

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

**IN RE:**

**CASE NO.: 09-5252-3F2**

**WILLIAM M. BREWER  
And CASSANDRA O. BREWER,**

**Debtors.**

**ORDER DENYING MOTION TO PROHIBIT USE OF CASH COLLATERAL AND  
GRANTING MOTION FOR ADEQUATE PROTECTION FILED BY FIRST FEDERAL  
BANK OF FLORIDA**

This case came before the Court upon Motion to Prohibit Use of Cash Collateral and for Adequate Protection filed by First Federal Bank of Florida (“First Federal”). The Court conducted a hearing on the matter on August 19, 2009. The Court accepted proffers of the parties. In lieu of oral argument the Court directed the parties to submit memoranda in support of their respective positions.

**Facts**

The following facts appear to be undisputed. On June 28, 2009 (the “Petition Date”) Debtors filed a Chapter 12 bankruptcy petition. Debtors own and operate a poultry farm and related real and personal property located in Suwannee County, Florida. On December 15, 2005 Debtors borrowed \$1,132,800.00 from First Federal. The loan was secured by a mortgage on Debtors’ real property. On that same day Debtors executed an assignment (the “Assignment”) by which they assigned to First Federal a portion of their interest in the proceeds under broiler production agreements entered into with Gold Kist, Inc., an entity which was subsequently acquired by Pilgrim’s Pride. On January 6, 2006 First Federal filed a UCC-1 Financing Statement with the Secretary of State of Florida which provided that it had a security interest in, among other things “any interest in poultry, eggs, poultry products and proceeds of poultry, eggs and poultry products owned or hereafter owned by the debtor.” Debtors renewed the loan with First Federal on January

12, 2009. The renewal note secured the mortgage dated December 15, 2005 and all extensions, modifications or renewals thereof.

Broiler production agreements with Gold Kist, Inc. were granted to poultry growers such as Debtors on a flock to flock basis and were subject to performance and other criteria utilized in Gold Kist's business judgment. No long term broiler production agreements were granted by Gold Kist, Inc. Under the terms of the broiler production agreements, the actual ownership of the chickens placed in Debtors' broiler houses and other growers remained with Gold Kist, Inc. As the Court noted, at some point Pilgrim's Pride acquired Gold Kist, Inc. Thereafter, Pilgrim's Pride entered into a series of broiler production agreements with Debtors on a flock to flock basis.

Debtors turned over their last pre-petition flock of birds pursuant to a Broiler Production Agreement with Pilgrim's Pride on June 8, 2009. On the Petition Date Debtors had no flocks of birds. On July 29, 2009 Debtors entered into a new Broiler Production Agreement with Pilgrim's Pride. On July 20, 2009 Pilgrim's Pride delivered the flocks which are the subject of the July 29, 2009 Broiler Production Agreement.

### **Discussion**

First Federal seeks to have the Court prohibit Debtors' use of First Federal's cash collateral and to turn over the cash collateral to First Federal. Alternatively, First Federal seeks adequate protection. Initially, First Federal argues that Debtors assigned a portion of the Pilgrim's Pride payments under the Broiler Production Agreement to First Federal. Debtors argue that the pre-petition assignment is not an absolute assignment but a collateral assignment given to secure payment of the indebtedness owed to First Federal.

Whether an assignment is intended to be an absolute assignment or to serve as a security transaction is a question of fact to be determined by the intent of the parties. In re Radice Corp., 88

B.R. 422 (S.D. Fla. Bankr. 1988). The court in Evergreen Valley Resort, Inc., 23 B.R. 659 (Bankr. D. Maine 1982) set forth a number of factors which the Court finds helpful in determining whether a transaction is intended to create a security interest or an absolute assignment. In that case the debtor executed a pre-petition assignment to a creditor of excess proceeds resulting from the sale of time share units. The debtor asserted that the proceeds were cash collateral, which it could use as the debtor-in-possession. The creditor argued that the assignment was absolute and the proceeds were not property of the estate. Initially the court noted that the Uniform Commercial Code offers little guidance in determining whether an assignment is absolute or is a security transaction. The court set forth the following factors, which indicate that an assignment operates to create a security interest only: 1) the assignee retains a right to a deficiency on the debt if the assignment does not provide sufficient funds to satisfy the debt; 2) the assignee acknowledges that its rights in the assigned property would be extinguished if the debt owed was paid from some other source; 3) the assignee must account to the assignor for any surplus received from the assignment over the amount of the debt; and 4) evidence shows that the assignor's debt is not reduced on account of the assignment. An application of the Evergreen factors to the instant case leads to the conclusion that the Assignment was intended to serve as a security transaction. The Mortgage, promissory note and related loan documentation permit First Federal to seek in personam relief, and to obtain a final judgment and writ of garnishment against Debtors in the event of a default. The loan documentation provides that if Debtors were to pay in full the indebtedness owed to First Federal, First Federal's assignment would be released. The loan documentation does not provide that the Assignment discharges the underlying debt. The Court finds that the Assignment was not an absolute assignment but was instead a collateral assignment given to secure payment of the indebtedness owed to First Federal.

Alternatively, First Federal argues that the assigned funds are its cash collateral. First Federal argues that its pre-petition liens extend to the Broiler Production Agreement proceeds received by Debtors post-petition. Debtors argue that because they entered into new Broiler Production Agreements after the Petition Date, any proceeds arising from production of the broilers are post-petition after-acquired property and do not constitute cash collateral. Section 552(a) of the Bankruptcy Code sets forth the general rule that a pre-petition security interest does not extend to property acquired after the commencement of a bankruptcy proceeding. Section 552(b)(1) creates an exception for the proceeds of pre-petition collateral and provides in pertinent part:

if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law.

The Court finds that § 552(b) does not apply to the post-petition proceeds in the instant case. The proceeds, products, offspring and products to which § 552(b) refers “may be secured by a pre-petition security agreement if, but only if, the primary collateral was acquired by the debtor prior to the commencement of the case.” In re Liebe, 41 B.R. 965, 968 (Bankr. Iowa 1994). The concept of proceeds is only implicated when “one asset is disposed of and another is acquired as its substitute.” American President Lines v. Lykes Bros. S.S. Co. (In re Lykes Bros.), 216 B.R. 856, 864 (Bankr. M.D. Fla. 1996). Debtors’ relationship with Pilgrim’s is governed by a post-petition contract. Debtors did not receive the poultry in question until after the Petition Date. The proceeds arising from production of broilers pursuant to broiler production agreements entered into after the Petition Date are not cash collateral of First Federal.

Debtors concede that First Federal is entitled to adequate protection because it is an undersecured creditor with no equity cushion. First Federal asserts that due to the difficulty of fashioning adequate protection under the circumstances, First Federal should recover all pre-petition and post-petition periodic cash payments subject to the Assignment. First Federal requests that the Court authorize Pilgrim's Pride to continue sending the payments subject to the assignment directly to First Federal. For purposes of this order only, the Court will grant adequate protection in the amount of \$6,302.88 quarterly. That amount is calculated based upon a claim value of \$292,500.00, an interest rate of 6%, a term of twenty years, and Debtors' receipt of four flocks per year. Upon the foregoing, it is

**ORDERED:**

1. Motion to Prohibit Use of Cash Collateral filed by First Federal Bank of Florida is denied.
2. Motion for Adequate Protection filed by First Federal Bank of Florida is granted.
3. Debtors shall pay \$6,302.88 to First Federal Bank of Florida quarterly through the offices of the Chapter 12 Trustee.
4. The entry of this Order is without prejudice to a higher payment based upon a greater claim value as determined by the Court or agreed to by the parties.

**DATED** this 2 day of October, 2009 in Jacksonville, Florida.

/s/

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**JERRY A. FUNK**  
United States Bankruptcy Judge

**Copies Furnished To:**

Keith Appleby, Attorney for First Federal Bank of Florida  
Andrew J. Decker, III, Attorney for Debtors  
Douglas Neway, Chapter 12 Trustee