

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION**

In re:

BAILEY'S EXPRESS, INC.,

Debtor.

)
) Chapter 11
)
) Case No. 17-31042(AMN)
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)

**MOTION FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTOR
TO USE CASH COLLATERAL, AND (II) AUTHORIZING AND
APPROVING GRANT OF ADEQUATE PROTECTION**

Bailey's Express, Inc. ("Bailey's"), as debtor and debtor in possession (the "Debtor"), by this motion (the "Motion"), respectfully seeks the issuance and entry of an interim order (the "Interim Order") and a final order (the "Final Order") for authority to, among other things, (i) pursuant to section 363 of Title 11 of the U.S. Code (the "Bankruptcy Code"), use, subject to certain terms and conditions, cash collateral within the meaning of section 363(a) of the Bankruptcy Code in which Bankwell Bank ("Bankwell") has a perfected first priority security interest ("Cash Collateral"), and (ii) provide adequate protection under sections 361 and 363 of the Bankruptcy Code on account of such use.

In support of this Motion, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

1. By this Motion, the Debtor seeks authority to use Cash Collateral in which Bankwell asserts a secured interest.

2. As described in greater detail below, the Debtor has an immediate need to use Cash Collateral. In particular, the Debtor must use the Cash Collateral to continue as a going concern postpetition. If the Debtor is unable to pay in the ordinary course, among other things,

its employees, suppliers and utilities, the Debtor will be forced to cease operations and convert their cases to Chapter 7.

JURISDICTION AND VENUE

3. This Court has jurisdiction of this Motion pursuant to 28 U.S.C.A. §§ 1334 and 157. Venue of the Debtor's Chapter 11 case and this Motion in this district is proper pursuant to 28 U.S.C.A. §§ 1408 and 1409. Consideration of the Motion constitutes a core proceeding under 28 U.S.C.A. § 157(b)(2). The statutory predicates for the relief sought herein are Sections 105, 361, 363 and 507 of the Bankruptcy Code and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELEVANT BACKGROUND

4. On July 13, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the Clerk of this Court. The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No trustee or examiner has been appointed in the Debtor's Chapter 11 case, nor has any creditors' or other official committee been appointed herein pursuant to Section 1102 of the Bankruptcy Code.

6. Bailey's is a Connecticut corporation located at 61 Industrial Park Road in Middletown, Connecticut 06457. Bailey's is a less than truckload carrier that provides shipping services across the nation and is dedicated to helping Connecticut, Massachusetts and Rhode Island companies market their products throughout the United States including Hawaii and Alaska. Bailey's also provides services to Mexico, Puerto Rico and Canada.

7. Bailey's has 41 full-time employees. Thirty-five of the employees belong to Teamster's Union Local 671. The Debtor's collective monthly gross payroll is approximately \$68,000 (\$63,000 for their employees and \$5,000 for their officers).

8. The Debtor's books and records indicate that as of the Petition Date the Debtor has assets totaling about \$3,600,000 and liabilities totaling about \$3,600,000.

9. Bailey's has been in business since 1920 and until recent years has been financially sound but because of the downturn in the economy, the increased costs of doing business and the new competition from businesses like Walmart and Amazon, which are now providing their own direct shipping services, Bailey's is suffering substantial losses. Bailey's is unable to pay its debts as they come due and has had to temporarily suspend shipping services. Bailey's has sought protection under Chapter 11 for the purposes of working through its financial difficulties, restoring services and reorganizing the business.

The Debtor's Secured Indebtedness

10. On February 25, 2011, the Debtor executed and delivered to Quinnipiac Bank and Trust Company ("QBT"), as lender, a certain Business Loan Agreement (the "Loan Agreement") and Promissory Note in the principal amount of \$150,000 (the Note"), a Commercial Security Agreement (the "Security Agreement") and a UCC-1 financing statement covering all of the Debtor's assets (the "UCC-1") (the Loan Agreement, the Note, the Security Agreement and the UCC-1 shall be collectively referred to as the "Loan"). The Loan was guaranteed by the John M. Hall Marital Trust as evidenced by a Commercial Guaranty executed and delivered on February 25, 2011, which guaranty is secured by an Open-End Mortgage on property located at 15 Rock Landing Road, Haddam Neck, Connecticut 06424 and an Assignment of Rents (the "Secured

Guaranty”). The Loan’s maturity period was extended several times through and to November 25, 2014.

11. Upon information and belief, on or about October 1, 2014, QBT merged with Bankwell and Bankwell became successor by merger to QBT. On December 23, 2014, the Debtor and Bankwell executed an Allonge to the Note extending the Loan’s maturity through and to December 26, 2017 and restating all of the Loan’s other terms and conditions until the Loan is paid in full. As of the Petition Date, the amount of approximately \$11,700 was due and owing to Bankwell on the Loan.

12. The foregoing obligations of the Debtor as described in ¶10-11 hereof are hereinafter referred to as the “Bankwell Prepetition Obligations.” The Bankwell Prepetition Obligations are secured by valid and duly perfected security interests (the “Bankwell Prepetition Liens”) in all of Debtor’s personal property existing as of the Petition Date (the “Bankwell Prepetition Collateral”).

The Debtor’s Need for Use of Cash Collateral

13. Given the purported encumbrances upon substantially all of the Debtor’s assets, the Debtor will be unable to continue its business operations absent some form of immediate relief from this Court. Without immediate relief, the Debtor will be unable to fund the day-to-day operations that are essential to the Debtor’s continued existence as a going concern to the detriment of its estate. To meet its ongoing financing needs, the Debtor seeks Court authority to use its Cash Collateral, subject to the terms and conditions of the Motion, the Budget (as defined below), the Interim Order and the Final Order.

RELIEF REQUESTED

A. Relief Sought

14. By this Motion, the Debtor seeks the entry of the Interim Order, substantially in the form of that which is filed contemporaneously herewith (the “Interim Order”), (i) authorizing the Debtor to use the “Cash Collateral,” defined as any cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents now or hereafter in the possession, custody or control of the Debtor, subject to the terms and conditions of the Motion, the Interim Order and a Final Order and (ii) authorizing and approving grant of adequate protection on account of such use. Further, the Debtor seeks the entry of a Final Order, after at least 14 days’ notice of the Motion, in substantially the form of the Interim Order with such other or different terms and conditions as may be agreed to by the Debtor and Bankwell or ordered by the Court.

15. Bankruptcy Rule 4001(b) requires a final hearing on a motion for authorization to use cash collateral to be held on no less than 14 days’ notice. Rule 4001(b) permits the Court to conduct a preliminary hearing, prior to the expiration of the 14-day period, to consider authorizing the Debtor to use that amount of Cash Collateral as is necessary to avoid immediate and irreparable harm to the estate pending the final hearing.

16. As indicated above, the Debtor will not have sufficient funds to cover the expenses that will accrue until a final hearing could be held on the Motion. Thus, without authorization to use Cash Collateral on an immediate basis, the Debtor would be forced to convert its case to Chapter 7, which would cause irreparable harm to its estate.

17. Accordingly, the Debtor is requesting that the Court exercise its authority to enter the Interim Order pursuant to Bankruptcy Rule 4001(b)(2). Entry of the Interim Order will not cause irreparable harm to interested parties, because such parties will be granted an opportunity

to assert an objection to the Motion subsequent to the entry of the Interim Order (until approximately 14 days after service of the Motion). The Interim Order permits the interim use of Cash Collateral in accordance with the Budget (as defined herein) pending a final hearing which will be scheduled pursuant to the Interim Order.

B. Terms

18. The specific financial terms and conditions of the Debtor's proposed use of Cash Collateral are as set forth in the Interim Order. The principal elements of the Interim Order are summarized as follows:

(a) Use of Cash Collateral. The Debtor will be permitted to make disbursements of Cash Collateral in its discretion, for the purpose of meeting the Debtor's cash needs from the date of entry of the Interim Order through August 12, 2017 or such other date as may be ordered by the Court (the "Interim Period") provided that the amount of each disbursement shall not exceed the amounts specified in the Budget for the Interim Period, substantially in the form of that which is attached hereto as **Exhibit "A"**. The Debtor shall use the Cash Collateral solely to fund its ordinary course business operations, and at all times in accordance with the Budget. For each weekly period set forth in the Budget, the Debtor's actual cash disbursements for such period shall not exceed the line item amount for such category as set forth in the Budget, provided, however, that notwithstanding the foregoing, (i) expenditures of the Debtor under any line item of the Budget for any period may exceed the expenditure amount budgeted for such line item by 20%, so long as aggregate total expenditures during the term of this order do not exceed the total amount budgeted for such period, and (ii) any line item expenditures budgeted during any given week, but not actually paid or expended during such week, may be paid during the following week. In no event shall aggregate total expenditures by the Debtor for the Interim

Period exceed the total expenditures for the Interim Period as set forth on the Budget, provided, however, that Debtor and Bankwell may, in their sole discretion, agree to increase cash disbursements and operating expenditures in the Budget and upon written agreement by Bankwell to so modify the Budget, Debtor will be authorized to use Cash Collateral in such amount without the need for any further order of the Court.

(b) Replacement Liens. As adequate protection for any Cash Collateral expended by the Debtor pursuant to the Interim Order, Bankwell will receive, pursuant to §§ 361(1) and 363(e) of the Bankruptcy Code, a first lien (the “Replacement Liens”) to secure an amount of Bankwell’s claims equal to (i) the amount of Cash Collateral actually expended by the Debtor; and (ii) an amount equaling the aggregate decline in the value of the Bankwell Prepetition Collateral (subject only to nonavoidable, valid, enforceable and perfected liens and security interests in the assets of Debtor, as a prepetition debtor, that existed on the Petition Date and are not subject to avoidance pursuant to the Code, in favor of such third parties holding perfected liens or security interests which are superior in priority, after giving effect to any existing subordination or intercreditor arrangements, to Bankwell’s security interests in and liens on the assets of Debtor, as prepetition debtor), on all personal property and assets of the Debtor, of any kind or nature whatsoever, whether now owned or hereafter acquired by any Debtor, and all proceeds, rents or profits thereof (collectively, the “DIP Collateral”).

(c) Superpriority Administrative Claim. Bankwell shall have an allowed administrative expense claim in an amount equal to the amount of Cash Collateral actually expended by Debtor pursuant to this Order, which claim shall have the highest administrative priority under Sections 503(b), 507(a)(1) and 507(b) of the Code (the “Super-Priority Claim”), and such claim shall have priority over, and be senior to, all other administrative claims.

(d) Professional Fees. Notwithstanding anything to the contrary, the Replacement Liens and priority claims granted to Bankwell pursuant to the Interim Order shall be subject and subordinate to the payment of the following (to the extent that there are not sufficient, unencumbered funds in Debtor's estates to pay such amounts at the time payment is required to be made and, in the case of Debtor professionals, to the extent that such Debtor Professionals do not have an adequate cash security deposit or retainer balance on hand): (a) compensation and expense reimbursement (collectively, "Professional Expenses") of Pullman & Comley, LLC ("P&C"), as prospective attorneys for Debtor, to the extent that such Professional Expenses, (i) were incurred on or after the Petition Date and prior to the earlier to occur of end of the Interim Period, (ii) are approved for payment by a final order of the Court, after notice and a hearing, or pursuant to an administrative procedure established by Court order, and (iii) do not exceed, without the prior written consent of Bankwell, in the aggregate as to all amounts paid or to be paid post-petition, the sum of \$25,000; (b) quarterly fees required to be paid to the Office of the United States Trustee pursuant to 28 U.S.C.A. §1930(a)(6); and (c) any unpaid wages owed by the Debtor (collectively, the "Carve-Out"); provided, however, that no Cash Collateral and no amounts received pursuant to the Carve-Out shall be used by any person or entity to pay Professional Expenses incurred in connection with any attempt to invalidate, set aside or subordinate the Bankwell Prepetition Indebtedness, the Bankwell Prepetition Liens or the Replacement Liens.

(e) Default. A failure by the Debtor to comply with any provisions of the Interim Order, which failure is not remedied within three (3) business days of Debtor's receipt of written notice of such failure, shall automatically terminate the Debtor's authority to use or spend any

further Cash Collateral without (i) further order of this Court and (ii) notice and the opportunity to be heard by Bankwell at a hearing prior to granting of such order.

(f) Stipulation by the Debtor. The Debtor stipulates that the security interests and liens granted to Bankwell pursuant to the documents evidencing and securing the Bankwell Prepetition Indebtedness constitute valid and perfected first priority security interests and liens, not subject to avoidance or subordination under the Bankruptcy Code or applicable nonbankruptcy law. However, the Interim Order does not preclude any creditor, a creditors' committee or any subsequently appointed trustee from objecting to or otherwise challenging the validity or amount of the Bankwell Prepetition Indebtedness or the extent, validity or perfection of Bankwell's prepetition liens upon and security interests in the Bankwell Prepetition Collateral.

C. The Lender's Interests Are Adequately Protected

19. Where a debtor has proposed to use cash collateral, the Court, pursuant to section 363(c) of the Bankruptcy Code, may permit the use of cash collateral so long as the debtor provides "adequate protection of such interest" in accordance with section 361 of the Bankruptcy Code. Section 361 of the Bankruptcy Code sets forth three nonexclusive examples of adequate protection. Adequate protection "is left to the vagaries of each case . . . but its focus is protection of the secured creditor from diminution in the value of its collateral during the reorganization process." In re Mosello, 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996) (quoting In re Beker Industries Corp., 58 BR 725, 736 (Bankr. S.D.N.Y. 1986)). See also Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 85 F.3d 970, 972 (2d Cir. 1996). ("[g]enerally, the right to adequate protection allows a secured creditor or its representative to propose a method of protecting its interest against the diminution in value of the security during a bankruptcy proceeding.").

Section 361 states, in pertinent part, that when “adequate protection” of an entity’s interest in property is required under Section 363, such adequate protection may be provided by:

- (1) requiring the [debtor-in-possession] to make a cash payment or periodic cash payments to such entity, to the extent that the ... use, sale, or lease under section 363 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 ... use, sale [or] lease ... 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.

20. The concept of adequate protection in the context of a proposed use of cash collateral is intended to be flexible, especially in the formative stages of a chapter 11 case, and must take into account the interests of the other creditors of the estate. In re O’Connor, 808 F.2d 1393, 1398 (10th Cir. 1987).

21. Provision of a replacement lien in property equal to the value of the cash collateral used specifically complies with section 361(2) and provides adequate protection within the meaning of section 363(e) of the Bankruptcy Code where the debtor in possession is using cash collateral to generate new inventory and accounts or is operating profitably in the postpetition period. In re Pursuit Athletic Footwear, Inc., 193 B.R. 713, 716 (Bankr. D. Del. 1996); In re Dynaco Corp., 162 B.R. 389, 393-95, 25 (Bankr. D.N.H. 1993); In re T.H.B. Corp., 85 B.R. 192, 195, (Bankr. D. Mass. 1988).

22. The Debtor respectfully submits that pursuant to section 361(2) of the Bankruptcy Code, the Replacement Liens granted to Bankwell constitute adequate protection for the Debtor's use of Cash Collateral. As provided in the Budget, the Debtor is cash flow positive and is not expected to suffer a diminution of assets postpetition. As a result, the Replacement Liens provide a more than adequate equity cushion to protect Bankwell's interests. Therefore, the Replacement Liens provide Bankwell with adequate protection of its interests for the Debtors' use of Cash Collateral. The additional granting of the superpriority administrative expense claim further establishes that Bankwell is adequately protected.

23. An additional form of adequate protection is provided by the existence of the third-party guarantees of the Bankwell Prepetition Indebtedness that were provided by non-debtor, John M. Hall Marital Trust. See In re Lombardo's Ravioli Kitchen, 2009 WL 585814, at *4-5 (Bankr. D. Conn. Feb. 20, 2009).

24. For the reasons set forth herein, the Debtor submits that, under all of the circumstances of this case, the interests of Bankwell are adequately protected for the Debtor's use of the Cash Collateral subject to the Interim Order. Thus, approval of the relief requested herein will allow the Debtor to pursue a reorganization of its business, thereby maximizing value for their creditors without harming or prejudicing the rights or interests of Bankwell.

25. No previous request for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that this Court issue and enter the attached Interim Order and a Final Order granting this Motion, and grant such other and further relief as the Court may deem just and proper.

Dated this 13th day of July, 2017.

Respectfully submitted,

PULLMAN & COMLEY, LLC
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