



SO ORDERED.

SIGNED this 7th day of August, 2017.

Robert E. Nugent
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

In re: SUNBURST FARMS PARTNERSHIP, DEBTOR.	Case No. 17-11389-11
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INTERIM ORDER GRANTING MOTION FOR ORDER AUTHORIZING SALE OF CROPS AND INTERIM USE OF CASH COLLATERAL

This matter comes before the Court on August 1, 2017 (the “Interim Hearing”), on the Debtor’s Motion for Order Authorizing Sale of Crops and Interim Use of Cash Collateral (Doc. 16). The matter was heard on expedited notice approved by the Court and properly noticed to all parties. Sunburst Farms Partnership appeared through its counsel, David Prella Eron of Eron Law, P.A. and through the president of one of its partners, Carol Bloesser. Bartlett Grain Company, L.P. filed an objection to the Motion and appeared through its counsel, Jerald S. Enslein of Martin, Pringle, et al. Frontier Ag, Inc. filed an objection to the Motion and appeared through its counsel, Lance H. Cochran of Kennedy Berkley, et al. Norder Supply, Inc. appeared through its counsel, Eric D. Bruce of Bruce & Lehman, L.L.C. Poole Chemical Company, Inc.

appeared through its counsel, William B. Sorensen, Jr. of Morris, Laing, et al. The managing members or presidents of the Debtor’s various partners, Carol Bloesser, Lori White, and Debbie Linenberger, appeared by and through counsel Edward J. Nazar of Hinkle Law Firm LLC. Jordan Sickman appeared on behalf of the United States Trustee. There were no other appearances or objections. No evidence was offered or admitted at the Interim Hearing and thus the Court made no findings of fact. Based upon the Motion, the representations of counsel at the Interim Hearing, and the record herein,

THE COURT FINDS AND ORDERS AS FOLLOWS:

1. The Debtor’s Motion for Order Authorizing Sale of Crops and Interim Use of Cash Collateral shall be and hereby is GRANTED on a limited, interim basis subject to the terms contained herein.

2. Debtor contends it has harvested all of its wheat crops for 2016 and 2017 (the “Crops”) and is currently farming approximately 155.92 acres milo and 250 acres feed sorghum (the milo and sorghum referred to as the “2017 Crops”), and that it must invest continued time and money into the marketing, transporting, and sale of the Crops as well as the growing and harvesting of the 2017 Crops.

3. 11 U.S.C. § 363(c)(1) provides that if the business of the debtor is authorized to be operated under Bankruptcy Code § 1108, unless the Court orders otherwise, the trustee (and the debtor exercising the powers of a trustee under § 1107) may enter into transactions, including the sale or lease of property of the estate, and may use property of the estate, in the ordinary course of business, without notice or a hearing. Additionally, 11 U.S.C. § 363(c)(2) provides that the trustee may not use, sell or lease cash collateral under subparagraph (c)(1) unless each

entity that has an interest in such cash collateral consents or unless the court, after notice and a hearing, authorizes such use, sale or lease in accordance with the provisions of 11 U.S.C. § 363.

4. 11 U.S.C. § 363(e) provides that on request of an entity that has an interest in property used, sold or leased or proposed to be used, sold or leased by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest. 11 U.S.C. § 361 provides that when adequate protection of an interest of an entity in property is required under §§ 362, 363 or 364, “such adequate protection may be provided by-- (1) requiring . . . 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; or (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 . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.”

5. The Debtor seeks the use of cash collateral to liquidate its assets.

6. Adequate protection must be determined on a case-by-case basis, permitting a debtor maximum flexibility in structuring its adequate protection proposal. See *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985); *In re George Ruggerie Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984). In this case, the Debtor contends the use of cash collateral is necessary to maximize the value of its assets, which Debtor intends to liquidate for the benefit of its creditors.

7. Courts have held that the existence of an equity cushion in collateral suffices as ample adequate protection to allow a debtor to use cash collateral. See, e.g., *In re Las Torres*

Dev., L.L.C., 413 B.R. 687, 696 (Bankr. S.D. Tex. 2009); *In re Triplett*, 87 B.R. 25, 27 (Bankr. W.D. Tex. 1988); *In re McCombs Properties VI, Ltd.*, 88 B.R. 261, 266 (Bankr. C.D. Cal. 1988); *In re Harrington & Richardson, Inc.*, 48 B.R. 431, 433- 34 (Bankr. D. Mass. 1985). The court in *In re Steffen*, 275 B.R. 570, 577 (Bankr. D. Colo. 2002), held that an equity cushion of 20% was sufficient to eliminate any requirement for adequate protection payments to a secured creditor.

8. No evidence was offered or admitted at the hearing. Thus, the following constitute assertions made by the Debtor in its Motion and the Interim Hearing but not findings of fact by this Court: (i) The Bank is the holder of a claim in the amount of \$1,935,071.98 which is secured by the Crops, the 2017 Crops, farm equipment, inventory, and certain funds on deposit; (ii) the collective value of Debtor’s encumbered assets exceeds \$4,000,000.00, and thus The Bank likely holds an equity cushion of more than 200%; and (iii) the only way to realize the value of the alleged collateral of The Bank, which includes the projected value of the 2017 Crops already planted, is to continue to invest the Crop proceeds into the marketing, transportation, sale, growing and harvesting of the 2017 Crops.

9. The Bank neither filed a pleading in response to the Motion nor was an appearance entered on its behalf at the Interim Hearing.

10. Debtor is authorized on an interim basis through August 17, 2017, the date of the Final Hearing (as defined below), to use proceeds generated from the sale of Crops to fund the expenses listed in the Projected Farm Budget marked Exhibit 1 attached to the Motion (“Budget”), but only as may be necessary for the Debtor to continue its operations without interruption through August 17, 2017. Specifically, the Debtor is authorized to pay its employee’s wages for the period from July 19, 2017, the date on which the Petition was filed

which commenced this case (“Petition Date”), through August 17, 2017. To the extent necessary, Debtor is also authorized to use any current funds held on deposit in its debtor in possession account at The Bank (“DIP Account”) to fund the expenses listed on the Budget which pertains to the month of August, 2017, but only through August 17, 2017; such usage shall be subject to a variance of up to 10% on any given line item.

11. Debtor shall deposit all funds received into the DIP Account, including, but not limited to, the proceeds from sales of Crops and receivables.

12. The Bank shall countersign all checks representing proceeds from the sale of Crops. A copy of each such check shall be provided by the Debtor to any party in interest requesting a copy of the same.

13. This Order is entered without prejudice to any party in interest, including, but not limited to, its right to file a motion seeking the termination of the continued use of cash collateral on the terms set forth herein.

14. The Bank shall retain all of its liens on any replacements thereof, accessions thereto, and proceeds therefrom, to the same extent, validity and priority as The Bank actually had, if any, as of the Petition Date, together with a replacement perfected lien under 11 U.S.C. § 361(2) on the 2017 Crops, any crop insurance, and/or governmental program payments (i) to the extent the cash collateral is actually used by Debtor, and (ii) to the same extent, validity and priority as actually existed in the Crops, crop insurance, and governmental program payments. The replacement lien granted hereunder shall be deemed to be perfected automatically upon entry of an order granting this Motion. See *Small v. Beverly Bank*, 936 F.2d 945, 948-49 (7th Cir. 1991). Debtor shall be required to submit to The Bank monthly reports reflecting all

farming income and expenses; Debtor shall provide a copy of each such report to any party in interest requesting the same. The Debtor and The Bank agreed that the Debtor shall pay to the Bank 50% of the net proceeds of the Crops (net proceeds being the difference between the revenues in a given month, less the cash expenditures during that month) on a monthly basis as further adequate protection; however, the Court reserves judgment on this additional provision until the time of the Final Hearing.

15. As further adequate protection, The Bank shall hold a superpriority claim, except for the Carve Out (as defined below), which shall have priority over all administrative expenses and unsecured claims against the Debtor and its estate, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expenses of the kinds specified in or ordered pursuant to 11 U.S.C. §§ 105, 326, 328, 330, 331, 365, 503(a), 503(b), 507(a), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 and, upon entry of a final order, all claims pursuant to 11 U.S.C. § 506(c). The superpriority claim shall be limited to the diminution in the value of The Bank’s collateral on account of any usage of cash collateral authorized hereunder. The Motion provides that “Carve Out” constitutes the following:

- a. statutory fees payable to the U.S. Trustee;
- b. pursuant to Section 726(b) of the Bankruptcy Code, claims allowed by a final order of the Bankruptcy Court under Section 503(b) of the Bankruptcy Code that are incurred after the conversion of the Chapter 11 case to a case under Chapter 7 of the Bankruptcy code in an amount not to exceed \$5,000.00 (meaning expenses of the Chapter 7 estate);
- c. the allowed and paid professional fees and disbursements incurred by the Debtor in an amount not to exceed \$50,000.00; and,

- d. up to \$10,000.00 of other professional fees and disbursements incurred prior to the entry of the Final Order and, subsequent to the entry of a Final Order, such amounts as are provided in the Budget, by an Statutory Committee for any professionals retained by final order of the Court or for any certified public accountants retained by the Debtors and appointed by the Court.

The Court reserves judgment as to any aspect regarding the Carve Out until the Final Hearing (as defined below).

16. The Debtor’s use of cash collateral is expressly limited by the Budget and the terms of this Order.

17. A final evidentiary hearing with respect to the Motion is scheduled for August 17, 2017, at 1:30 p.m. (the “Final Hearing”). The Debtor shall promptly mail copies of this Order (which shall constitute adequate notice of the Final Hearing) to the parties having been given notice of the Interim Hearing, and to any other party that has filed a request for notices with the Court and to any Committee after the same has been appointed, or Committee counsel, if the same shall have been appointed. Any party in interest objecting to the relief sought at the Final Hearing shall serve and file written objections; which objections shall be served upon:

- a. David Prella Eron, Eron Law, P.A., 229 East William, Suite 200, Wichita, Kansas 67202 (david@eronlaw.net); and
- b. Office of the United States Trustee for the District of Kansas,

and which objections shall be filed with the Clerk of the Court so as to be received no later than 5:00 p.m. (Central Daylight Savings Time) on August 14, 2017.

IT IS SO ORDERED.

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Respectfully submitted by:

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