

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

In re:

Pure Prairie Poultry, Inc.,

Debtor.

Case No.: 24-32426
Chapter 11 Case

**COMMUNITY BANK AND TRUST’S OBJECTION TO DEBTOR’S MOTION FOR
INTERIM AND FINAL ORDERS (I) GRANTING EXPEDITED HEARING, (II)
APPROVING POSTPETITION FINANCING, (III) GRANTING LIENS AND
PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (IV)
AUTHORIZING USE OF CASH COLLATERAL, (V) GRANTING ADEQUATE
PROTECTION, (VI) MODIFYING AUTOMATIC STAY, AND (VII) GRANTING
RELATED RELIEF**

Community Bank and Trust (“Community Bank”), the senior secured creditor of Pure Prairie Poultry, Inc. (the “Debtor”), hereby objects to the Debtor’s Motion for Interim and Final Orders (I) Granting Expedited Hearing, (II) Approving Postpetition Financing, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Authorizing Use of Cash Collateral, (V) Granting Adequate Protection, (VI) Modifying Automatic Stay, and (VII) Granting Related Relief (the “Motion”). (ECF No. 13.) In support of this Objection, Community Bank states as follows:

RELEVANT FACTUAL BACKGROUND

Community Bank facilitated a loan to the Debtor under the Food Supply Chain Guaranteed Loan Program administered by the United States Department of Agriculture (the “USDA”). (Motion 8.) The Debtor and Community Bank executed the Food Supply Chain Guaranteed Loan on April 26, 2023 (the “FSC Loan”). (*Id.*) The FSC Loan is secured by Debtor’s main asset – the real estate where the poultry production plant and supporting facilities are located – as well as the equipment located at the plant (collectively, the “Community Bank Collateral”). (*Id.* at 8-9, Ex.

D.) Community Bank may not subordinate its lien position in the Community Bank Collateral without first receiving approval from the USDA. 7 CFR 5001.510. As detailed more fully below, Community Bank objects to the relief sought in the Motion. Regardless, as of the date of this Objection, USDA has not approved Community Bank's subordination of its lien rights in the form sought in the Motion and thus Community Bank cannot consent to such relief.

LEGAL ARGUMENT

I. LEGAL STANDARD AND BURDEN OF PROOF.

Under 11 U.S.C. § 364(d)(1), a court may authorize a debtor to obtain credit or incur debt secured by a senior or equal lien on property of the estate that is subject to a lien only if: "(A) the [debtor] is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." 11 U.S.C. § 364(d)(1). The statute is written in the conjunctive, which means a debtor must satisfy both elements in order for a court to grant relief.

When seeking such relief, the burden of proof belongs to the debtor as to both elements. *In re Vander Vegt*, 499 B.R. 631, 636 (Bankr. N.D. Iowa 2013), *aff'd sub nom. First Sec. Bank & Tr. Co. v. Vegt*, 511 B.R. 567 (N.D. Iowa 2014) ("Section § 364(d)(1)(A) requires *the debtor* to show that less burdensome financing is unavailable.") (emphasis added); 11 U.S.C. § 364(d)(2) ("The debtor has the burden of proof on the issue of adequate protection."). The debtor must meet its burden by a preponderance of the evidence. *In re Packard Square LLC*, 574 B.R. 107, 116 (Bankr. E.D. Mich. 2017); *see generally Grogan v. Garner*, 498 U.S. 279, 286 (1991).

In determining whether a debtor meets its burden under 11 U.S.C. § 364(d), the bankruptcy court should consider the extraordinary relief sought by the debtor, as such relief is a "*last resort*." *See, e.g., In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) ("[G]ranting

post-petition financing on a priming basis is extraordinary and is allowed only as a last resort.”); *Bland v. Farmworker Creditors*, 308 B.R. 109, 115 (S.D. Ga. 2003) (“[T]he § 364(d) process is considered rare and extraordinary[.]”) (internal quotation marks omitted); *In re Seth Co., Inc.*, 281 B.R. 150, 153 (Bankr. D. Conn. 2002) (“The ability to prime an existing lien is extraordinary[.]”); *In re Qualitech Steel Corp.*, 276 F.3d 245, 248 (7th Cir. 2001) (“Section 364(d) is supposed to be a last resort. The statutory text itself conveys that message[.]”).

If a debtor seeks interim relief under 11 U.S.C. § 364(d) pursuant to Rule 4001(c)(2) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), a court may only authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing. Fed. R. Bankr. P. 4001(c)(2). While the rule does not define “immediate and irreparable harm,” in other contexts, the Eighth Circuit has stated, “[i]n order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for . . . relief.” *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013). Again, the debtor has the burden of proof.

Therefore, “[t]o summarize [a d]ebtor’s burden, the following must be established: (1) inability to obtain credit ‘otherwise’; (2) adequate protection of the liens to be subordinated to the financing; and (3) immediate and irreparable harm to the estate if the emergency loan is not authorized.” *In re C.B.G. Ltd.*, 150 B.R. 570, 571–72 (Bankr. M.D. Pa. 1992).

II. THE DEBTOR CANNOT DEMONSTRATE THAT COMMUNITY BANK IS ADEQUATELY PROTECTED.

The Bankruptcy Code does not define “adequate protection,” but 11 U.S.C. § 361 identifies certain ways that adequate protection may be provided:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361.

In the Motion, the Debtor purports to provide Community Bank with adequate protection in the form of:

(i) adequate protection liens in the amount equal to the aggregate diminution in value of the interests, in the Prepetition Collateral (including Cash Collateral) from and after the Petition Date, a valid replacement security interest in and lien on all prepetition and post-petition property and assets of Debtor and its estate, including the DIP Collateral and all proceeds thereof, subordinate only to the DIP Liens (as defined in the Interim DIP Order), (ii) payments as set forth in the Proposed Budget (to the extent applicable), and (iii) access to all information provided to DIP Lender. The interests of Disputed Prepetition Secured Claims are protected by (i) adequate protection liens in Debtors' postpetition assets of the same character, value, validity and dignity as existed prior to the Petition Date.

(Motion 520.)

However, the granting of a replacement lien on assets in which a secured lender already holds a lien in an amount that exceeds the value of the assets is "illusory" and cannot constitute adequate protection. *In re LTAP US, LLP*, No. 10-14125 KG, 2011 WL 671761, at *3 (Bankr. D. Del. Feb. 18, 2011); *see also In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 443 (Bankr. S.D.N.Y. 2010) (rejecting a request for a priming lien when the value of the subject property totaled \$45 million and the amount of the secured lender's lien totaled \$46 million).

Here, Community Bank already holds first-priority liens on the Community Bank Collateral. (Motion Ex. D.) The Debtor estimates that it owes Community Bank a total of \$36,265,911.59 as of the Petition Date. (*Id.* at 14.) The Motion does not contain verified collateral value projections. The only evidence of value of the Community Bank Collateral is an appraisal demonstrating a current market value at \$18,700,000. (Motion Ex. F.) The Debtor concedes that no equity exists in the Community Bank Collateral or any of the Debtor's other assets. (Decl. of Alex Dybsky in Support of Motion for Debtor-in-Possession Financing and Use of Cash Collateral ¶¶ 7-8, Ex. 1.) Based solely on the evidence in the record, Community Bank is currently under-secured and any grant of replacement liens is purely illusory and cannot adequately protect Community Bank. *In re LTAP US, LLLP*, 2011 WL 671761, at *3.

Moreover, the Debtor's projections reveal that the Debtor anticipates no positive revenue during the cash collateral period, while increasing the debt owed to the proposed lender (the "DIP Lender") to \$13,450,000. (Motion Ex. C.) Thus, not only does the Debtor fail to adequately protect Community Bank, but the relief sought in the Motion would result in a significantly worse position for Community Bank – a loss of approximately \$13,450,000 in secured collateral position with no benefit provided to Community Bank.

Also, the Debtor fails to articulate how it will diminish operating level cash losses or manage losses beyond the 13-week period of its budget, after most, if not all, of the DIP Loan will have been advanced. By contrast, other than passing statements of intent to sell or reorganize, the Debtor articulates no apparent way forward in the case. For example, the Debtor does not have in hand any concrete offers to buy its assets or provide capital to reorganize its operations. The DIP Loan thus appears futile and will only serve to put off temporarily the inevitability of the

Debtor running out of cash. The risk of liquidation appears significant while the offer of adequate protection illusory.

As the Debtor fails to satisfy its burden of proving Community Bank is adequately protected by the relief sought in the Motion, the Motion must be denied.

III. THE DEBTOR CANNOT PROVE THAT IT WILL SUFFER IMMEDIATE AND IRREPARABLE HARM DURING THE INTERIM PERIOD.

The Debtor seeks, on an interim basis, authority to borrow up to \$7.5 million and argues that such amount is necessary to avoid “immediate and irreparable harm” under Bankruptcy Rule 4001(c)(2). (Motion 526.) As noted above, the Eighth Circuit requires a showing “that the harm is certain and great and of such imminence that there is a clear and present need for . . . relief.” *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013).

Nothing contained in the Motion sufficiently satisfies the Debtor’s burden of proving immediate and irreparable harm if the Debtor does not borrow \$7.5 million. To the contrary, the Debtor’s proposed budget and the terms of the proposed financing facility clearly demonstrate lack of “clear and present need for . . . relief.” For instance, during the interim period, the Debtor includes payments of (a) \$1,244,000 in SG&A expenses,¹ (b) \$1,173,000 to critical vendors,² (c)

¹ The Motion contains no further description of such general and administrative expenses and certainly no explanation for why such expenses are needed during the interim period.

² The Debtor contemporaneously filed a Motion for Expedited Hearing and for an Order Authorizing Debtor to Pay the Prepetition Section 503(b)(9) and PASA Claims of Certain Critical Vendors seeking authority to pay \$1,831,448.91 to alleged “critical vendors” on an expedited basis. (ECF No. 7.) It is unclear why the Debtor’s budget contains a different critical vendor amount. Based on the continuous projected losses, it is not clear why these “critical vendors,” particularly the PASA Claims, should be preferred during this interim period.

\$364,000 to professionals,³ (d) \$317,000 for “debt payments,”⁴ (e) \$110,788 for pre-petition taxes,⁵ and (f) \$375,000 for an “Issuance Fee” paid to the DIP Lender.⁶ (Motion Ex. C.) The Debtor fails to satisfy its burden of proving a clear and present need to pay for such amounts, totaling \$3,583,788, during the interim period. Consequently, the Motion must be denied.

IV. ADDITIONAL DEFICIENCIES.

Community Bank also objects to a number of the terms of the proposed DIP Loan, including:

- A \$375,000 issuance fee, that would become due and payable upon the initial draw during the interim period;
- A 20% interest rate, with interest added to the principal balance of the loan and does not count against draw limits;
- An exit fee in the amount of 2% of the loan balance or a multiple on invested capital multiplier;
- Default interest of an additional 200 b.p. and tight milestones and covenants that create a significant likelihood of default; and

³ It is not clear how the Debtor would be permitted to pay professionals during the interim period without first seeking approval from the Court. The Motion additionally does not explain why the payment of professionals during the interim period is necessary to avoid irreparable harm.

⁴ The Motion contains no explanation for the \$317,000 in “debt” payments.

⁵ The Debtor’s budget does not contain the pre-petition tax payments, but the Debtor sought relief to make that payment in its Motion for an Expedited Hearing and for an Order Authorizing the Debtor to Pay Pre-Petition Real Property Taxes. (ECF No. 11.) The payment of pre-petition taxes is certainly not necessary to avoid irreparable harm during the interim period.

⁶ This fee is also not included in the Debtor’s budget, but the Debtor would be required to pay it to the DIP Lender when the initial \$7.5 million draw is funded. (Motion 9.)

- Requirement to pay the lender's fees and expenses, with no estimate for the amount of such fees and expenses and no cap on such fees and expenses.

(Motion 6-13.) Such terms create a significant financial burden on the Debtor and the Debtor fails to satisfy its burden of proving that financing on less burdensome terms was unavailable.

V. RESERVATION OF RIGHTS.

Community Bank hereby further reserves any and all rights it may have related to the Motion, the Debtor, the FSC Loan and related documents, and this bankruptcy case. Community Bank further reserves its right to object to the final relief sought in the Motion. Community Bank and the Debtor continue to engage in discussions and Community Bank expressly reserves the right to withdraw this Objection.

CONCLUSION

For the foregoing reasons, Community Bank respectfully requests that the Court deny the Motion.

Dated: September 25, 2024

/s/ Steven R. Kinsella

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