 22, 2017.

22. CNHi was granted relief from stay as to the Collateral by this Court on March 24, 2017 in both bankruptcy cases.

23. This Court never entered an order requiring the Blankenships or the Farms Debtor to make adequate protection payments to CNHi, in either bankruptcy case.

24. CNHi took possession of the Collateral on April 27, 2017.

25. After obtaining relief from stay, CNHi recovered the Collateral and sold the Collateral at private party foreclosure sales through its equipment remarketing website, Equipment Alley, as follows:

    a. one (1) 2208 Case IH Combine Header, Serial No. CBJ030111, was sold for $6,500 at a private foreclosure sale on May 19, 2017, with the bill of sale executed on May 19, 2017.

    b. one (1) 2208 Case IH Combine Header, Serial No HAJ035217 was sold for $5,000 at a private foreclosure sale on November 16, 2017, with the bill of sale executed on November 16, 2017.

    c. one (1) 8230 Case IH Combine, Serial No. YCG215997, was sold for $106,500 at a private foreclosure sale on October 26, 2017, with the bill of sale executed on November 6, 2017.

    d. one (1) 2162 Case IH Combine Head, Serial No. YCZN17892 was sold for $32,000 at a private foreclosure sale on May 19, 2017, with the bill of sale executed on July 12, 2017.

    e. one (1) 9250 Unverferth Grain Cart, Serial No. B30170128 was sold for $17,972 at a private foreclosure sale on July 24, 2017, with the bill of sale executed on July 27, 2017.

    f. one (1) 1245 Case IH Planter, Serial No. YDS042613 was sold for $60,900 at a private foreclosure sale on August 9, 2017, with the bill of sale executed on August 14, 2017.

    g. one (1) 1245 Case IH Planter, Serial No. YDS042551 was sold for $58,501 at a private foreclosure sale on August 9, 2017, with the bill of sale executed on August 11, 2017.

    h. one (1) 290 Case IH Magnum Tractor, Serial No. ZERD02119 was sold for $99,500 at a private foreclosure sale on November 14, 2017, with the bill of sale executed on November 15, 2017.

    i. one (1) True Tandem 3 Case IH Soil Preparation vertical tillage machine, Serial No. YED072229 was sold for $25,260 at a private foreclosure sale on November 28, 2017, with the bill of sale executed on November 28, 2017.

26. The Trustee held a public auction for the sale of other farm equipment owned by the Blankenships and the Farms Debtor in both bankruptcy cases in July 2017, but CNHi elected not to participate in the Trustee's public auction.

27. At the time of the private foreclosure sales, CNHi had a secured claim in the amount of $519,076.16. The private foreclosure sales by CNHi generated a total amount of $412,133.00 to be applied to CNHi's claim.

28. CNHi asserts entitlement to payment of $106,946.16 (the difference between its secured claim on the Petition Date and the results from the private foreclosure sales) as an administrative expense because (a) CNHi was prohibited from exercising its rights to the Collateral during the pendency of the automatic stay and (b) the Blankenships and the Farms Debtor were continuing to use the Collateral for preservation of the estate.

29. The Trustee, on behalf of the Blankenships and the Farms Debtor has filed an objection to CNHi's requests for an administrative claim.

Joint Pre-Trial Stipulations of Fact in Connection with the Am. Mots. by CNH Industrial Capital America, LLC For Allowance of Administrative Expense Claim and the Trustee's Am. Objs. Thereto, ECF No. 415.

In her objection to CNHi's motion for an administrative expense, the Trustee asserts that CNHi failed to establish a basis for its administrative expense claim. The Trustee argues that CNHi's failure to pursue adequate protection during the pendency of the case defeats CNHi's claim. The Trustee also asserts that CNHi's failure to provide any justification for its delay in liquidating the collateral defeats its claim.

The Trustee filed a Motion for Summary Judgment as to CNHi's Administrative Expense Application (ECF No. 418), a Statement of Undisputed Material Facts in support thereof (ECF No. 419), and a memorandum of law in support thereof (ECF No. 420) on April 10, 2019. The additional facts set forth in the Trustee's Statement of Undisputed Material Facts are as follows:

> CNHi continued the hearing on the Individual Motion for Relief on seven (7) different occasions, allowing the hearing to remain pending and the Individual Motion for Relief to remain unresolved for over 10 months.
>
> ….The orders granting the Motions for Relief, however, did not address or require the [Blankenships] or Blankenship Farms to make any form of adequate protection payments to CNHi.
>
> After the private sale of the collateral, on December 29, 2017, CNHi …. filed its first motion for allowance of an administrative expense claim pursuant to

> Sections 503(b)(1) and 507(a)(1) of the Bankruptcy Code (the "Motion for Administrative Expense").
>
> The Trustee filed a timely objection to the Motion on January 23, 2018.
>
> CHNi subsequently filed an Amended Motion by CNH Industrial Capital America, LLC for Allowance of Administrative Expense Claim (the "Amended Motion for Administrative Expense") on or about May 3, 2018, thereby continuing to assert an entitlement to allowance of an administrative expense claim but in a reduced amount of $106,946.16.
>
> The Trustee again objected to CNHi's Amended Motion for Administrative Expense on or about May 24, 2018. Dkt. No. 358.

Stmt. Of Undisputed Material Facts at ¶¶ 8, 10, 12, 13, 14 and 15, ECF No. 419.

CNHi filed a Response to the Trustee's Statement of Undisputed Material Facts on April 24, 2019 (ECF No. 426). CNHi agreed that all of the facts set forth in the Trustee's Statement of Undisputed Facts were undisputed.

CNHi also filed a Response in Opposition to the Trustee's Motion for Summary Judgment on April 24, 2019 (ECF No. 425.) CNHi stated in this pleading that

> [t]he Facts recited by the Trustee are accurate, with regard to how CNHi came to assert a claim for an administrative expense in this case, but a few more are necessary to understand fully the position of CNHi in this matter.

Resp. in Opp'n to Mot. for Summ. J. at 1, ECF No. 425. Facts set forth in CNHi's Response that have not previously been set forth in the case are as follows:

> CNHi agreed with the Debtors that its Collateral had an equity cushion for CNHi, and agreed with the Debtors to continue, repeatedly, the hearing on the Motion for Relief from Stay or for Adequate Protection until after the 2016 crop came in.
>
> Given that the Blankenship Farms Debtor had obtained this Court's approval for a multimillion dollar post-petition crop loan, CNHi agreed to rely on that equity cushion for adequate protection of its interests.
>
> The pieces securing the claim of CNHi were not small and were not simply ancillary to the operations of these Debtors.
>
> According to the Debtors' statements and schedules, these were the bulk of the Debtors' farming equipment.

Id. at 2. At the hearing in this matter, counsel for the Trustee stated that they do not dispute any of these additional facts.

CNHi filed a Statement of Additional Undisputed Material Facts (ECF No. 428) on April 25, 2019. All of the facts set forth therein have been previously set forth in the Joint Pre-trial Statement of Undisputed Material Facts, the Trustee's Motion for Summary Judgment and the pleadings in support thereof, or CNHi's Response to the Motion for Summary Judgment.

At the hearing on the Trustee's summary judgment motion, counsel for CNHi stated that they had the farm equipment appraised shortly before the Debtors filed for chapter 11 relief. That assessment indicated there was between $500,000 (wholesale value) and $800,000 (retail value) worth of equity in the equipment at the time of the bankruptcy filings.

II. CONCLUSIONS OF LAW

A. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7056 and 9014, provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the Supreme Court recognized in the case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact." *Id*. at 247-48 (emphasis added). The substantive law on the underlying issue determines which facts are material to the inquiry. *Id.* at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks and citation omitted).

The party moving for summary judgment has the initial "burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W.W., Inc., v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005). Pursuant to Fed. R. Civ. P. 56(c), the movant must support its assertion that there are no genuine factual disputes by

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "The moving party need not support its motion with evidence disproving the nonmoving party's claim, but need only show … that there is an absence of evidence to support the nonmoving party's case." *Employers Ins. of Wausau v. Petroleum Specialties, Inc*. 69 F.3d 98, 102 (6th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)) (internal quotation marks omitted). The burden then shifts to the nonmoving party to "come forward with 'specific facts showing that there is a *genuine issue for trial.' "* *Matsushita Elec. Indus. Co.,* 475 U.S. at 587 (citing Fed. R. Civ. P. 56(e)) (emphasis in original)). "The nonmoving party must identify specific facts, supported by evidence, and may not rely on mere allegations contained in the pleadings." *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) and *Anderson*, 477 U.S. at 248). In so doing, the nonmoving party is not required to "produce evidence in a form that would be admissible at trial[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, (1986). The nonmoving party is only required to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 323.

When considering a motion for summary judgment, a court must view all the facts and make all reasonable inferences in favor of the non-moving party. *Flagg v. City of*

Detroit, 715 F.3d 165, 178 (6th Cir. 2013). The court does not, however, "weigh the evidence to determine the truth of the matter, but instead, simply determines whether a genuine issue for trial exists." *Anderson*, 477 U.S. at 249. The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

In this case, CNHi argues that §§ 503(b) and 507(a) entitle it "to the allowance of an administrative claim for the depreciation of the Collateral caused by the use of the Collateral by the Debtors after the Petition Date." Am. Mot. by CNHi for Allowance of Administrative Expense Claim at 5, ECF No. 380. In order to determine whether the Trustee is entitled to judgment as a matter of law on this issue, the Court must determine what facts are essential to resolution of the matter and whether any of these facts are in dispute.

B. ADMINISTRATIVE EXPENSE CLAIM FOR POST-PETITION DEPRECIATION

Section 503(b)(1)(A) of the Bankruptcy Code authorizes an administrative expense for "the actual, necessary costs and expenses of preserving the estate including—(i) wages, salaries, and commissions for services rendered after the commencement of the case[.]" 11 U.S.C. § 503(b)(1)(A). Section 507(a) of the Code grants such expenses first priority status. 11 U.S.C. § 507(a)(2); Fed. R. Bankr. P. 9001(11). "The purpose of this priority is to facilitate the rehabilitation of insolvent businesses by encouraging third parties to provide those businesses with necessary goods and services." *Nat'l Union Fire Ins. Co. v. VP Bldgs., Inc.*, 606 F.3d 835, 838 (6th Cir. 2010) (citations omitted). "[B]ecause priority claims reduce the funds available for creditors and other claimants," claims for administrative expenses must be "strictly construed." *Id.* (citing *In re Federated Dep't Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001)). Although bankruptcy courts have "broad discretion to determine whether a claim for an administrative expense is, in actuality, an administrative expense," they "should strictly scrutinize [the] claims and narrowly construe the terms 'actual' and " 'necessary.' " *In re Moore*, 109 B.R. 777, 780 (Bankr. E.D. Tenn. 1989) (citations omitted). The movant has the burden of proving that

a claim qualifies as an administrative expense and "that the expenses were reasonable, necessary and benefited the estate." *Id.* (internal quotation marks and citations omitted); *Nat'l Union Fire Ins.*, 606 F.3d at 838. The movant must demonstrate "that the claimed expenses are entitled to administrative priority" by a preponderance of the evidence. *In re HNRC Dissolution Co.*, 371 B.R. 210, 226 (E.D. Ky. 2007) (citation omitted).

The issue of whether deprecation is allowed to be requested as an administrative expense under 11 U.S.C. §§ 503(b)(1) and 507(a)(2) was addressed by the United States Bankruptcy Court for the Middle District of Tennessee in the case of *In re Advisory Information & Management Systems, Inc.*, 50 B.R. 627 (Bankr. M.D. Tenn. 1985). In that case, a pre-petition creditor with a secured claim "moved for the allowance of an administrative expense based on the depreciation of its collateral between the date of the debtor's bankruptcy filing and the date the creditor was granted relief from the stay and repossessed its collateral." *Id.* at 627. The debtor argued "that there is no authority for awarding an administrative expense to a creditor who has merely been delayed by bankruptcy in recovering property under its security interest." *Id.* The collateral at issue was computer equipment.

The *Advisory* Court agreed with the debtor and held that a "creditor is not entitled to an administrative expense allowance," for collateral depreciation "between the date of the debtor's bankruptcy filing and the date the creditor was granted relief" from the automatic stay. *Id.* In so doing, the court relied heavily on a decision issued by the Seventh Circuit Court of Appeals in 1984, *In re Jartran, Inc.*, 732 F.3d 584 (7th Cir. 1984). The *Advisory* Court quoted heavily from *In re Jartran*:

> The policies underlying the provisions of § 503 (and its predecessor, § 64(a)(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1) (1976)) are not hard to discern. If a reorganization is to succeed, creditors asked to extend credit after the petition is filed must be given priority so they will be moved to furnish the necessary credit to enable the bankrupt to function. *See In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir.1976) (Coffin, Chief Judge). Thus, "[w]hen third parties are induced to supply goods or services to the debtor-in-possession ... the purposes of [§ 503] plainly require that their claims be afforded priority." *Id*. (emphasis added) (footnote omitted). Without a provision like § 503, efforts to reorganize would be hampered by the necessity of advance payment for all goods and services supplied to the

> estate since presumably no creditor would willingly assume the status of a non-priority creditor to a debtor undergoing reorganization.
>
> This involves no injustice to the pre-petition creditors because it is for their benefit that reorganization is attempted. If reorganization successfully rehabilitates the debtor, presumably the pre-petition creditors will be better off than in a liquidation. *See Reading Co. v. Brown*, *supra*, 391 U.S. [471] at 478, 88 S. Ct. [1759] at 1783 [20 L.Ed.2d 751]. However, because priority should not be afforded unless it is founded on a clear statutory purpose, if the appellants' claim does not comport with the language and underlying purposes of § 503, their claim must fail. *See In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 658 F.2d 1149, 1163 (7th Cir.1981) (general rule is equality of distribution; deviation must appear in the statute), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982). Any preference for claims not intended by Congress to have priority would dilute the value of the intended priority and thus frustrate the intent of Congress. *Id*.; *In re Mammoth Mart, supra*, 536 F.2d at 953.

In re Advisory Info. & Mgmt. Sys., Inc., 50 B.R. at 628–29 (quoting *In re Jartran, Inc*., 732 F.2d at 586).

With these guideposts in mind, the *Advisory* court analyzed the case before it.

> We do not believe § 503(b) is intended to provide an administrative expense award to a prepetition secured lender based on the debtor's postpetition possession and use of collateral. As the quoted portion of *Jartran* demonstrates, the administrative priority should not be awarded absent a clear statutory purpose. *In re Jartran, supra*, 732 F.2d at 586. The policy of encouraging business dealings with the postpetition debtor during the reorganization period is not served by according administrative priority to a prepetition secured party. The secured claimholder is not electing postpetition to do business with the debtor—the possibility of having to deal with a debtor in bankruptcy was one of the many considerations a lender must evaluate at the time of the original loan and security agreement. First State is not a postpetition lender who might be entitled to special protections under 11 U.S.C. § 364. As an ordinary prepetition secured party, First State is only entitled to the usual remedies of a secured lender in a bankruptcy case—no more, no less.
>
> A secured creditor is protected against depreciation of collateral during the reorganization period through various other provisions of the Bankruptcy Code. Under 11 U.S.C. §§ 361 and 362 adequate protection of the creditor's interest may be required through periodic cash payments, replacement liens, or other relief except the granting of a § 503(b)(1) administrative expense. Where the adequate protection given by the trustee or debtor-in-possession proves to be inadequate, 11 U.S.C. § 507(b) provides a

> superpriority to the injured creditor. *See In re Callister*, 15 B.R. 521, 5 BANKR.CT.DEC. (CRR) 446, 5 COLLIER BANKR.CAS.2d (MB) 1058 (Bankr.D.Utah 1981). If adequate protection is not feasible, the creditor may receive relief from the stay to repossess its collateral. 11 U.S.C. § 362(d). Pursuant to 11 U.S.C. § 363(e) the court may prohibit or condition the use of property in which the creditor has an interest as is necessary to provide adequate protection of such interest.

In re Advisory Info. & Mgmt. Sys., Inc., 50 B.R. at 629. The *Advisory* Court continued, stating:

> In a typical Chapter 11 case, the debtor-in-possession must use many encumbered assets to operate its business. Although the secured creditor may be entitled to adequate protection of its lien interest, absent other demonstrated cause it cannot divest the debtor of its right to use collateral necessary to reorganization unless it can show that postpetition retention and use of the collateral will impair the creditor's adequate protection.

Id. at 630. Because the creditor never sought adequate protection and chose to wait a year after the case was filed to seek relief from the stay, the *Advisory* Court denied the creditor's claim.

> Had the bank asserted its rights, the debtor would have had the option to surrender the collateral to First State and avoid providing adequate protection or the debtor would have had to comply with §§ 361, 362, etc., and protect the bank's interest in the collateral. The Bankruptcy Code nowhere puts the responsibility on the debtor to initiate consideration of adequate protection of a creditor's noncash collateral. There is nothing in § 503 remotely suggesting that administrative expense priority was intended as an optional remedy to adequate protection of a secured claimholder's interest in property of the estate.

Id. at 629–30. Had the debtor fraudulently withheld the collateral from the creditor or contested the creditor's request from the automatic stay in bad faith, the *Advisory* Court indicated the outcome may have been different. *Id*. at 630.

The issue of whether deprecation is allowed to be requested as an administrative expense under 11 U.S.C. §§ 503(b)(1) and 507(a)(2) was more recently addressed by the Sixth Circuit Bankruptcy Appellate Panel in the case of *In re Gasel Transportation Lines, Inc.,* 326 B.R. 683 (B.A.P. 6th Cir. 2005). In that case, a debtor was permitted to retain possession of 11 tractors in order to maintain business operations during the course of the chapter 11 case. The creditor, who had financed the debtor's purchase of

the tractors pre-petition, moved for relief from the automatic stay approximately six weeks after the debtor's May 2003 bankruptcy filing. After a hearing on the matter, the bankruptcy court issued an order conditionally denying the motion for relief based on the debtor making "a more significant offer of adequate protection." *Id.* at 686. In so doing, the court adopted the creditor's "assessment of the current values and the rate of depreciation" of the collateral. *Id.* When the debtor failed to offer adequate protection within the time limit set forth in the order, the court terminated the automatic stay. After the stay was terminated but before the creditor recovered possession of the collateral, the debtor and creditor entered into an agreed order whereby the debtor agreed to make monthly adequate protection payments in exchange for continuing to use the tractors. *Id.* The parties entered the agreed order on October 16, 2003. The order provided that the adequate protection payments would begin on October 15, 2003, and would cover the time period from September 2003 forward. *Id.*

In December 2003, the creditor requested an administrative expense for the debtor's use of the collateral "during the period between commencement of the case and the onset of the adequate protection payments." *Id.* at 686. The bankruptcy court denied the creditor's request, noting that "[g]enerally what's required is ... proof of a post-petition trans-action [sic] with the estate and…proof that there has been direct and substantial benefit to the estate or the debtor in possession." *Id.* at 687 (citing bankruptcy court hearing transcript). Because there was no such transaction in the case before it, the bankruptcy court denied the creditor's application. *Id.* In ruling from the bench, the bankruptcy court reasoned as follows:

> I don't see a post-petition transaction here with the debtor. I instead see a pre-petition contractual relationship where the debtor had agreed to pay so much per month for the use of the trucks. That agreement occurred pre-petition. Once the case was filed, then it becomes a matter … of making appropriate adequate protection payments, which was done here. … I don't think I'm entitled to give your client an administrative expense priority because … the whole transaction is pre-petition, there is no separate post-petition transaction in this case.

Id. (citing bankruptcy court hearing transcript).

On appeal, the BAP affirmed the bankruptcy court. The BAP relied on the Sixth Circuit's test for analyzing requests for administrative expense claims.

> A debt qualifies as an actual, necessary administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate. The benefit to the estate test limits administrative claims to those where the consideration for the claim was received during the post-petition period.

Id. (citing *PBGC v. Sunarhauserman, Inc.* (*In re Sunarhauserman, Inc.*), 126 F.3d 811, 816 (6th Cir. 1997) (citing *Employee Transfer Corp. v. Grigsby* (*In re White Motor Corp.*), 831 F.2d 106, 110 (6th Cir. 1987))); *see also Nat'l Union Fire Ins. Co.,* 606 F.3d at 838. The BAP continued,

> In determining whether there was a transaction with the bankruptcy estate, the proper focus is on the inducement involved in causing the creditor to part with its goods or services.
>
> ….
>
> A creditor provides consideration to the bankrupt estate *only when* the debtor-in-possession induces the creditor's performance and performance is then rendered to the estate. If the inducement came from a pre-petition debtor, then consideration was given to that entity rather than to the debtor-in-possession.
>
> …
>
> Normally, merely continuing to possess equipment pursuant to a prepetition contract does not constitute inducement by the debtor in possession.

Id. at 687-88 (emphasis added) (citing *United Trucking Serv., Inc. v. Trailer Rental Co.* (*In re United Trucking Serv., Inc.*), 851 F.2d 159, 162 (6th Cir.1988) and *White Motor Corp.*, 831 F.2d at 110). Because there was no transaction with the post-petition debtor for the period in which the creditor was seeking an administrative expense, the BAP concluded that the bankruptcy court had properly denied the creditor's claim. *In re Gasel Transp. Lines, Inc.*, 326 B.R. at 688 ("The debtor in possession was able to retain and use [the] collateral during the first fifteen weeks of the chapter 11 case *solely by virtue of the automatic stay.*")

In issuing its ruling, the BAP recognized that it might have reached a different result had the creditor been seeking an administrative expense claim for the time period after entry of the agreed order on October 16, 2003. That order required the debtor to provide the creditor with adequate protection. In return, the creditor agreed to hold off on repossessing the collateral even though the court had already lifted the automatic stay. The BAP stated that the creditor's "willingness to allow the Debtor to use its non-cash collateral on specified terms—after the stay was terminated—constituted a new, postpetition transaction with the estate." *Id.* at 688. As such, the BAP reasoned "[t]he problem for Volvo is that the Agreed Order, and its arguable inducement for Volvo to do new business with the Debtor's estate, occurred after the time period for which it sought an administrative expense claim." *Id.*

A number of other courts around the country have agreed with the holdings in *In re Advisory Info. & Mgmt. Sys., Inc.*, and *In re Gasel Transp. Lines, Inc.,* including the Bankruptcy Appellate Panel of the Eighth Circuit and various district and bankruptcy courts. *Williams v. IMC Mortg. Co.* (*In re Williams*), 246 B.R. 591, 595 (B.A.P. 8th Cir. 1999) ("Courts commonly recognize that § 503(b) is not intended to provide an administrative expense award to a prepetition secured lender based on the debtor's postpetition possession and use of collateral."); *Tidewater Fin. Co. v. Henson*, 272 B.R. 135, 139(D. Md. 2001); *In re Robinson*, 225 B.R. 228, 233 (Bankr.N.D.Okla.1998) ("It is the ruling of the Court today … that § 503(b) of the Bankruptcy Code does not provide an alternative means to obtain adequate protection on an after-the-fact basis."); *In re Lovay*, 205 B.R. 85, 87 (Bnakr. E.D. Tex. 1997); *In re McLeod*, 205 B.R. 76, 79 (Bankr. E.D. Tex. 1996); *In re James B. Downing & Co.*, 94 B.R. 515, 521-22 (Banrk. N.D. Ill. 1988); *In re Provincetown-Boston Airline, Inc.*, 66 B.R. 632, 634 (Bankr. M.D. Fla. 1986) ("The secured creditor is not contributing to the estate by allowing a Debtor-in-Possession to use collateral which it already owns and has a statutory right to use."); *In re Briggs Transp. Co.*, 47 B.R. 6 (Bankr. D. Minn. 1984).

C. ANALYSIS

Having set forth the substantive law on the issue of whether CNHi is entitled to an administrative expense claim, the Court must now determine which facts are material to

the inquiry and whether these facts are undisputed. As set forth *supra*, in order to succeed on its claim for an administrative expense in this case, CNHi must prove that its claim (1) arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate. It is important to note that this 2-part test is written in the conjunctive. *In re Swallen's, Inc*., 210 B.R. 120, 122–23 (Bankr. S.D. Ohio 1997). Therefore, a creditor must be able to prove both prongs of the test in order to be successful on its application for an administrative expense. Failure to prove one prong is fatal to the inquiry as a whole. *Id.*

Prong One: Transaction with the Bankruptcy Estate

In the case at bar, the parties stipulated to several facts. First, the Court never entered an order requiring the Blankenships or the Farms Debtor to make adequate protection payments to CNHi. Second, the Debtors offered to make adequate protection payments to CNHi, but CNHi rejected this offer. Third, the parties never entered an order providing that the equity cushion would serve as adequate protection for CNHi's claims. Fourth, the Court continued CNHi's motion to lift the automatic stay seven times between June 16, 2016, and March 23, 2017. Fifth, the Court did not lift the automatic stay as to CNHi's collateral until March 24, 2017.

There is only one fact on which the parties disagree under the first element of the administrative expense issue: whether CNHi had an agreement with the Debtors that qualifies as a transaction with the bankruptcy estate sufficient to justify an administrative expense award. CNHi alleges that the Debtors' agreement to allow the equity cushion to serve as adequate protection is sufficient to satisfy the first prong of the inquiry even though the parties never entered an order that memorialized this agreement. The Trustee disagrees and argues that the absence of a court order defeats CNHi's claim.

In supporting its claim for an administrative expense, CNHi relies on the holding in *Bonapfel v. Nalley Motor Trucks* (*In re Carpet Center Leasing Co.*), 991 F.2d 682 (11th Cir. 1993). In that case, the debtor was engaged in the trucking business.

> Pursuant to a consent decree between Debtor and Paccar, Debtor was allowed to continue using the twenty six tractors in bankruptcy in exchange

> for monthly "adequate protection" payments to Paccar to protect Paccar's interest in the depreciating collateral.

Id. at 684, opinion amended on denial of reh'g, 4 F.3d 940 (11th Cir. 1993). Although the debtor made the adequate protection payments, not all the payments were timely. Approximately one year after the case was filed, the court appointed a chapter 11 trustee. Following this appointment, the trustee and Paccar entered into an agreed order which lifted the automatic stay and allowed Paccar to foreclose on the tractors.

After the vehicles were liquidated, the creditor sought an administrative expense claim "for the diminution in value of the collateral that occurred because of Debtor's continued use of the trucks pursuant to the automatic stay in bankruptcy." *Id.* at 685. The bankruptcy court awarded the creditor an administrative expense priority award in this amount pursuant to § 507(a). The district court affirmed the award. *Id.* at 685. On appeal, the Eleventh Circuit agreed with the lower courts and affirmed the administrative expense award.

In affirming the bankruptcy court, the Eleventh Circuit held that "[t]he negotiation for continued possession of the tractors in return for adequate protection is a post-petition transaction providing new value to the bankruptcy estate." *In re Carpet Ctr. Leasing Co., Inc.*, 991 F.2d at 686–87. Accordingly, CNHi argues that its negotiations with the Debtors regarding the equity cushion qualify as a transaction with the bankruptcy estate. This argument, however, overlooks some important facts in *Carpet Center*: the parties formalized their negotiations in a consent order that required the debtor to make monthly adequate protection payments which constituted new value to the bankruptcy estate. *Id*. at 684. None of those things happened in the case currently before the Court.

CNHi also relies on the case of *In re Rose*, 347 B.R. 284 (Bankr. S.D. Ohio 2006) in moving for its administrative expense. As was the case in *Carpet Center Leasing*, however, there was an order of adequate protection entered in the *Rose* case. The *Rose* Court specifically acknowledged this fact in awarding the creditor an administrative expense:

> Similar to the debtor in *In re Carpet Ctr. Leasing Co*., Debtor in the instant case bargained for the post-petition use of the vehicle. When the Bank filed

> a Motion for Relief From Stay, Debtor negotiated with the Bank to keep the vehicle *as evidenced by the parties' agreement to the entry of an Agreed Order* that allowed Debtor to keep the vehicle in return for Debtor's promise to pay monthly adequate protection payments to the Bank through Debtor's Plan.

In re Rose, 347 B.R. at 288–89 (emphasis added); *see also Employee Transfer Corp. v. Grigsby* (*In re White Motor Corp.*), 831 F.2d 106, 111 (6th Cir. 1987) (Sixth Circuit held that a creditor was not entitled to an administrative expense claim because creditor's post-petition performance of a service contract was not "court ordered" or induced by the post-petition debtor).

Although neither the *In re Carpet Center Leasing* or the *In re Rose* case are directly on point, CNHi is correct that issuance of a court order for adequate protection is not necessarily fatal to a claim for an administrative expense. In *United Trucking Service, Inc., v. Trailer Rental Co., Inc.* (*In re United Trucking Service, Inc.*), 851 F.2d 159 (6th Cir. 1988), the debtor leased 55 trailers from Trailer Rental Company. The lease required the debtor to maintain the trailers in good condition and to make any necessary repairs at its own expense. After the debtor filed for bankruptcy relief, the lessor filed a motion to compel the debtor to reject or assume the lease. The lessor expressed concerns that the debtor was not maintaining the trailers and/or making any necessary repairs and asserted that the debtor's continued use of the trailers would result in even more damage and deterioration. The bankruptcy court gave the debtor 30 days to assume or reject the lease. When the debtor failed to respond, the lessor filed another motion to protect its interest. The bankruptcy court then ordered the debtors to produce the trailers for inspection and to provide proof of insurance. The debtor produced 4 of the 55 trailers. The bankruptcy court responded by issuing an order that required the debtor to produce all of the trailers for inspection. The order provided that the debtor's failure to comply would deem the lease rejected. The debtor returned 53 of the 55 trailers over the next two months, all of which were in a state of disrepair, and asserted that the other two trailers had been stolen pre-petition. The lessor then filed an application for an administrative expense for repair estimates, casualty loss of the two stolen trailers and the cost of replacing tires deemed to be commercially valueless.

In reviewing the case, the Sixth Circuit first set forth the two-step test a court must use in analyzing a creditor's claim for an administrative expense:

> a claimant must prove that the debt (1) arose from a transaction with the debtor-in-possession as opposed to the preceding entity (or, alternatively, that the claimant gave consideration to the debtor-in-possession); and (2) directly and substantially benefitted the estate.

Id. at 161-62 (quoting *In re White Motor Corp.*, 831 F.2d at 110 and *Cramer v. Mammoth Martin, Inc.* (*In re Mammoth Mart*), 536 F.2d 950, 954 (1st Cir. 1976). The Sixth Circuit also noted that in proving the first prong of the test, the movant ordinarily must demonstrate that "the debtor-in-possession induce[d] the creditor's performance and performance [was] then rendered to the estate." *Id.* at 162. However, because "this case involves a claim arising from [the debtor's] post-petition continued use of leased equipment that allegedly was not in accordance with the terms of the pre-petition lease agreement," the Sixth Circuit determined that the key inquiry was not on whether the post-petition debtor induced the lessor's performance. *Id.* at 162. Instead, the Circuit held that

> The right to priority in the event the trustee or debtor in possession receives benefits under the [executory] contract during the interval between the filing of the debtor's petition and the rejection of the contract "is an equitable right based upon the reasonable value" of the benefits conferred, rather than upon the contract price.
>
> ....
>
> ... [T]he purpose of according priority in these cases is fulfillment of the equitable principle of preventing unjust enrichment of the debtor's estate, rather than the compensation of the creditor for the loss to him.

Id. (citing *American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.,* 280 F.2d 119 (2d Cir.1960)).

This situation in the case at bar is entirely distinct from the one in *In re United Trucking Service, Inc.* In that case, the creditor continued to allow the debtor to use the rented property post-petition. In the Debtors' case, the Debtors had an ownership interest in the farm equipment at the time they filed their bankruptcy petitions. The bankruptcy court in *In re Advisory Information and Management Systems* recognized the distinction in relation to claims for administrative expenses:

> There is a fundamental difference between security agreements and lease agreements. In lease situations the lessor is the owner of the property and the lessee must compensate the lessor for the benefit to the estate of using the lessor's property. By contrast, the secured lender is not the owner of the collateral but instead merely has a lien for which it is entitled to adequate protection.

In re Advisory Info. & Mgmt. Sys., Inc., 50 B.R. at 630; *see also In re Purdy*, 763 F.3d 513, 518 (6th Cir. 2014) ("A lease involves payment for the temporary possession, use and enjoyment of goods, with the expectation that the goods will be returned to the owner with some expected residual interest of value remaining at the end of the lease term. In contrast, a sale involves an unconditional transfer of absolute title to goods, while a security interest is only an inchoate interest contingent on default and limited to the remaining secured debt.) As Judge Gregg recognized in his concurrence in *In re Gasel Transportation Lines, Inc.*, a secured creditor has fundamentally different rights than a lessor.

> Under § 363(c)(1), a debtor-in-possession may use non-cash collateral, such as the eleven tractors at issue in this case, in the ordinary course of its business operations without the permission of the bankruptcy court. Section 362 further assists reorganization efforts by automatically staying all collection efforts and foreclosure actions against property of the debtor's estate by creditors such as Volvo. Simply stated, Volvo is "not contributing anything to the estate by sitting back and 'allowing' [the] debtor-in-possession to use collateral which it already owns and has a statutory right to use."

In re Gasel Transp. Lines, Inc., 326 B.R. at 691 (quoting *In re Advisory Info. & Mgmt. Sys., Inc*., 50 B.R. at 630) (footnote omitted). Accordingly, this Court holds that *In re United Trucking Service, Inc.*, is inapplicable to the case at bar.

Another case relied on by CNHi is *In re Collins & Aikman Corp*., 384 B.R. 751 (Bankr. E.D. Mich. 2008). In that case, a tooling manufacturer moved for an administrative expense claim for post-petition services it provided to the debtor pursuant to a pre-petition contract. Although the debtor testified at the hearing that a post-petition email it sent to the tooling manufacturer was intended to induce the manufacturer's continued performance, the debtor argued that the tooling manufacturer "was incapable

of being induced to that performance" because it was "contractually obligated to perform" post-petition[.]" *Id.* at 760. The bankruptcy court found this argument without merit.

> Certainly the purchase orders required Phillips to perform until PPAP was achieved if it wanted to get paid. However, it does not follow at all that Phillips needed no further inducement to perform. Indeed, Phillips had stopped performing and Samul, C & A's own employee, clearly recognized the need to assure Phillips of payment in order to induce Phillips' continued performance.

Id. Based on this post-petition inducement, the court determined that the tooling manufacturer was entitled to an administrative expense for the post-petition services it provided to the debtor regardless of the fact there was no order requiring such. *Id.*

As with *United Trucking*, *In re Collins & Aikman Corp* is entirely distinct from the case at bar. The creditor in *Collins & Aikman* was obligated to perform services to the debtor under a pre-petition contract. At the time of filing, the creditor had stopped providing those services. The debtor then offered the creditor an inducement to resume its services and continue performing. That is not what occurred in the case at bar. The Debtors had an ownership interest in the farming equipment at the time the case was filed. There has been no indication that the Debtors were in default at the time of filing. In fact, CNHi's counsel stated that the valuation done close in time to the chapter 11 filings indicated CNHi had between $500,000 and $800,000 worth of equity.

The other cases cited by CNHi in its memorandum of law in support of its motions for allowance of administrative expense claims are equally inapplicable to the case at bar. In *In re Colter, Inc.*, 53 B.R. 958 (Bankr. D. Colo. 1985), the collateral at issue was cash collateral. In such instances, a creditor may object to the use of cash collateral "absent adequate protection." *Id.* at 959. The parties in *Colter* entered an agreed order allowing the debtors to use the cash collateral in exchange for monthly adequate protection payments. *Id.*

Although the other case cited by CNHi, *In re Becker*, 51 B.R. 875 (Bankr. D. Minn. 1985) involved farm equipment, there was a court order in that case that required the debtor to make adequate protection payments. After the debtors defaulted on one of the

payments, the stay was lifted pursuant to the terms of the order. In that case, the court recognized

> Section 507(b) supplements the parties' own determination of what is necessary to shield a creditor from loss during pendency of the case while the estate retains possession and control of the collateral. It is an attempt to codify a statutory fail-safe system in recognition of the ultimate reality that protection previously determined the indubitable equivalent ... may later prove inadequate.

In re Becker, 51 B.R. 975, 979 (Bankr. D. Minn. 1985) (internal quotation marks and citation omitted). In the case at bar, CNHi was already shielded from loss at the time the Debtors allegedly agreed to provide them adequate protection. CNHi's counsel stated that there was between $500,000 and $800,000 in equity shortly before the chapter 11 case was filed.

In the case of *In re Blehm Land & Cattle Co.*, 859 F.2d 137 (10th Cir. 1988), the Tenth Circuit was asked to review an order denying a creditor's application for an administrative expense. The creditor in *Blehm,* Travelers Insurance Company, had first deed of trust interests in all of the Debtor's real property in Weld County, Colorado. The debtor operated a feed lot on this property at the time of filing for chapter 11 relief. Because the feed lot business was not doing well at the time of the bankruptcy filing, the debtor negotiated with a third party "to lease a portion of the Debtor's real property for the purpose of constructing an oil field waste water disposal system." *In re Blehm Land & Cattle Co.*, 71 B.R. 818, 820 (D. Colo. 1987), *rev'd*, 859 F.2d 137 (10th Cir. 1988). Approximately five months after execution of the leases, Travelers learned of the debtor's intent to permit construction of the waste water disposal system. Travelers informed the lessee it did not consent to the construction. Travelers also filed a motion for a temporary restraining order and preliminary injunction, which was granted by the bankruptcy and district courts. *Id.*

Eventually the bankruptcy court appointed a chapter 11 trustee. The trustee rejected the lease negotiated by the debtor and entered into a new lease of the land with the same lessee. The trustee then entered into negotiations with Travelers to get the temporary restraining order and preliminary injunction lifted and to obtain Travelers'

permission to use the property. *Id.* The trustee and Travelers eventually reached an agreement which required that compensation be paid to Travelers for use of the property. The parties memorialized this agreement in a Memorandum of Agreement, but did not file this agreement with the bankruptcy court. *Id.*

Following the lessee's breach, Travelers filed an application for a superpriority administrative expense for all amounts the trustee was obligated to pay pursuant to the Memorandum of Agreement. "The Application contended that the Agreement between Travelers and the Trustee was in the nature of, and was intended to be, an adequate protection agreement requiring periodic cash payments to Travelers." *Id.* at 821. The bankruptcy court disagreed and denied the application based on the fact that the parties "failed to obtain court approval of the Memorandum of Agreement out of which the expense arose." *In re Blehm Land & Cattle Co.*, 859 F.2d at 138. The district court affirmed.

In a *per curiam* decision, the Tenth Circuit reversed.

> Contrary to the district court's statement that court approval of an adequate protection plan is always required by statute, … the [Bankruptcy] Code is silent with respect to the necessity of court approval of an adequate protection plan when a creditor *does not* object to the protection being offered.

Id. at 139 (emphasis in original). The Tenth Circuit continued,

> We concur with the court's conclusion in [*In re Callister*, 15 B.R. 521 (Bankr. D. Utah 1981)] that neither the [Bankruptcy] Code nor its legislative history supports the interpretation that court approval of an ex parte adequate protection agreement is a prerequisite to a 507(b) expense. Such a rule would deprive the bankruptcy court of much-needed flexibility with respect to the administration of the bankruptcy estate.

Id. at 140 (citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 338-40, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5963, 6295, 6296). The court cautioned, however, that *ex parte* adequate protection agreements should be strictly scrutinized.

> [W]hile such agreements are not presumptively invalid, neither should claims arising from them be automatically approved. On the contrary, ex parte adequate protection agreements should receive close scrutiny from

> the court. In particular, [w]hen examining administrative claims arising from such agreements, the court should consider 1) whether the agreement is consistent with the intent and purpose of the Bankruptcy Code, 2) whether the conduct of the secured creditor has been inequitable, and 3) whether effecting the agreement would create an inequitable result.

Id. at 140 (internal citations omitted).

"Adequate protection safeguards a secured creditor's interest in its depreciating collateral during the pendency of the automatic stay." *In re Norton*, 347 B.R. 291, 298 (Bankr. E.D. Tenn. 2006) (citation omitted). "Adequate protection comes in a variety of forms, including periodic payments, additional or replacement liens, and other relief that provides the indubitable equivalent to the protections afforded to the creditor outside of bankruptcy. *In re Shivshankar P'ship LLC*, 517 B.R. 812, 817 (Bankr. E.D. Tenn. 2014) (internal quotation marks and citation omitted). In certain circumstances, an equity cushion can also serve as adequate protection of a secured creditor's interest in collateral. *In re Packard Square, LLC*, 574 B.R. 107, 121 (Bankr. E.D. Mich. 2017).

For purposes of the Trustee's motion for summary judgment, the Court will presume that the Debtors in this case had an *ex parte* agreement with CNHi that the equity cushion in the equipment would serve as adequate protection of CNHi's secured interest. This presumption, however, does not end the inquiry. CNHi can only satisfy the first prong of the administrative expense inquiry if can demonstrate that such agreement qualifies as a transaction with the bankruptcy estate sufficient to establish its entitlement to an administrative expense. The Court finds that resolution of this question is purely a legal interpretation rather than a factual one. Therefore, the Court concludes that summary judgment is appropriate.

Reviewing the facts of this case in the light most favorable to CNHi, the Court concludes that the parties' *ex parte* agreement to allow the equity cushion to serve as adequate protection for CNHi's interest does not give rise to an administrative expense for CNHi. CNHi stated it conducted a valuation of the collateral shortly before the Debtors filed for bankruptcy relief. According to counsel for CNHi, that assessment indicated the Debtors had between $500,000 and $800,000 worth of equity in the farm equipment. There were no allegations that the Debtors were in default at the time the petitions were

filed. *See* Proofs of Claim 6-1, 6-2, and 6-3, Bankr. Case No. 16-10840. As such, the Debtors entered bankruptcy with the right to continue using the equipment and CNHi was adequately protected by the equity at the time the Debtors continued using the equipment. The Debtors did not induce CNHi to do anything. CNHi was protected by an equity cushion prior to the filing of the chapter 11 petitions and it continued to be adequately protected when the Debtors filed for bankruptcy relief. As the court stated in *Matter of Provincetown-Bos. Airline, Inc.*, 66 B.R. 632 (Bankr. M.D. Fla. 1986),

> In a Chapter 11 case, the Debtor-in-Possession must use many encumbered assets to operate the business. Even though the secured creditor may be entitled to adequate protection of its lien interest, absent other demonstrated cause, it cannot divest the debtor of its right to use collateral necessary to reorganization unless the creditor can show that postpetition retention and use of the collateral will impair the creditor's adequate protection. The secured creditor is not contributing to the estate by allowing a Debtor-in-Possession to use collateral which it already owns and has a statutory right to use.

Id. at 634.

This Court simply cannot conclude that a debtor's *ex parte* agreement to allow an equity cushion that existed at the time of filing to serve as adequate protection qualifies as a post-petition inducement that would entitle a creditor to receive an administrative expense claim. As the Tenth Circuit stated *In re Blehm Land & Cattle Co*., "ex parte adequate protection agreements should receive close scrutiny from the court." 859 F.2d at 140. This Court concludes that an *ex parte* agreement such as the one in the case at bar cannot withstand this heightened level of scrutiny. There was a large equity cushion at the time the Debtors filed for bankruptcy relief. CNHi asserts that the debtors agreed for the equity cushion to serve as adequate protection post-petition. However, in doing this, the Debtors did not offer CNHi anything they did not have at the time the case was filed. Therefore, this Court cannot conclude that the Debtors offered any inducement to CNHi that would entitle it to an administrative expense claim. As the bankruptcy court held in *In re Gasel*, this was not "a post-petition transaction … with the debtor." 326 B.R. at 686 (quoting bankruptcy court transcript). Instead, the Court concludes that the agreement CNHi had with the Debtors arose out of a pre-petition contractual relationship with the Debtors and that the agreement occurred pre-petition. Had the Debtors agreed

to provide additional adequate protection to CNHi after the case was filed, the result would be different.

Because the undisputed material facts do not demonstrate that CNHi made an agreement with the post-petition Debtors, it is unnecessary to address the second prong of the inquiry. As stated *supra*, failure to prove one of the elements is fatal to the claim as a whole.

An order will be entered in accordance herewith.

Mailing Information:

Marianna Williams, Chapter 11 Trustee
E. Franklin Childress, attorney for Chapter 11 Trustee
Joseph E. Prochaska, attorney for CNHi
Robert Campbell Hillyer, attorney for Debtors
United States Trustee

Dated: May 03, 2019
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

BLANKENSHIP FARMS, LP,	**Case No. 16-10840**
Debtor.	**Chapter 11**

ORDER GRANTING CHAPTER 11 TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AS TO CNH INDUSTRIAL CAPITAL AMERICA, LLC'S AMENDED MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM

For the reasons set forth in the Court's Memorandum Opinion re: the Chapter 11 Trustee's Motion for Summary Judgment as to CNH Industrial Capital America, LLC's Amended Motion for Allowance of Administrative Expenses, the trustee's motion is **GRANTED.**

IT IS FURTHER ORDERED that CNH Industrial Capital America, LLC's Amended Motion for Allowance of Administrative Expenses is **DENIED.**

IT IS SO ORDERED.

Mailing Information:

Marianna Williams, Chapter 11 Trustee
E. Franklin Childress, attorney for Chapter 11 Trustee
Joseph E. Prochaska, attorney for CNHi
Robert Campbell Hillyer, attorney for Debtors
United States Trustee