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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF IDAHO

In re:

FARMERS GRAIN, LLC  
Debtors.

CASE NO. 17-00450-TLM

**CHAPTER 11**

**RABO AGRIFINANCE LLC'S *EMERGENCY* MOTION TO TERMINATE THE USE OF  
CASH COLLATERAL**

COMES NOW RABO AGRIFINANCE LLC ("**Rabo**"), which is the largest creditor in the above-entitled case, by and through its attorneys of record, and hereby moves this Court on an emergency basis pursuant to 11 U.S.C. §§ 361, 363(c)(2)(B) and (e), Federal Rule of Bankruptcy Procedure 4001, and paragraph 6 of the Court's *Continuing Order Authorizing Use of Cash*

*Collateral and Granting Adequate Protection and Adequate Protection Liens* (the “**Final Cash Collateral Order**”) [Dkt. 65], for the entry of an Order terminating the Debtor’s authority to use Cash Collateral. In support hereof, Rabo states as follows:

**GROUND FOR EMERGENCY NATURE OF RELIEF REQUESTED**

Paragraph 6 of the Final Cash Collateral Order provides that any creditor may request from the Court, “on an emergency basis or otherwise,” the entry of an Order terminating the Debtor’s use of Cash Collateral. [Dkt. 79, ¶6] Rabo is seeking an emergency and expedited hearing on this Motion because:

1. There are substantial, material and continuing defaults under the Final Cash Collateral Order and the Court’s prior interim orders, including both payment defaults and defaults related to providing required financial reports and disclosures;

2. The Debtor’s June Monthly Operating Report, filed on August 8, 2017 [Dkt. 79], reveals that the Debtor exceeded the authorized June 2017 expenditures by more than \$100,000.00;

3. The Debtor’s June Monthly Operating Report also reveals that between the April 18, 2017 and June 30, 2017, a period of only seventy-three days, the Debtor’s current assets (i.e., the assets that would constitute Cash Collateral) declined from \$9,654,056.29 to \$5,172,880.05, or over \$4.48 million (an average of \$61,385.00 per day) and more than forty-six percent (46%). If this same daily average diminution rate has held since June 30, the Debtor’s total current assets have now declined another \$2.455 million, and the total decline from the Petition Date now exceeds \$7.5 million.

### **FACTUAL BACKGROUND**

A. The Bankruptcy Filing and the Terms of the Court's Cash Collateral Orders.

1. The Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) on April 18, 2017 (the “**Petition Date**”).

2. On April 27, 2017, the Court entered its *Interim Order Authorizing Use of Cash Collateral Granting Adequate Protection and Adequate Protection Liens; Notice of Opportunity to Object; and Notice of Final Hearing* (the “**First Interim Order**”) [Dkt. 25].

3. Paragraph 7(E)(i) of the First Interim Order set forth certain reporting requirements that the Debtor was required to comply with as a condition to its use of Cash Collateral. Specifically, the Debtor was required to provide Rabo a report for the period of April 18, 2017 through May 22, 2017 (defined as the “Applicable Period”) setting forth the following information:

a. “A report specifying for each line item of the Budgets the actual receipts and payments made during the Applicable Period”; [and]

b. “All income or other receipts during the Applicable Period setting forth the source of income and the amount attributable to such source.”

4. Further, paragraph 7(E)(ii) of the First Interim Order required the Debtor, on or before May 8, 2017, to provide Rabo with “a report identifying the location, quantity and estimated market value of all of Debtor’s inventory; the existence of or potential claim by any creditor of the Debtor, other than Rabo, to a lien or security interest of any kind or nature to the Debtor’s inventory or the products and proceeds thereof.”

5. Further, paragraph 7(E)(iv) of the First Interim Order required the Debtor, on or before May 8, 2017, to provide Rabo with “a report identifying, and continuing on a monthly basis thereafter, a ‘Borrowing Base Certificate’ as defined in the Loan Documents between Rabo and the Debtor, in the form to be provided to the Debtor by Rabo.”

6. On June 6, 2017, the Court entered its *Interim Order Authorizing Use of Cash Collateral and Granting Adequate Protection and Adequate Protection Liens; and Notice of Final Hearing* (the “**Second Interim Order**”) [Dkt. 50].

7. Paragraph 6(E) of the Second Interim Order set forth certain reporting requirements that the Debtor was required to comply with as a condition to its use of Cash Collateral. Specifically, the Debtor was required to provide Rabo a report for the period of April 18, 2017 through June 12, 2017 (again defined as the “Applicable Period”) setting forth the following information:

a. “A report specifying for each line item of the Budgets the actual receipts and payments made during the Applicable Period”; [and]

b. “All income or other receipts during the Applicable Period setting forth the source of income and the amount attributable to such source.”

8. This Court entered the Final Cash Collateral Order on June 26, 2017. The Final Cash Collateral Order authorized the Debtor to use Cash Collateral for the period of June 12, 2017 through October 31, 2017 pursuant to the Cash Collateral Budget attached as Exhibit “A” to the Final Cash Collateral Order (the “**Approved Budget**”), and also pursuant to the terms and conditions of the Final Cash Collateral Order.

9. Paragraph 5(E) of the Final Cash Collateral Order requires the Debtor to “pay Rabo the sum of \$100,000.00 monthly as an Adequate Protection Payment, beginning on June 1, 2017 and continuing on the first day of each succeeding month thereafter until the Cash Collateral used by the Debtor is paid in full to Rabo, until the Adequate Protection Payment is modified by order of the U.S. Bankruptcy Court, until a Final Order Authorizing the Use of Cash Collateral Order is entered by the Court, or until a Chapter 11 Plan is confirmed by the Court.”

10. Paragraph 5(F) of the Final Cash Collateral Order also requires the Debtor to “provide Rabo’s counsel, by fax, ECF Notice or e-mail,” certain financial reports, including:

a. “A report specifying for each line item of the Budgets the actual receipts and payments made during the Applicable Period”; and

b. “All income or other receipts during the Applicable Period separately setting forth the source of the income and the amount attributable to such source.”

11. Further, paragraph 5(f) requires the Monthly Operating Reports (“**MORs**”) filed by the Debtor to include “a report showing the previous-month’s grain purchases, indicating whether the previous-month grant purchases were paid-for during the previous month, or whether the grain producer elected to receive payment later. In the case of an election to receive payment later, the Debtor shall indicate whether, and to what extent, that grain producer waived any lien claim it may have in the unpaid-for grain. In the event the grain producer did not waive any lien claim, the Debtor shall indicate the type and quantity of the grain purchased, the estimated value of the grain, and where and how it is segregated from the Debtor’s paid-for grain.”

12. In the Final Budget, the Debtor predicted that during June 2017 it would receive total income of \$1,852,744.66, have total expenses of \$1,223,165.34 (including the \$100,000.00 Rabo Adequate Protection Payment), and generate net income of \$629,579.32.

B. The Debtor's Actual Post-Petition Performance, and its Failure to Abide by the Court's Cash Collateral Orders.

13. The Debtor's MOR for the period ending April 30, 2017 [Dkt. 45] showed that, as of the Petition Date, the Debtor had \$2,832,597.95 in accounts receivable, \$5,765,638.50 in inventory, and \$8,962,073.14 in total current assets.

14. That same MOR showed that, by April 30, 2017 (less than two weeks after the Petition Date), those numbers had declined to \$2,666,135.45 in accounts receivable, \$4,310,343.24 in inventory, and \$7,481,280.18 in total current assets.

15. The Debtor's MOR for the period ending May 31, 2017 [Dkt. 73] showed further financial decline. As of the end of May (approximately six weeks into the bankruptcy case) inventory had dropped to \$1,912,011.87 and total current assets had dropped to \$6,505,348.85.

16. On August 8, 2017 (approximately three weeks past its due date), the Debtor filed its MOR for the period ending June 30, 2017. [Dkt. 79] The June 2017 MOR shows that the Debtor's material financial decline continues. First, the June MOR shows that the Debtor's total current assets as of the Petition Date were actually \$9,654,056.29, or almost \$700,000.00 higher than originally reported in the April MOR. Second, the Debtor also reported that as of June 30, 2017, it had \$1,865,700.72 in cash, \$1,991,352.33 in accounts receivable, a mere \$198,866.86 in inventory, and total current assets of \$5,172,880.05.

17. In other words, the Debtor is now reporting that, between the Petition Date and June 30, 2017, its total current assets (i.e., Rabo's Cash Collateral) declined from \$9,654,056.29

to \$5,172,880.05, a decline of over forty-six percent (46%). Further, the actual dollar amount decrease of this decline was more than \$4.48 million!

18. Further, the Comparative Income Statement attached to the June MOR [Dkt. 79, pg. 3] shows that the Debtor's June performance was far worse than it had predicted in the Approved Budget, and that the Debtor also exceeded its budgeted authority. As noted above, the Approved Budget attached to the Final Cash Collateral Order estimated total income of \$1,852,744.66, total expenses of \$1,223,165.34, and net income of \$629,579.32 for June 2017, but the Comparative Income Statement attached to the June MOR shows that total income was only \$1,607,691.66 (almost \$250,000.00 lower than budgeted), total expenses were \$1,336,104.51 (more than \$100,000 higher than budgeted), and net income of just \$9,474.64 (more than \$600,000 less than budgeted).

19. As of August 9, 2017, Rabo has not received its August Adequate Protection Payment in the amount of \$100,000.00, even though that payment was due by no later than August 1, 2017.

20. As of August 9, 2017, Rabo has never received several of the financial reports required by paragraphs 7(E)(i) and (ii) of the First Interim Order. Moreover, the Debtor has never provided Rabo with monthly Borrowing Base Certificate in this case, even though they are required by paragraph 7(E)(iv) of the First Interim Order.

21. As of August 9, 2017, Rabo also has never received several of the final reports required by paragraph 6(E) of the Second Interim Order.

22. As of August 9, 2017, Rabo also has never received "[a] report specifying for each line item of the Budgets the actual receipts and payments made during the Applicable Period" or

a report of “[a]ll income or other receipts during the Applicable Period separately setting forth the source of the income and the amount attributable to such source,” even though those reports are required by paragraph 5(F) of the Final Cash Collateral Order.

23. Finally, while the Debtor has now filed MORs in this case for the periods ending April 30, May 31 and June 30, 2017, none of those MORs comply with paragraph 5(f) of the Final Cash Collateral Order, which requires that all MORs filed by the Debtor must include “a report showing the previous-month’s grain purchases, indicating whether the previous-month grain purchases were paid-for during the previous month, or whether the grain producer elected to receive payment later. In the case of an election to receive payment later, the Debtor shall indicate whether, and to what extent, that grain producer waived any lien claim it may have in the unpaid-for grain. In the event the grain producer did not waive any lien claim, the Debtor shall indicate the type and quantity of the grain purchased, the estimated value of the grain, and where and how it is segregated from the Debtor’s paid-for grain.”

### **ARGUMENT**

As the Court is aware, Rabo has a lien on substantially all of the Debtor’s personal property assets and, in particular, on its cash, its accounts, and its farm products and grain inventory (and all proceeds thereof), all of which constitute Cash Collateral. The Debtor has been spending and using Rabo’s Cash Collateral in this case pursuant to the terms of the Final Cash Collateral Order and the two interim orders entered prior thereto. All of those prior orders outline the terms and conditions under which the Debtor’s authority to use Cash Collateral shall continue. Moreover, all of those order, including the Final Cash Collateral Order, provide that nothing set forth therein “shall prevent or prejudice a creditor from requesting the Court, on an



emergency basis or otherwise, to terminate the use of Cash Collateral . . . or from seeking any other relief including, without limitation, stay relief or dismissal or conversion of this case.”

[*See, e.g.*, Dkt. 65, ¶6]

Here, Rabo asks the Court to terminate the use of Cash Collateral that was authorized by the Final Cash Collateral (and to the extent applicable the First Interim Order and the Second Interim Order), because Rabo’s interest in Cash Collateral is not adequately protected, and the Debtor has failed to comply with various requirements of the Court’s Orders regarding use of Cash Collateral. There is no doubt that a debtor’s continuing use of cash collateral requires adequate protection to the lienholder. *See* 11 U.S.C. §§ 361, 363(c)(2)(B) & (e). Further, there is no doubt that the party using cash collateral must prove that, in return for that use, all entities with an interest in cash collateral will be adequately protected. *See* 11 U.S.C. § 363(p)(1); *In re Carbone Cos., Inc.*, 395 B.R. 631, 635 (Bankr. N.D. Ohio 2008). Exactly what constitutes adequate protection must be decided on a case-by-case basis. *See In re O'Connor*, 808 F.2d 1393, 1396–97 (10<sup>th</sup> Cir. 1987) (citing *In re Martin*, 761 F.2d 472 (8<sup>th</sup> Cir. 1985)).

The focus of the adequate protection requirement is to protect a secured creditor from diminution in the value of its interest in collateral during the reorganization process. *See In re Kain*, 86 B.R. 506, 513 (Bankr. W.D. Mich.1988); *Delbridge v. Prod. Credit Assoc. & Fed. Land Bank*, 104 B.R. 824 (E.D. Mich. 1989); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Ledgemere Land Corp.*, 116 B.R. 338, 343 (Bankr. D. Mass. 1990) (finding that a question of adequate protection should focus on secured lender’s entire property interests, not just its interest in cash sought to be used).

Here, the Court has ordered the Debtor to do certain things to try and provide adequate protection to Rabo in return for its use of Cash Collateral. Among other things, the Court has ordered that the Debtor make monthly payments to Rabo of no less than \$100,000.00 per month by the first day of each month, and that it also provide Rabo (and other parties in interest) certain reports and information. The Debtor has not done these things. Rabo has not received its \$100,000.00 Adequate Protection Payment for August 2017, even though the payment was due no later than August 1, 2017. Further, the Debtor has not provided Rabo with any Borrowing Base Certificates or a number of the reports and financial disclosures required by paragraphs 7(E) of the First Interim Order, 6(E) of the Second Interim Order, and 5(F) of the Final Cash Collateral Order.

The Debtor also has failed to comply with paragraph 5(f) of the Final Cash Collateral Order, which requires that all MORs filed by the Debtor must include “a report showing the previous-month’s grain purchases, indicating whether the previous-month grant purchases were paid-for during the previous month, or whether the grain producer elected to receive payment later. In the case of an election to receive payment later, the Debtor shall indicate whether, and to what extent, that grain producer waived any lien claim it may have in the unpaid-for grain. In the event the grain producer did not waive any lien claim, the Debtor shall indicate the type and quantity of the grain purchased, the estimated value of the grain, and where and how it is segregated from the Debtor’s paid-for grain.” None of the MORs filed by the Debtor in this case to date provide this information to the Court or creditors.

The Debtor also has failed to use and spend Cash Collateral in conformance with the terms of the Approved Budget. Paragraph 4 of the Final Cash Collateral Order expressly

provides that “Debtor may exceed the monthly amount for a line item expense by not more than 10% so long as the total expenditures for all budgeted line items do not exceed the total budgeted expense set forth in the Budget.” While we do not know whether the Debtor is exceeding budgeted line items and in what percentages (because the Debtor is not providing any budget to actual information), it is beyond dispute that the total authorized June 2017 expenses were only \$1,223,165.34 [*see* Dkt. 65, pg. 10], and that the total actual June 2017 expenses were \$1,336,104.51 (more than \$100,000 higher than budgeted) [*see* Dkt. 79, pg. 3]. Thus, it is crystal clear that the Debtor has violated the terms of the Final Cash Collateral Order.

Finally, even if the Debtor had otherwise fully complied with the terms of the Final Cash Collateral Order and the Court’s prior interim orders dealing with Cash Collateral Use (and it has not done so), it is clear that Rabo’s interest in Cash Collateral is not being adequately protected, and that Rabo is being substantially and irreparably harmed by the continued imposition of the automatic stay and the Debtor’s continued ability to use and spend Cash Collateral. This case was filed on April 18, 2017. In the seventy-three (73) days between April 18, 2017 and June 30, 2017, the Debtor’s total current assets (i.e., Rabo’s Cash Collateral) declined from \$9,654,056.29 to \$5,172,880.05. The total decline was more than \$4.48 million, which equates to approximately \$61,385.00 in diminution per day through June 30. If this same daily average has held true since June 30, the Debtor’s total current assets have now declined another \$2.455 million, and the total decline from the Petition Date now exceeds \$7.5 million.

Rabo and other parties with an interest in Cash Collateral are being materially and substantially harmed in this case. Their interest in Cash Collateral is not adequately protected and, moreover, the Debtor appears to have no ability to provide adequate protection. The Court

must stop the hemorrhaging before there is nothing left. The Court should immediately terminate the Debtor's ability to use Cash Collateral, and it should grant Rabo and other parties in this case with such other protections and the Court deems just and proper.

WHEREFORE, Rabo respectfully asks this Court for the entry of an Order immediately terminating the Debtor's ability to use and spend Cash Collateral.

DATED this 9<sup>th</sup> day of August, 2017.

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By: /s/ Ron Kerl  
Ron Kerl

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on the 9<sup>th</sup> day of August, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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AND, I HEREBY CERTIFY that I have mailed by United States Postal Service the foregoing document(s) to the following non-CM/ECF Registered Participant(s). (List names and mailing addresses):

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Watson Agriculture, Inc.  
c/o Doug Delong, Controller  
P.O. Box 300  
Parma, ID 83660

By: /s/ Ron Kerl  
Ron Kerl