

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>IN RE:</b>	)	
	)	
<b>MARK GERMANN,</b>	)	<b>Case No. 01-40059</b>
<b>JANICE GERMANN,</b>	)	<b>Chapter 12</b>
	)	
<b>Debtors.</b>	)	
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**MEMORANDUM OPINION ON DEBTORS' MOTION FOR  
USE OF CASH COLLATERAL**

Debtor's motion for cash collateral usage, filed on February 1, 2001, sought the use of the proceeds of debtor's 2000 wheat, corn, milo, and soybeans. Both the United States, acting through the Farm Service Administration (variously "FSA", the "United States," or the "Government"), debtors' longtime farm lender, and AgriBank, FCB, formerly known as American Express Centurion Bank ("Agribank"), objected. Each creditor asserted priority in the cash collateral to be used. Notwithstanding FSA's longtime previous perfected status in debtors' crops, AgriBank suggests that it has a prior claim to these proceeds by virtue of the little-used "input" provisions contained in KAN. STAT. ANN. §84-9-312(2). This statute provides that a creditor who holds a perfected security interest in crops to secure repayment of inputs may have priority over an earlier perfected security interest under certain conditions. After a hearing before Chief United States Bankruptcy Judge James A. Pusateri, debtors were granted limited use of the cash collateral and the Court reserved a lien for the competing creditors, leaving the determination of each creditor's relative priority to this Court. In the order, entered on March 7, 2001, Judge Pusateri granted the debtors' motion pursuant to an agreement among the parties which permitted the debtors to use crop proceeds and granted an adequate protection lien on the debtors' post-petition crops to both

FSA and AgriBank, subject to this Court's future determination of the creditors' relative priority in the crops utilized. Thereafter, on August 23, 2001, this Court granted a final cash collateral order which modified the prior order and granted debtors use of the proceeds of their 2001 wheat crop, subject to some limitations not relevant to this inquiry, and again granted an adequate protection lien to both creditors with priorities to be determined later. After careful review of the facts as agreed to by the creditors, the Court finds that AgriBank's growing crop liens are, as of the date of filing, not perfected. Even if they were, applying the input priority provision requires the Court to find that AgriBank's input security interest does not meet the required stringent timing tests to afford input lenders priority over earlier-filed security interests.

#### FINDINGS OF FACT

The Court makes the following findings of fact based upon the creditors' respective submissions and upon the testimony of Mark Germann. Although no formal stipulation of facts was filed, the creditors agree as to the salient facts of this matter. With the testimony of Mr. Germann about his crop planting dates, the Court has a competent record upon which to rule. As background, this case was filed on January 8, 2001 as a proceeding under Chapter 13, presumably because Chapter 12 had not yet been reenacted. On May 30, 2001, this Court granted debtors' motion to convert this case to Chapter 12.

Determining the relative priority of the Government's and AgriBank's security interests starts with an examination of AgriBank's loan documentation, followed by a chronological review of the debtors' borrowing and planting leading up to and after the filing of this case. According to FSA's undisputed proof of claim, the United States has held a valid and perfected security interest in debtors' growing crops since 1988. Debtors owe the United States some \$141,157.25 as of February 6, 2001 with interest accruing thereafter at \$20.1236 per diem. This obligation was

formerly payable in annual installments, due on the first day of January of each year, in the amount of \$13,413. In January of 1999, however, debtors failed to make the full payment. Instead, they paid FSA \$9,000 on December 31, 1998 and did not make up the balance of the payment, \$4,413 until April 7, 1999. Thus, the debtors' debt to FSA was at least partially due and unpaid from January 2, 1999 until cured on April 7, 1999.

In June of 1999, debtors established a relationship with AgriBank. On June 27, 1999 they gave a promissory note to AgriBank in the amount of \$50,000. This note was intended as a revolving credit line for input financing. To secure this note's repayment, debtors executed and delivered their Agricultural Security Agreement (the "First Agreement") to AgriBank which purported to grant it a security interest in various classes of collateral including crops, whether harvested, processed, or growing. Although the security agreement speaks to growing crops, it contains no reference to the legal description of any of the land on which said crops were growing.

AgriBank then filed a financing statement on July 21, 1999 (the "First Financing Statement") which purported to cover the same collateral, but neither referenced growing crops nor the land on which the debtors' crops were planted. This financing statement appears to have been signed, not by the debtors themselves, but by one "Alex C. Fair" who appears to have signed as "attorney-in-fact" for debtors and whose signature is adjacent to a stamped statement "Signing for All." This Court has been presented no competent evidence of the appointment of Mr. Fair by the debtors to execute the financing statement.

Notwithstanding these documentary anomalies, AgriBank began to disburse loan proceeds to the debtors in July of 1999. Debtors received a series of advances beginning on July 23 and ending on October 6, 1999. The parties do not dispute that these advances were made to enable the debtors' planting of the 2000 wheat crop. According to Mark Germann's testimony, he

commenced planting this crop on October 2 and completed planting on October 11, 1999.

Debtors' next FSA payment was due on January 1, 2000. This payment was not made. On April 21, 2000, debtor executed and delivered to AgriBank an Amended Security Agreement (the "Second Agreement") which covered the same collateral package as the 1999 agreement, but now included legal descriptions of the debtors' growing crops. This Second Agreement also contained a clause which provided as follows:

Grantor hereby appoints Lender as its irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect of to continue the security interest granted in this Agreement.

Thereafter, on June 7, 2000, AgriBank filed an Amended Financing Statement (the "Second Financing Statement") stating that the amendment was for the purpose of adding to the prior filing the legal descriptions of the land where debtors' crops were planted. Legal descriptions were provided, but no reference to growing crops was added. This Second Financing Statement was signed by one Dana K. Smith, apparently an AgriBank employee, as attorney-in-fact for the debtors and as a representative of the creditor.

From October 26, 1999 until January 18, 2000, debtors took a series of advances from AgriBank. According to Mr. Germann, debtors planted their 2000 corn crop between April 22 and April 26, 2000. Debtors took no further advances on the AgriBank loan until June 3, 2000.

Debtors planted their next fall crop, soybeans, between May 6 and May 12, 2000. They then planted their milo crop between June 1 and June 3, 2000. On June 7, 2000, debtors rescheduled their past-due indebtedness to FSA, extending the January 1, 2000 payment due date to February 1, 2001 and reducing its amount. On July 20, 2000, debtors borrowed \$19,000 from FSA on a separate note, this advance being for the input of 2001 wheat. Further, FSA permitted the debtors to utilize a Commodity Credit loan payment in the amount of \$17,400.22 to pay in part

AgriBank's debt. AgriBank made no further disbursements after June 3, 2000. Debtors planted their 2001 wheat between September 28 and October 11, 2000. Mark Germann testified that he used the proceeds of the FSA loan to accomplish this.

After this case was filed, debtors sought leave to use the proceeds of the 2000 crops as cash collateral. The parties later agreed to an order, entered by Judge Pusateri in March of 2001, pursuant to which the debtors utilized some \$21,951.85, representing all of the proceeds of the 2000 crops. In July of 2001, the debtors requested leave to sell the 2001 wheat crop, financed by FSA, and use its proceeds in their farming operation. FSA objected to this motion, but later agreed to allow the use of this cash collateral to the extent of \$22,701, less any amounts the debtors were to receive on account of Market Loss Assistance payments from the United States Department of Agriculture. This agreement was memorialized in an order entered by this Court on August 23, 2001. The August 23 order preserved several issues including the lien priority question presented here.

### ISSUES

At first issue here is whether AgriBank's security interest in the debtors' crops was perfected. If it was properly perfected, the Court must then determine whether any or all of the AgriBank advances meet the narrow conditions laid out in KAN. STAT. ANN. §84-9-312(2) which would accord them input lien priority over the previously perfected security interest of FSA. Determining this question requires the Court to apply the various time tests contained in that statute to the various advances to identify qualifying advances.

### JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This cash collateral motion which requires a determination of the relative priority of security interests in property of

the estate is heard as a contested matter pursuant to Fed. R. Bankr. P. 9014 and is therefore a core proceeding. 28 U.S.C. § 157 (b)(2)(K) and (M).

### ANALYSIS

This dispute is purely a matter of Kansas commercial law. AgriBank asserts its entitlement to input lien priority under KAN. STAT. ANN. 84-9-312(2). This statute provides that the holder of a perfected security interest in crops may claim priority treatment over an earlier-filed security interest in the same crops under certain conditions described below. Thus, to avail itself of this exalted status, AgriBank must first demonstrate that its security interest is perfected. The United States asserts that AgriBank's security interest is not properly perfected because the First Financing Statement contained no legal descriptions and lacked the signatures of the debtors themselves. The Government further avers that AgriBank's First Agreement lacks any language purporting to appoint it debtors' attorney in fact for the purpose of signing perfection documents. With regard to the Second Financing Statement, the United States argues that the appointment of the creditor as an attorney in fact (which is expressly provided for in the Second Security Agreement) is, in essence, an evasion of the creditor's duty to obtain the debtors' signatures on the financing statement as required by KAN. STAT. ANN. §84-9-402(1). Because the security interest was never perfected, the Government's argument goes, it cannot benefit from the protection of §9-312(2) which specifically confers its priority on *perfected* security interests only. AgriBank asserts, on the other hand, that creditors may solicit and obtain authority from debtors to sign documents on debtors' behalf. It further suggests that its security interest need not have been perfected at the time the loans were made. In light of the flaws in AgriBank's attempt to perfect its security interest, the latter two issues need not be addressed.

Neither party addresses an apparent attachment problem in AgriBank's documents. KAN.

STAT. ANN. § 84-9-203(1)(a) specifically requires that, in order for a security interest in growing crops to attach, the debtor must sign a security agreement containing a description of the land concerned. No such description appears in the First Agreement. Not until the debtors executed the Second Security Agreement were any land descriptions incorporated into the documents. This forces the legal conclusion that AgriBank's security interest did not even attach to debtors' crops until the execution of the Second Agreement on April 21, 2000, well after the planting of the 2000 wheat in October of 1999 and immediately before the corn planting in 2000. If AgriBank's Second Financing Statement filed June 7, 2000 is otherwise valid, AgriBank's security interest in debtors' crops was perfected as of that date. Regrettably, the amendment does not cure the most glaring error in the First Financing Statement.

Nowhere in the First Financing Statement is there a mention of growing crops. KAN. STAT. ANN. § 84-9-402(1) requires the secured party to include a description of its collateral in the body of the financing statement. AgriBank's description of collateral in the First financing Statement includes:

*All harvested crops; all processed crops; . . . whether any of the forgoing is now existing or hereafter raised or grown . . .* (Emphasis added).

The amendment made by the Second Financing Statement simply adds legal descriptions to this description. The plain meaning of the above-quoted language is that AgriBank gave notice of a security interest in *severed* crops ("harvested" or "processed"), whether on hand or to be raised thereafter. There is simply no reference here to presently growing crops or crops which may be growing in the future. Because the description is faulty, AgriBank's security interest remains unperfected in the growing crops of the debtor in existence at the time this case was filed.

Because AgriBank's effort at perfection falls short, the Court need not visit the issue of

whether the secured party had requisite authority to sign the financing statements on behalf of the debtors. Even if the financing statements did adequately describe AgriBank's collateral, AgriBank would receive no benefit from the input priority because of the relationship between the debtors' planting, their defaults to FSA, and AgriBank's advances.

Before applying the arcane provisions of KAN. STAT. ANN. § 84-9-312(2), a brief review of its text is helpful. This section of the UCC resolves priorities among conflicting security interests in the same collateral. Section 9-312(5) states the general rule that, as between two properly perfected security interests, the first-to-file takes priority over later filers. The balance of the section is devoted to detailing the priorities accorded perfected purchase money security interests, which, as defined by KAN. STAT. ANN. §84-9-107, are security interests taken by sellers of goods to secure repayment of their price or those taken by a person makes advances to enable the debtor to acquire rights in the collateral if the advances are used for that purpose. Although input loans for crops would appear to fall within the second category of purchase money security interests, they must meet more rigorous timing requirements than ordinary purchase money security interests.

KAN. STAT. ANN. § 84-9-312(2) provides:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given *not more than three months* before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due *more than six months* before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest. (Emphasis added).

KAN. STAT. ANN. § 84-9-312(2) 1996.

A security interest accorded this special priority status must therefore meet the following

criteria:

1. The security interest must be perfected;
2. The debtor must have granted the interest to secure repayment of new value extended for crop planting in the season the loan is made;
3. The new value must be given *not more than three (3) months* before the crops are planted; and
4. The obligation secured by the earlier perfected security interest must be due *more than six (6) months* before the crops are planted.

Thus, if the prior lender's obligation is fewer than six months past due at the time of planting, the subsequent lender's security interest receives no priority. AgriBank asserts that, because all its disbursements were made more than six months after debtors' default to FSA on January 1, 1999, all of its loan should be granted this priority. This position ignores the plain language of the section which states that date of planting is the "trigger" date for determining whether the six months have expired. It further ignores the fact that the debtors appear to have cured their 1999 default by making up the rest of the January 1, 1999 payment on April 7, 1999. This Court believes that each planting "event" need be reviewed seriatim and both the three- and six-month rules applied to determine the degree and extent of AgriBank's priority, if any.

Debtor planted his 2000 wheat crop between October 2 and October 11, 1999. In order for advances to qualify as enabling input loans, the same must have been made within three months of the planting. Thus all of the advances made by AgriBank between July 23, 1999 and October 6, 1999 meet the "three-month" test. However, AgriBank needed to show that FSA's debts were due more than six months before planting. Debtors' January 1, 1999 payment was not made in full on that date. The payment made by debtors on December 31, 1998 lacked \$4,313 and the Court can

conclude that FSA's claim was "due" at least to that extent until the payment was made up on April 7, 1999. Thus, when debtor commenced planting his 2000 wheat on October 2, 1999, the debtors' default had been cured and the United States' debt was no longer due at all, much less past due for more than six months. AgriBank is not entitled to priority in the 2000 wheat.

Debtors next planted their 2000 corn crop between April 22 and April 26, 2000. Thus, any advances qualifying for priority status must have been made fewer than three months before April 22 or after January 22, 2000. According to the list of advances made by AgriBank and agreed to among the parties, there were no advances made in that period and the Court need not apply the "six month" test at all. The United States has priority in the 2000 corn crop.

Similarly, debtors planted their 2000 soybeans between May 6 and May 12, 2000. To qualify for priority status, advances would have had to be made after February 6, 2000. There appear to be no advances in that period. The United States has priority in the debtors' 2000 soybean crop.

With respect to the 2000 milo, debtors planted same between June 1 and June 3, 2000. Qualifying AgriBank advances would have had to be made after March 1, 2000. AgriBank made one advance (its final advance) on June 3, 2000 in the amount of \$3,197. Unfortunately for AgriBank, however, this advance does not meet the "six month" test. Debtors defaulted on their January 1, 2000 loan payment to the Government. At the time they commenced planting milo, the January payment had been due for a period of only five months. The United States therefore has priority in the debtors' 2000 milo crop.

Finally, the debtors planted their 2001 wheat crop between September 28 and October 11, 2000. There appears to have been no advance made by AgriBank to enable the planting of this crop. Indeed, the parties agree that the United States' \$19,000 loan made in July of 2000 funded

the planting of this crop. The United States has priority in the debtors' 2001 wheat.

In short, even if AgriBank's security interest was perfected, its advances would not qualify for super priority under the UCC. Unlike the situation in In re Cress, 89 B.R. 163 (Bankr. D. Kan. 1988), where the input lender was granted priority to the extent of a past due payment owing to the earlier-perfected lender, none of the Germanns' crops were planted during times when their loan payments were more than six months past due. Another similar case is In re Connor, 733 F.2d 523 (8<sup>th</sup> Cir. 1984) where the failure of the input lender to demonstrate that the debtors' installment payments to the earlier lender were ever past due by more than six months sealed its fate. As one learned commentator has stated, "Most cases construing § 9-312(2) illustrate its weakness as a source of purchase money security." BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶8.05[2][c] (Revised ed. 2000). AgriBank is now the victim of that weakness.

Having decided that AgriBank's security interest in debtors' growing crops was unperfected and, in any case, that AgriBank cannot benefit from the provisions of §9-312(2) because of the temporal sequence of debtors' plantings and defaults, this Court concludes that the security interest of the United States as to the debtors' growing crops at the time of the filing of case, and any cash collateral proceeds thereof, is a valid and perfected first security interest and that the adequate protection lien granted by Judge Pusateri in his Cash Collateral Order dated March 7, 2001, should be for the sole benefit of the United States acting through the Farm Service Agency. That order, as well as this Court's Final Order on Cash Collateral entered August 23, 2001 shall be deemed amended and supplemented to that extent.

IT IS SO ORDERED.

Dated this 1st day of November, 2001.

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ROBERT E. NUGENT, BANKRUPTCY JUDGE  
UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS

## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion on Debtors' Motion For Use of Cash Collateral** were deposited in the United States mail, postage prepaid on this 1<sup>st</sup> day of November, 2001, to the following:

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