

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

VAN'S POULTRY FARM INC.
f/k/a Country Lane Inc.
Debtor(s).

Bankruptcy No. 93-51037XS

Chapter 11
Contested No. 8110

ORDER RE: APPLICATION TO SETTLE PENDING MOTION FOR RELIEF FROM STAY

Debtor seeks approval of an agreement to settle a motion to lift stay filed by First National Bank of Sioux Center. Proof of service (docket no. 202) indicates that the motion to settle was served on all creditors and parties-in-interest. Although the list of parties attached to the proof does not list all creditors, the court will rely on the certification that service to all was made.

Only the Internal Revenue Service (United States) objected to the settlement. It has withdrawn its objection (docket no. 209). Hearing on the motion to settle was held October 12. Donald Molstad appeared for the debtor-in-possession; Steven Jensen appeared for First National Bank of Sioux Center; Richard Moeller appeared for Peoples Bank and Trust.

Debtor contends that the settlement is in the best interest of the estate. Approval or denial of a settlement involving the estate is within the discretion of the court. Lambert v. Flight Transportation Corp. (In re Flight Transportation Corp. Securities Litigation), 730 F.2d 1128, 1135 (8th Cir. 1984). The court is to consider (a) the probability of success in the litigation, (b) difficulties of collection, (c) the complexity of the litigation and the attendant expense and delay, and (d) the interests of creditors. Id.

For the reasons stated hereafter, the court declines to approve the proposed settlement. Debtor's motion will be denied.

As grounds for its motion for relief, First National Bank alleged that debtor had failed for at least four months to make cash adequate protection payments to a trust account pursuant to a court order permitting the use of cash collateral (Motion, docket no. 189, ¶ 6). Such failure, the Bank contends, is cause for relief under 11 U.S.C. § 362(d)(1). Bank also contended that the debtor lacks equity in the property secured to Bank and that debtor cannot effectively reorganize. Therefore, Bank also seeks relief under 11 U.S.C. § 362(d)(2). Bank seeks relief so that it may take action to recover its collateral.

Bank claims a security interest in real estate and in personalty including equipment, accounts, vehicles, and inventory. Bank alleged in its motion that at filing, it was owed \$354,216.84. As of July 20, 1994, the date of the motion, it alleged it was owed in excess of \$400,000.00. At the hearing, Bank claimed it was now owed approximately \$411,000.00 including post-petition interest, fees and costs. Although the parties appear to agree that at the outset of the case Bank was fully secured, they may disagree now whether Bank remains so.

Debtor and Bank seek to settle the stay motion by an agreement which values Bank's security and provides for adequate protection of Bank's interests (Motion to Settle, docket no. 201). The settlement recognizes Bank's perfected security interest in certain real estate and values the real estate and the Bank's interest at \$205,000.00.

The parties further agreed that Bank had a perfected first lien against equipment and vehicles, with exceptions as to certain vehicles. As to machinery and vehicles which the debtor intends to retain during and after the reorganization,

debtor and Bank value the lien and the collateral at \$55,000.00.

The agreement provides that the Bank will retain its lien on the real estate and personalty and that debtor will repay Bank their values over time. As to the real estate, the \$205,000.00 will be repaid at nine per cent per annum over 15 years with monthly payments retroactive to June 1, 1994. As to the personalty, the \$55,000.00 will be repaid at nine per cent per annum over three years, in monthly payments retroactive to June 1, 1994.

Equipment in which Bank has a lien which will not be retained by debtor will be sold, and the proceeds paid to Bank. There is no estimate as to the value of this collateral. The agreement also acknowledges Bank's perfected interest in the proceeds of sale of other equipment which took place after filing. The net proceeds are \$54,597.39. This money is being held by the debtor, but would be turned over to Bank upon approval of the agreement.

Debtor's counsel is holding substantial funds in a trust account pursuant to the cash collateral agreement and order previously mentioned. Under the stay settlement now proposed, \$68,011.74 of this money would be turned over to Bank.

The money in the cash collateral account is a result of an order entered July 15, 1993, on agreement of the debtor and its secured creditors (docket no. 76). The creditors involved included Bank, Land O'Lakes, Inc., LOL Finance Co., Midwest Hatchery, Inc., and certain co-operative elevators in northwest Iowa. The order and agreement permitted debtor to use pre-petition and post-petition accounts receivable. As adequate protection for the use of funds, the debtor, among various requirements and payments, was to deposit \$11,321.06 in a trust account at Bank. The money would be distributed to secured creditors only on court order according to their interests as later determined by the court. The total deposit represented monthly adequate protection for use of various categories of collateral as follows:

real estate	\$2,943.78
accounts	2,822.21
vehicles	1,593.53
inventory	3,486.02
computer equipment	273.00
office equipment	182.62

A portion of the total deposit, \$19.90, is not accounted for in the allocation to collateral. Nonetheless, the total represented "what debtor believes will be necessary for adequate protection payment to the holders (sic) of secured creditors claiming an interest in debtors' (sic) real estate, inventory, accounts receivable and equipment." (Amendment to proposed use, docket no. 74, ¶ 4B.) Each of the creditors was to be granted a replacement lien in inventory, livestock, accounts, general intangibles to the extent of its prepetition secured claim (Order, docket no. 76, ¶ 5E).

Debtor's counsel explains that the purpose of the cash collateral/adequate protection agreement was to compensate the creditors with interests in the various types of collateral in exchange for the debtor's continued use. He states that instead of litigating stay issues, the debtor would be permitted to use assets of the estate and that creditors holding claims against the types of collateral would be adequately protected for the debtor's use, including adequate protection for interest on fully secured claims. Debtor's counsel contends that at filing, Bank was fully secured. Thus, debtor contends that a turnover of the funds is merely the adequate protection previously bargained for now that other secured creditors apparently no longer dispute Bank's priority in real estate and equipment.

The unacceptable aspect of this settlement is debtor's turnover to Bank of \$68,011.74. Despite debtor's present characterization of the cash collateral settlement, the money deposited in trust was to adequately protect secured creditors' interests in property of the estate. It cannot be interpreted to permit overprotection of those interests. The extent of protection to be provided must be gauged by the decline in value of the collateral as a result of the operation of the automatic stay or the debtor's use. 11 U.S.C. § 361. The amount of protection necessary must ultimately be determined by the relationship of the value of collateral at filing and the value at the time the protection is afforded.

Bank may be entitled to protection against lost value occasioned by the stay or by the debtor's use, but the proposal here

does not make that clear. The proposal sets the present value of real estate and equipment to be retained by the debtor and it provides adequate protection of the values of those assets by monthly payments commencing June 1, 1994. The proposal contemplates sale of other equipment and the turnover of proceeds. It also proposes turnover of proceeds from a previous sale. These latter proposals do not give the Bank more than it is entitled to. However, the payment of funds from the trust account do not take into account whether the Bank has been injured by a decline in value of any of these assets from the filing date to the approval of the settlement. If the real estate has maintained its value or if the personalty has declined only minimally, it may be that the decline does not amount to \$68,000.00. There has been no adequate showing that a \$68,000.00 payment to the Bank is necessary to compensate it for a decrease in value of its interest in real estate or equipment. Nor has there been a showing that payment is necessary to compensate Bank for use of prepetition accounts against which the Bank held a lien having value.

Debtor's counsel states that Bank did not have a pre-petition interest in livestock, meaning chickens. The cash collateral account, including the \$68,000.00, is proceeds of post-petition sales of eggs. There is no evidence that Bank has a post-petition security interest in such proceeds, except perhaps to the extent it may have been granted a replacement lien. There has been no showing that Bank is entitled to the funds in the account because it has an interest in them. It should not be given the funds outright unless the transfer is required to protect a loss in the value of its interest in other collateral.

Debtor contends that Bank is entitled to the payment in any event to compensate it for lost interest because at the time of filing Bank was fully secured. At the time of filing, Bank may have had an equity cushion. The parties have failed to show such by competent evidence. But the court disagrees that Bank is without question entitled to adequate protection of that cushion so that the Bank can continue throughout the pendency of the case to collect allowable post-petition interest pursuant to 11 U.S.C. § 506(b).

Bank is only entitled to protection as to the value of its collateral. The theory that Bank is entitled to protection of an equity cushion for the payment of post-petition interest is called into question by several authorities. In re Lane, 108 B.R. 6, 8 (Bankr. D. Mass. 1989); McCombs Properties VI, Ltd. v. First Texas Savings Association (In re McCombs Properties VI, Ltd.), 88 B.R. 261, 266-67 (Bankr. C.D. Cal. 1988); Bankers Life Insurance Co. of Neb. v. Alyucan Interstate Corp. (In re Alyucan Interstate Corp.), 12 B.R. 803, 810-12 (Bankr. D. Utah 1981); see also United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S.Ct. 626 (1988).

In consideration of the facts and arguments presented, the court concludes that debtor has failed to prove that the settlement agreement is reasonable.

IT IS ORDERED that the debtor's motion to settle contested matter 8110 (Motion for Relief filed by First National Bank of Sioux Center) is denied. Judgment shall enter accordingly.

SO ORDERED ON THIS 14th DAY OF OCTOBER, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U. S. mail to: Donald Molstad; Richard Moeller; Steven Jensen, U. S. Trustee, 2002 List.