

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985 C. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
THE HARD ROCK PAVING COMPANY LIMITED AND THE COMPANIES LISTED
ON SCHEDULE "A"**

**AFFIDAVIT OF WILLIAM SCARLETT
(SWORN JULY 18, 2008)**

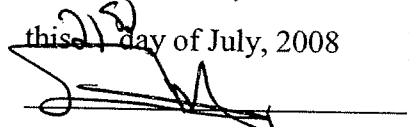
I, **WILLIAM SCARLETT**, of the City of Burlington, in the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:


1. I am Senior Territory Manager of Caterpillar Financial Services Limited ("CFSL"), and as such, I have knowledge of the matters hereinafter deposed to. Where my knowledge is based upon information provided to me by others, I have stated the source of the information and I believe it to be true.
2. I make this Affidavit in response to GE's position that a vesting order ought not to be issued in this case unless GE is paid in full in respect of its leases.
3. CFSL also has lease agreements with the Applicants. Attached hereto as Exhibit "A" is a copy of a sample lease agreement between CFSL and Hard Rock.
4. The sample lease agreement provides at paragraph 15 of its terms and conditions that "Subject to Lessee's right to use and possess the Units, as provided in this Lease and subject to sections 13 and 14 (as applicable), title to and ownership of the units shall remain in Lessor."

5. Attached hereto as Exhibit "B" is a copy of the amounts required to be paid in order to satisfy Hard Rock's obligations in full, as of July 21, 2008. Of the amounts owing to Hard Rock, approximately \$2.8 million is owing in respect of the lease agreements between CFSL and Hard Rock.
6. The total amount owing to CFSL, excluding the DIP loans, is approximately \$32 million.
7. CFSL has first priority security over all assets including the quarry and the asphalt plant, which is being sold. An amount from the sale proceeds must be allocated to these.
8. If GE is correct that it is entitled to be paid in full for the equipment that is the subject matter of its lease agreements and other financing agreements, then CFSL is entitled to the same, based on the same rationale with respect its leases. There are insufficient funds payable out of the proceeds of sale to accommodate payment for the amounts owing under any validly perfected lease financings as additional funds are subject to CFSL's first priority security interest in the other assets of the business, including the quarry and the asphalt plant. Therefore it is appropriate that the assets which are subject to validly perfected lease financings be monetized and allocated a value based on appraised values as determined by the Court.
9. The position of GE is contrary to their position in May, 2008 in respect of the DIP financing provided to the company by CFSL. Attached hereto as Exhibit "C" is a copy of an email exchange between counsel for GE and counsel for CFSL in which GE acknowledged that it would be subordinated by any DIP charge. The position of GE that it be paid in full contradicts this acknowledgment.
10. I also note that no independent opinion as to the validity and priority of GE's security has been provided by the Monitor or otherwise. To the extent that any of GE's security is found not be valid or have priority, then CFSL would have entitlement to look to those assets purporting to be subject to GE's first priority security, as CFSL has a general security agreement over all assets of Hard Rock.

11. I therefore swear this Affidavit in response to the position of GE, and for no other or improper purpose.

SWORN before me at the)
City of Oakville, Ontario)
this 1st day of July, 2008)


A Commissioner, etc.
Steven Weir


WILLIAM SCARLETT

This is **Exhibit "A"** referred to in
Affidavit of William Scarlett
sworn the day of July, 2008

A COMMISSIONER, ETC.

ADDITIONAL TERMS AND CONDITIONS

6. **POSSESSION, USE AND MAINTENANCE:** Lessee shall not (a) use, operate, maintain or store any Unit improperly, carelessly, unreasonably or in violation of any law or regulation or for any purpose other than in Lessee's business; (b) abandon any Unit; (c) sublease any Unit; (d) permit the use of any Unit by anyone other than Lessee; (e) change the use of any Unit from that specified in the applicable Delivery Supplement and the Application Survey attached hereto; (f) change the permanent location of any Unit from the county or district and province specified without the prior written consent of Lessor; or (g) sell, assign or transfer, or directly or indirectly, create or suffer to exist any lien, mortgage, claim, security interest or encumbrance of its rights hereunder or (h) change its name without giving 14 days written notice to the Lessor. Each Unit is and shall remain personal property irrespective of its use or attachment to realty. Upon prior notice to Lessee, Lessor or its agent shall have the right (but not the obligation) at all reasonable times to inspect any Unit and the maintenance records relating thereto. Lessee shall at all times during the Lease Term maintain each Unit in good operating order, repair and condition and shall perform maintenance at least as frequently as its expense as set forth in any operator's guide, service manual, and lubrication and maintenance guide for the Units. Lessee shall not alter or modify any Unit necessary or equivalent to any Unit if such alteration or modification would impair the originally intended function or use or reduce the value of such Unit. Any alteration or addition to any Unit shall be at the sole risk of Lessee. All parts, accessories and equipment affixed to any Unit shall be (i) deemed to be a permanent part of such Unit (ii) subject in all respects to this Lease, as if such items were part of the Unit at the time the Unit was initially leased hereunder; and (iii) subject to the security interest of Lessor granted hereunder. All of Lessee's right, title and interest in and to such items shall transfer automatically to Lessor immediately upon such affixing. Lessee shall authorize the Lessor to release to others copies of this Lease and information relating thereto, whether the Lessor is required to release the same by law, or otherwise. Lessee shall from time to time, forthwith on Lessor's request provide the Lessor with such information and do make and execute all such acts, documents, returns and things as may be required by the Lessor in relation to the Units or any part thereof, or as may be required to give effect to this Lease.

7. **TAXES:** Lessee agrees to promptly pay or reimburse Lessor for all fees and taxes of any nature, together with any penalties, fines or additions to tax or interest thereon (all of them, hereinafter the "impositions") arising at any time prior to, during or subsequent to the Lease Term and levied upon Lessor by any taxing authority with respect to or in connection with any Unit, excluding, however, taxes measured by Lessor's net income (but not including any net income taxes which, by the terms of the statute imposing such tax, expressly relieve Lessor or Lessee from the payment of any impositions which Lessee would otherwise be obligated to pay or reimburse) and such payment or reimbursement constitutes income to Lessor, from Lessee shall also pay to Lessor the amount of any impositions which Lessee is required to pay in respect of (e) such payment or reimbursement by Lessee and (b) any payment by Lessee made pursuant to this sentence. Lessee shall prepare and file in a manner satisfactory to Lessor, any reports or returns which may be required with respect to the Units.

8. **LOSS OR DAMAGE:** Lessee shall bear the risks of any loss, damage or destruction to any Unit prior to or during the Lease Term. If any Unit becomes damaged, from any cause whatsoever, Lessee shall give Lessor prompt notice thereof. If Lessor reasonably determines that such damage is not irreparable, then Lessee shall, at its expense, promptly restore such Unit to the condition required by section 5. If any Unit becomes worn-out, lost, stolen, destroyed or irreparably damaged (as reasonably determined by Lessor) from any cause whatsoever, Lessee shall give Lessor prompt notice thereof. "Casualty Occurrence" shall mean any such loss, damage or destruction (including any such loss, damage or destruction caused by fire or taken by condemnation or otherwise (any such occurrence being a "Casualty Occurrence") prior to or during the Lease Term, Lessee shall give Lessor prompt notice thereof. Thirty days after each Casualty Occurrence, Lessee shall pay to Lessor (i) the present value of the entire unpaid balance of all rental payments due under this Lease as of the date of the Casualty Occurrence, (ii) the present value of the entire unpaid balance of all rental payments due under this Lease as of the date of the Casualty Occurrence, (iii) all additional amounts, if any, then due or to become due or payable by Lessee under this Lease with respect to such Unit, and (iv) the maximum amount permitted by law under such circumstances, whichever is less. Present values will be computed by discounting at the implicit interest rate of this Lease. Upon payment to Lessor of (a) or (b) above by Lessee together with any taxes due in connection with the disposition of any such Unit, Lessor shall deliver to Lessee a bill of sale (without any representations or warranties except that such Unit is free of all encumbrances of any person claiming through Lessor) for such Unit, and the Lease Term as to such Unit shall terminate.

9. **WAIVER AND INDEMNITY:** LESSEE HEREBY RELEASES ANY CLAIM NOW OR HEREAFTER EXISTING AGAINST LESSOR ON ACCOUNT OF, AND AGREES TO DEFEND, INDEMNIFY AND HOLD LESSOR HARMLESS FROM, ALL CLAIMS OF LESSEE AND/OR THIRD PARTIES INCLUDING WITHOUT LIMITATION CLAIMS BASED UPON STRICT LIABILITY IN TORT, NEGLIGENCE, FUNDAMENTAL BREACH OR FOR CONSEQUENTIAL DAMAGES), LOSSES, DEMANDS, SUITS AND JUDGMENTS, AND ALL COSTS OR EXPENSES INCURRED IN CONNECTION THEREWITH INCLUDING REASONABLE LEGAL FEES, WHICH MAY RESULT FROM OR ARISE AT ANY TIME OUT OF THE SELECTION, PURCHASE, DELIVERY, CONDITION, USE, OPERATION, OWNERSHIP, MAINTENANCE OR REPAIR OF ANY UNIT PRIOR TO OR DURING THE LEASE TERM AS TO SUCH UNIT, OR WHICH MAY BE ATTRIBUTABLE TO ANY DEFECT IN ANY UNIT ARISING FROM THE MATERIAL USED THEREIN OR FROM MANUFACTURE OR TESTING THEREOF OR FROM ANY USE, MAINTENANCE OR REPAIR OF ANY UNIT. REGARDLESS OF WHEN SUCH DEFECT SHALL BE DISCOVERED OR WHERE SUCH UNIT MAY BE LOCATED AND WHETHER OR NOT SUCH UNIT IS IN THE POSSESSION OF LESSEE.

10. **INSURANCE:** Lessee, at its expense, shall keep each Unit insured against all risks for not less than the Balance Due with respect to such Unit and shall maintain comprehensive public liability insurance in an amount reasonably acceptable to Lessor, with loss payable to and in the name of Lessor. All such insurance shall be in such form and with such companies as Lessor reasonably approves, shall specify Lessor (or Lessor's designee) and Lessee as named insured, shall be primary, without right of contribution from any insurance carried by Lessor, and shall provide that such insurance may not be cancelled or altered so as to affect the interest of Lessee without at least 30 days prior written notice to Lessor. All insurance covering loss or damage to the Units shall name Lessor (or Lessor's designee) as loss payee and shall be payable solely to and in the name of Lessor. Lessee shall, prior to the Delivery Date for any Unit, upon request furnish Lessor with satisfactory evidence of Lessor's prior written consent. If Lessee makes any adjustment or settlement with any insurer regarding any Units involved in the prior written consent, without limitation of any other remedies Lessor may have hereon, Lessee shall, at the option of Lessor, forthwith purchase from Lessor any Unit involved in the prior written consent or affected by any such settlement or adjustment, for a purchase price equal to the Balance Due for such Unit, and the Lease Term as to such Unit shall terminate. Lessee hereby irrevocably appoints Lessor its attorney to receive payment of and enforce all cheques and other documents and to take any other actions necessary to pursue insurance claims.

11. **EVENTS OF DEFAULT:** (a) each of the following shall constitute an "Event of Default" hereunder: (i) if Lessee fails to make any payment to Lessor when due hereunder; (ii) if Lessee fails to observe or representation or warranty of Lessee contained herein or in any document furnished to Lessor in connection herewith is incorrect or misleading when made; (iii) if any default occurs under any other agreement between Lessee and Lessor; (iv) if Lessee or any guarantor of this Lease shall cease to do business, become insolvent, make an assignment for the benefit of creditors or file any petition or action under any bankruptcy, reorganization, insolvency or moratorium law, or any other law for the relief of debtors; (v) if any involuntary petition shall be filed under any bankruptcy statute against Lessee or any guarantor of this Lease, or any receiver, trustee, custodian, receiver and manager, encumbrancer or similar official shall be appointed to take possession of or shall take possession of all or substantially all of the properties of Lessee or any guarantor of this Lease, unless such petition or appointment ceases to be in effect within 30 days of said filing or appointment; or (vi) if any guarantor of this Lease breaches or repudiates any guarantee obtained by Lessor in connection with this Lease.

(b) Repudiation. Without assigning any other rights Lessor may have, if Lessee receives a notice from Lessor requiring Lessee to cure or remedy any Event of Default hereunder, and fails to do so with 15 days of such notice, Lessee shall be conclusively deemed, effective upon a further notice being given by Lessor to that effect, to have repudiated this Lease as of date specified in the latter notice.

12. **REMEDIES:** If any Event of Default occurs and is continuing, Lessor may, at its option, (a) without terminating this Lease or any leasing hereunder, proceed by appropriate court action to enforce this Lease or to recover damages for the breach thereof, including without limitation, leasing or renting any of the Units, as agent for Lessee, for such period, to such persons and upon such commercially reasonable terms as Lessor, in its sole discretion shall determine; or (b) by notice in writing to Lessee terminate this Lease, but Lessee shall remain liable, as hereinafter provided, for all obligations hereunder. If Lessee terminates this Lease, Lessor may, at its option, do any one or more of the following: (i) provided Lessee has or is deemed pursuant to the terms hereof to have repudiated this Lease, declare the aggregate Balance Due for the maximum amount permitted by law, if recovery of the entire Balance Due is prohibited with respect to the Units immediately due and payable as a genuine pre-estimate of liquidated damages, and not as a penalty; (ii) recover any additional damages and expenses sustained by Lessor by reason of the breach of any covenant, representation or warranty contained in this Lease other than for the payment of rent; (iii) enforce the security interest given hereunder; (iv) without notice, shall have all rights given to a secured party by law. Provided Lessor receives possession of the Units following an Event of Default, Lessor shall not be obliged to preserve rights against others in connection with any Unit, and may at its option and to the extent permitted by law, without any notice to Lessee, the requirement for which is hereby waived by Lessee, undertake commercially reasonable efforts to sell or re-lease the Units, including all taxes and reasonable legal fees, and all payments for any repair or to keep any prior encumbrance in good standing; second, to the extent not previously paid by Lessee, to pay Lessor all amounts then due or accrued under this Lease; and third, to pay Lessor as a genuine pre-estimate of liquidated damages, and not as a penalty, the aggregate Balance Due for the maximum amount permitted by law, if recovery of the entire Balance Due is prohibited including accelerated payments and interest on late payments. Any surplus shall be paid to the person or persons entitled thereto by law. Lessee shall promptly pay any deficiency to Lessor. Lessee acknowledges that any sale or disposition may be for cash or with deferred payment or on credit or for part cash and part credit, to a wholesaler, retailer or user of the Units, at public or private sale, and that any sale or disposition may be for cash or with deferred payment or on credit or for part cash and part credit, to a wholesaler, retailer or user of the Units, at public or private sale, and with or without the Units being present at such sale, and the costs and expenses incurred by Lessor in enforcing this Lease and in performing other obligations in connection with this Lease required by law, including but not limited to reasonable legal fees and costs and expenses incurred by Lessor in enforcing this Lease and in performing other obligations in connection with this Lease, shall be cumulative and, in addition to all other remedies under applicable law, no remedy for the enforcement of this Lease hereunder shall be exclusive of or dependent on any other such remedy. If Lessee fails to perform any of its obligations under this Lease, Lessor may (but need not) perform such obligations, and the expenses incurred in connection therewith shall be payable by Lessee upon demand.

13. **PURCHASE PROVISION:** If the Purchase Provision box on the front of this Lease is checked, at the end of the Lease term with respect to any Unit, provided this Lease has not been earlier terminated with respect to such Unit and Lessee is not then in default hereunder or Lessor has not waived any default which is then continuing, Lessee shall purchase such Unit from Lessor for the Purchase Price set forth on the front of this Lease. Upon receipt of the Purchase Price, plus any taxes due in connection with the sale of such Unit, Lessor shall deliver to Lessee a bill of sale (without any representations or warranties except that such Unit is free of all encumbrances of any person claiming through Lessor) for such Unit.

14. **PURCHASE OPTION:** If the Purchase Option box on the front of this Lease is checked and if no event of Default shall have occurred and be continuing, Lessee may, by written notice to Lessor not less than 60 days prior to the end of the Lease Term with respect to any Unit, elect to purchase at the end of such term such Unit for the purchase Price set forth on the front of this Lease. Upon receipt of the Purchase Price, plus any taxes due in connection with the sale of such Unit, Lessor shall deliver to Lessee a bill of sale (without any representations or warranties except that such Unit is free of all encumbrances of any person claiming through Lessor) for such Unit. If Lessee does not elect to purchase such Unit at the end of such term, Lessee shall return such Unit to Lessor as provided in section 12 and furnish Lessor with such documentation as Lessor may reasonably request so that Lessor obtains the return of the Unit and title therein, free and clear of all liens, prior claims, security interests and encumbrances.

15. **OWNERSHIP; SECURITY INTEREST; LESSEE ASSURANCES AND REPRESENTATIONS:** Subject to Lessee's right to use and possess the Units, as provided in this Lease and subject to sections 13 and 14 (as applicable), title to and ownership of the Units shall remain in Lessor. Lessee hereby grants to Lessor a continuing security interest in the Units, including all accessories, accessories and optional features thereto (whether or not installed thereon) and all substitutions, replacements, additions and accessories thereto, and assigns and grants a security interest in the proceeds of all of the foregoing to Lessor to secure the payment of all sums due hereunder. Lessee will, at its expense, do any further act which Lessor may reasonably request to protect Lessor's title to the Units and Lessor's rights and benefits under this Lease. Lessee represents and warrants to Lessor that (a) Lessee has the power to make, deliver and perform under this Lease; (b) the person executing and delivering this Lease is authorized to do so on behalf of Lessee; (c) this Lease constitutes a valid obligation of Lessee, legally binding upon it and enforceable in accordance with its terms. Lessee shall display labels supplied by Lessor stating that the Units are leased from Lessor in a prominent place on the Units during the Lease Term.

16. **ASSIGNMENT; COUNTERPARTS:** The rights and remedies of Lessor under this Lease and title to the Units may be assigned by Lessor at any time. If this Lease is assigned by Lessor, the term "Lessor" shall therefore mean Lessor's assignee, if notified by Lessor. Lessee shall make all payments of rental to the party designated in such notice, without any offset or deduction. Lessee agrees that the assignee under any such assignment shall not be subject to any claim, defense or other equity as between Lessor and Lessee and the Lessee agrees not to assert the same against such assignee. No assignment of this Lease or any right or obligation hereunder may be made by Lessee without the prior written consent of Lessor. This Lease shall be binding upon and inure to the benefit of Lessor and Lessee and their respective successors and permitted assigns. Although multiple counterparts of this document may be signed only the counterpart accepted, acknowledged and certified by Caterpillar Financial Services Limited on the signature page thereof as the original will constitute original chattel paper.

17. **EFFECT OF WAIVER; ENTIRE AGREEMENT; MODIFICATION OF CONTRACT; NOTICES:** No deed or omission to exercise any right or remedy accruing to Lessor hereunder shall imply any such right or remedy nor shall it be construed to be a waiver of any breach or default of Lessee. Any waiver or consent by Lessor under this Lease must be in writing specifically so forth. This Lease completely states the rights of Lessor and Lessee with respect to the Units and the lease thereof and supersedes all prior agreements, statements, representations and warranties and guarantees with respect thereto. Time is of the essence of this Lease. No variation or modification of this Lease shall be valid unless in writing. All notices hereunder shall be in writing, addressed to each party at the address set forth on this Lease or at such other address as may hereafter be furnished by either party.

18. **SEVERABILITY; SURVIVAL OF COVENANTS:** If any provision of this Lease is invalid under any applicable law, such provision shall be deemed omitted but the remaining provisions hereof shall be given effect. Lessee, if a corporation, agrees that The Law of Property Act (Alberta) and The Limitation of Civil Rights Act (Saskatchewan) shall have no application to this lease or the rights, powers or remedies of Lessor or any other person hereunder and at the benefits of those Acts and any similar legislation.

JUL 29 2002

This is **Exhibit "B"** referred to in
Affidavit of William Scarlett
sworn the day of July, 2008

A COMMISSIONER, ETC.

44368	966GII	CAT0966GCANT00304	\$248,965.86	3,740.67	\$253,627.22	12,681.36	\$266,308.58
44369	420DIT	CAT0420DLBLN12546	\$69,647.77	957.64	\$70,824.37	3,541.22	\$80,031.54
44370	420DIT	CAT0420DHBLN12659	\$70,808.30	973.66	\$72,004.60	3,600.23	\$81,365.20
44371	330CL	CAT0330CTDKY03868	\$219,159.95	3,556.44	\$223,529.67	11,176.48	\$252,588.53
44372	CS-423E	CATCS423KAST00374	\$65,253.14	1,047.53	\$66,550.75	3,327.54	\$75,202.35
44373	IT38GII	CATIT38GTCSX00634	\$107,241.87	1,745.29	\$109,386.31	5,469.32	\$123,606.53
58710	DIP	DIP (Interest 06/30-07/21)	\$1,250,000.00	5,106.15	\$1,255,106.15		\$1,255,106.15
59373	DIP 2	DIP 2 (Interest 06/30-07/21)	\$1,000,000.00	4,084.92	\$1,004,084.92		\$1,004,084.92
		TOTALS	\$33,292,674.44	\$523,823.78	\$34,116,494.67	\$133,328.50	#####

PER DIEM *PYMT. DUE*
DATE

\$3,050.72
\$614.54 8TH
\$125.41 8TH
\$1,477.53 8TH
\$25.87 26TH
\$17.00 18TH

\$29.57 4TH

\$5.91 23RD
\$36.21 7TH
\$15.13 22ND
\$30.68 15TH
\$7.84 30TH
\$22.65 30TH
\$18.76 27TH
\$16.08 27TH
\$21.75 4TH
\$34.41 14TH
\$17.62 7TH
\$36.53 30TH
\$16.08 28TH
\$11.33 28TH
\$15.70 8TH

\$42.03	30TH
\$10.76	30TH
\$10.94	30TH
\$39.96	30TH
\$11.77	29TH
\$19.61	30TH
\$243.15	30TH
\$194.52	30TH

This is **Exhibit "C"** referred to in
Affidavit of William Scarlett
sworn the day of July, 2008

A COMMISSIONER, ETC.

WEISZ, STEVEN

From: Harvey Chaiton [Harvey@chaitons.com]
Sent: Friday, May 02, 2008 11:24 AM
To: WEISZ, STEVEN
Subject: Re: Hard-Rock

To be clear though, this assumes the DIP financing is otherwise acceptable to GE

-----Original Message-----

From: "WEISZ, STEVEN" <STEVEN.WEISZ@blakes.com>
To: Harvey Chaiton <Harvey@chaitons.com> Creation Date: 5/2 10:03 am
Subject: Re: Hard-Rock

I confirm you advised that GE (in whatever capacity it is involved with the debtors) agrees that it will be subordinated by any DIP Charge.

Steven J. Weisz
steven.weisz@blakes.com
Dir: 416.863.2616
Cell: 647.295.2616

Blake, Cassels & Graydon LLP
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<http://www.blakes.com/>

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-----Original Message-----

From: Harvey Chaiton <Harvey@chaitons.com>
To: WEISZ, STEVEN
Sent: Fri May 02 09:52:46 2008
Subject: Hard-Rock

Steve
I confirm that the proposed DIP financing will provide for a DIP Charge in priority to all claims except the Admin Charge

Court File No.: 08-CL-7503

**IN THE MATTER OF THE BANKRUPTCY OF HARD-ROCK CONSTRUCTION INC.
of the Town of Port Colborne, in the Province of Ontario**

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

Proceeding Commenced at Toronto

**AFFIDAVIT OF WILLIAM SCARLETT
(Sworn July 18, 2008)**

BLAKE, CASSELS & GRAYDON LLP

Barristers and Solicitors
Box 25, Commerce Court West
199 Bay Street, Suite 2800
Toronto, Ontario M5L 1A9

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Solicitors for Caterpillar Financial Services
Limited