

held by the Debtors' as of the Petition Date. On December 14, 2021, the Court appointed Dennis Gerrard, with CR3 Partners, LLC, as Chief Restructuring Officer (the "CRO"). The CRO has been managing the Debtors' operations since late October 2021. This includes managing the Debtors' cash, escrowing funds for the utilization, sale or processing of grain, and purchasing grain as needed

On December 20, 2021, the MDAC filed its Motion. EFC 1526. In its Motion, MDAC requests the Court grant it relief from the automatic stay to "suspend, cancel, and/or revoke the Grain Warehouse Licenses Nos. 1450WH (Sidon), 187-WH (Greenwood), and 188-WH (Minter City) issued to John Coleman and Express Grain Terminals" (collectively, the "Grain Warehouse Licenses").

The alleged financial misrepresentations by Express Grain, which MDAC asserts give rise to the relief requested happened on or before the July 1, 2021, renewal of the licenses of Express Grain under the grain warehouse laws of Mississippi, and were in conjunction with such renewal. MDAC seeks relief to not only investigate these alleged misrepresentations, but to also investigate alleged misrepresentations concerning licenses issued in 2019, 2020, 2021, and prospectively for 2022. It is especially noteworthy that MDAC makes no allegations in its Motion with respect to any improper activity of the Debtors or the CRO during the time the Debtors have been operating under Chapter 11 and the close supervision of this Court.

The Hearing on this Motion is set for 10:00 am on January 6, 2022. The Response is due on January 4, 2022. This Response is timely filed.

Legal Argument

MDAC bases its Motion on its assertion that its request falls within the exception to the automatic stay as set forth in Bankruptcy Code section 362(b)(4), which provides:

The filing of a petition under section 301, 302, or 303 of this title [. . .] does not operate as a stay [. . .] under paragraph (1), (2), (3), or (6) of subsection (a) of this section of the commencement or continuation of an action or proceeding by a governmental unit [. . .] to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's policy or regulatory power.

11 U.S.C. § 362(b)(4).

In the Fifth Circuit, “[t]o determine whether proceedings fall within the police or regulatory power exception to the automatic stay, courts have applied two related and somewhat overlapping tests: the pecuniary purpose test and the public policy test.” *In re Halo Wireless, Inc.*, 684 F.3d 581, 588 (5th Cir. 2012) (internal quotations omitted). The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health.” *Id.* The public policy test “asks whether the government is effectuating a public policy rather than adjudicating private rights.” *Id.* The pecuniary purpose and public policy tests both “contemplate that the bankruptcy court, after assessing the totality of the circumstances, [will] determine whether the regulatory proceeding at issue is designed primarily to protect the public safety and welfare, or represents a governmental attempt to recover from property of the debtor estate, whether on its own claim, or on the nongovernmental debts of private parties.” *Id.*

Here, MDAC has not shown that its request for relief and the action it intends to take falls within the exception set forth in section 362(b)(4). Moreover, even if this Court determines that MDAC's requested relief *does* fall within the 362(b)(4) exception, it should ultimately exercise its discretion under section 105(a) to prohibit MDAC from suspending, cancelling, or revoking the grain warehouse licenses issued to Express Grain (the “Grain Warehouse Licenses”) as such action would prevent the Debtors' operations.

I. MDAC Does Not Pass the Pecuniary Interest Test or the Public Policy Test

Section 362(b)(4) does not operate as an exception to the automatic stay for every regulatory action taken by a governmental unit. Rather, it excepts only those governmental actions that are “designed primarily to protect the public safety and welfare.” See *In re Halo Wireless, Inc.*, 684 F.3d at 588. MDAC’s commencement or continuation of regulatory and/or judicial proceedings to suspend, cancel, or revoke the Grain Warehouse Licenses issued to Express Grain does not protect the public safety and welfare and thus should not be excepted from the automatic stay under section 362(b)(4). MDAC makes no allegations in its pleadings that there is a risk to the public safety and welfare by the ongoing operation of the Debtors’ operations, which are being capably managed by the CRO and under the close supervision of the Bankruptcy Court.

In *State of Mo. v. U.S. Bankruptcy Court for the E.D. of Ark.*, 647 F.2d 768 (8th Cir. 1981), the Eighth Circuit analyzed Missouri’s grain laws and the legislative history of section 362(b)(4) and considered whether the State of Missouri was able to take action to enforce its grain regulatory laws under the 362(b)(4) exception. The court determined that, while the laws were regulatory in nature, the exception found in section 362(b)(4) referred to “the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.” *State of Mo.*, 647 F.2d at 776. The court concluded that:

Missouri’s grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors’ property and not to matters of public safety and health. Missouri’s laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

Id.

Likewise, in this instance, MDAC has asserted no health, welfare, moral, or safety violations that would warrant the revocation of the Grain Warehouse Licenses. Rather, MDAC's potential investigation and subsequent determination regarding the Grain Warehouse Licenses centers on Express Grain's failure to provide timely and accurate financial statements to MDAC under the Grain Warehouse Law. While the statute requiring a grain warehouse to provide MDAC with annual financial statements is regulatory in nature, it does not relate to matters of public safety and health. To the extent licensing does relate to matters of public safety and health, any risk to the public has been mitigated due to the Court's supervision and the Court's appointment of a Chief Restructuring Officer. Revoking a license from the court supervised Chief Restructuring Office does not serve the goal of public protection and would only cause needless harm to the Debtors' sale efforts.

Moreover, MDAC's action to investigate and thereafter revoke, suspend, or cancel the Grain Warehouse Licenses conflicts directly with this Court's control of the Debtor's property. *See State of Mo.*, 647 F.2d at 776; *see also In re Commonwealth Companies, Inc.*, 913 F.2d 518, 524 (8th Cir. 1990) (discussing the principle and stating: "[O]ur holding in *Missouri v. Bankr. Court*, 647 F.2d at 775–76, resolved this problem by classifying an action to protect a 'pecuniary interest' in property of the debtor or of the estate as one which directly conflicts with the bankruptcy court's control of that property, perhaps the clearest example of an action resulting in a pecuniary advantage over other creditors."); *In re Mason*, 18 B.R. 817, 820 (Bankr.W.D.Tenn.1982) ("A liquor license constitutes a property interest sufficient to invoke the jurisdiction of the bankruptcy court.").

There are cases in which courts have held that revocation or suspension of a debtor's business or other license does fall within the 362(b)(4) exception to the automatic stay. However,

these cases are distinguishable in that the licenses at issue directly affected the health and safety of the public at large, and the protections potentially offered by new management or a CRO were not explored. Here, Express Grain's alleged violations of the Grain Warehouse Laws do not implicate the same concerns.

II. Express Grain's Licenses Should Remain in Place.

Even if this Court determines that MDAC's request for relief falls within the 362(b)(4) exception—which UMB believes it does not—UMB requests the Court not waive the fourteen day stay under Rule 4001(a)(3) or, exercising its discretion, and impose the stay under Rule 7062 in order to allow the Debtors or other parties in interest time to seek alternative relief including an injunction under 11 U.S.C. § 105. Alternatively, this court could *sua sponte* impose such injunctive relief. As the Eighth Circuit recognized, “[e]ven if Missouri’s liquidation proceedings come within the exception, the State’s attempted enforcement of its insolvency laws does not oust the bankruptcy court of jurisdiction. . . . The bankruptcy court could take appropriate steps to protect its jurisdiction over the estate regardless of whether a proceeding falls within the section 362(b)(4) exception.” *State of Mo.*, 647 F.2d at 776. An order under section 105, whether immediate or in due course, enjoining MDAC’s suspension, cancellation, or revocation of the Grain Warehouse Licenses is warranted.

Section 105(a) of the Bankruptcy Code provides that “the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Express Grain is a grain warehouse that requires licenses to operate in Mississippi. Its successful operation under Chapter 11 and the anticipated sale of its assets is reliant on its ability to move forward as a fully operating, going concern. It must be able to buy grain, store grain, process grain and sell grain. Revocation or other disturbance of the Grain Warehouse

Licenses would significantly impair the Debtors' ability to consummate sale of their assets and considerably diminish distributions to creditors. *See, e.g., In re Mason*, 18 B.R. 817 (Bankr. W.D. Tenn. 1982) (applying discretion under section 105(a) to conditionally stay administrative proceeding to revoke a liquor license because such revocation would result in debtor's store closing and preclusion of successful repayment to creditors); *In re Anderson*, 15 B.R. 399 (Bankr. S.D. 1981) (ordering that the State Tax Commission renew a debtor's liquor permit where refusal to do so would irreparably harm the debtor's prospects of a successful reorganization).

Additionally, the acts MDAC allege as the basis of its Motion—submitting the inaccurate financial and audit reports—happened under previous management that is no longer in control of Debtors or their operations. As of December 14, 2021, the Court appointed Dennis Gerrard of CR3 as the Chief Restructuring Officer. So the management under which the alleged misrepresentations occurred is no longer in control. In addition to being under new management, because the Debtors are in bankruptcy, the business is now under the scrupulous eye of the Court. With the ongoing risk of any operational irregularity for all practical purposes eliminated, the Court should enjoin MDAC from revoking the Grain Warehouse Licenses.

For these reasons, UMB requests that the Court deny the Motion, and grant such other and further relief, at law or in equity, to which it is entitled.

Date: January 4, 2022

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically through the Court's CM/ECF system and served electronically on all parties enlisted to receive service of electronic notice, and the Notice of Electronic Filing indicates that Notice was electronically mailed to all parties in interest.

SO CERTIFIED, this the 4th day of January 2022.

/s/ R. Spencer Clift, III