

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

In re:

BORDEN DAIRY COMPANY, *et al.*,

Debtors.¹

Chapter 11

Case No. 20-10010 (CSS)

(Jointly Administered)

Ref. Dkt. No. 586, 587

Obj. Deadline: May 12, 2020 at Noon

**PRELIMINARY OBJECTION OF PNC BANK, NATIONAL ASSOCIATION
TO DEBTORS' MOTION FOR AN ORDER APPROVING KERP/KEIP PLAN
AND MOTION TO SHORTEN NOTICE THEREON**

PNC Bank, National Association, in its capacities as first-out lender, letter of credit issuer, and administrative and collateral agent (“Agent”) under that certain Financing Agreement dated as of July 6, 2017 (as amended, restated, supplemented and/or otherwise modified) by and among Debtor Borden Dairy Company as borrower, each of the other Debtors, as guarantors, and the lenders party thereto from time to time (the “Lenders”), objects to (i) *Debtors' Motion for Order, Pursuant to Sections 363(b) and 503(c) of the Bankruptcy Code: (I) Approving Key Employee Retention Plan, and Key Employee Incentive Plan, and (II) Granting Related Relief Filed by Borden Dairy Company* [Dkt. No. 586] (the “KERP/KEIP Motion”) and (ii) *Motion to Shorten the Time for Notice of Debtors' Debtors Motion for Order, Pursuant to Sections 363(b) and 503(c) of the Bankruptcy*

¹ The debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers are: Borden Dairy Company (1509); Borden Dairy Holdings, LLC (8504); National Dairy, LLC (9109); Borden Dairy Company of Alabama, LLC (5598); Borden Dairy Company of Cincinnati, LLC (1334); Borden Transport Company of Cincinnati, LLC (3462); Borden Dairy Company of Florida, LLC (5168); Borden Dairy Company of Kentucky, LLC (7392); Borden Dairy Company of Louisiana, LLC (4109); Borden Dairy Company of Madisonville, LLC (7310); Borden Dairy Company of Ohio, LLC (2720); Borden Transport Company of Ohio, LLC (7837); Borden Dairy Company of South Carolina, LLC (0963); Borden Dairy Company of Texas, LLC (5060); Claims Adjusting Services, LLC (9109); Georgia Soft Serve Delights, LLC (9109); NDH Transport, LLC (7480); and RGC, LLC (0314). The location of Debtors' service address is: 8750 North Central Expressway, Suite 400, Dallas, TX 75231.

Code: (I) Approving Key Employee Retention Plan, and Key Employee Incentive Plan, and (II) Granting Related Relief [Dkt. No. 587] (the “Motion to Shorten” and together with the KERP/KEIP Motion, the “Motions”).

OBJECTION TO MOTION TO SHORTEN

1. Without notice to Agent, Debtors filed the Motions on Friday night and requested an expedited hearing on May 27. The timing is suspicious because Debtors faced no filing deadline and contemporaneously filed a motion for an expedited disclosure statement hearing on June 4, which is also the tentative date for the sale hearing in these cases. Why the KERP/KEIP Motion needs to be heard one week earlier remains a mystery. Simply, Debtors fail to establish the need for expedited consideration.

2. Agent is concerned the proposed KERP/KEIP will affect the Debtors’ ongoing sale process by adding over \$4 million of employee obligations to the Debtors’ balance sheet a few days prior to the June 1 bid deadline and create yet another substantial obligation for which the Debtors have no funds to pay and for which approval was not obtained under the Final Cash Collateral Order (defined below).

3. Deferring the hearing on the KERP/KEIP Motion to June 4 or later would avoid this unnecessary distraction to the sale process and permit the future owners of this enterprise to make appropriate decisions about employee retention and compensation.

PRELIMINARY OBJECTION TO KERP/KEIP MOTION

4. The KERP and KEIP plans are excessive and unnecessary under the circumstances. The Debtors’ recent projections show a liquidity shortfall of approximately \$20 million based on accrual of administrative expenses and estate professional fees to case conclusion prior to adding any KERP/KEIP payments. Meanwhile, the national unemployment rate for April 2020 surged to

a record high of 14.7%, with 20.5 million jobs eliminated.² Nevertheless, the Debtors – without the support of the Agent or the Committee – seek to increase their liquidity shortfall and shower their officers and managers with more than \$4 million of bonuses on the eve of a sale of the company to a new owner. Such a decision is more properly made by a new owner (whether through a sale or plan) and not the existing board of managers on its way out.

5. Remarkably, the KERP is structured to pay 25% of the approximate \$2 million upon Court approval notwithstanding the lack of authority for this expense in the Debtors' cash collateral budget and the lack of unencumbered cash for any such payments. Agent opposes the payment of any KERP or KEIP amounts from Agent's cash collateral.

6. This is not the first time in the cases the Debtors have sought to pay bonuses. The Debtors previously requested permission to pay up to \$1,575,000 in alleged non-insider prepetition bonuses to certain employees in connection with their requested first day relief. *See Motion For Entry of an Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation and Reimbursable Expenses, and (B) Continue Employee Benefits Program, and (II) Granting Related Relief* [Dkt No. 5] at ¶¶ 57-58 (seeking authority to pay non-insider prepetition AIP obligations arising from the 2019 calendar year of up to \$1,575,000). The Debtors eventually withdrew that request. However, with the KERP/KEIP Motion, the Debtors appear to have renewed and broadened their request. *Compare* KERP/KEIP Motion ¶¶ 12, 16-23 57-28 (explaining that the Debtors' prepetition AIP obligations remain unpaid; seeking to pay \$2,027,000 in KERP Plan liabilities to 44 employees, inclusive of a \$250,000 slush fund to be applied in the Debtors' discretion).

² See U.S. Bureau of Labor Statistics website, <https://www.bls.gov/news.release/empsit.nr0.htm> (05/08/2020).

7. If the KERP is a means to pay prepetition AIP obligations, the KERP/KEIP Motion does not request authority, much less cite any law, to enable Debtors to pay prepetition bonuses in excess of the \$13,650 statutory cap under section 507(a)(4) of the Bankruptcy Code. Regardless of whether the Debtors may exceed the section 507(a)(4) cap, the Debtors are permitted to use cash collateral only in accordance with the approved budget. *See Final Order (A) Authorizing Use of Cash Collateral, (B) Granting Adequate Protection, (C) Authorizing Use of Reserve Account Cash, and (D) Granting Related Relief* [Dkt. No. 369] (the “Final Cash Collateral Order”) at ¶ 2 (providing that Debtors may only use cash collateral “subject to the terms and conditions of this Final Order and solely in accordance with the Applicable Budgets.”). The current approved budget³ does not include payment of the KERP/KEIP bonuses, and any such payment would be a “Termination Event” under the Final Cash Collateral Order. *See id.* at ¶14(q) (providing that a Termination Event shall occur if “[t]he Debtors shall use Cash Collateral in any manner not permitted by or otherwise inconsistent with the Applicable Budget and the other terms of this Final Order.”). Yet, the KERP/KEIP Motion fails to provide any explanation as to how the Debtors intend to pay over \$4 million in bonuses (the proposed KEIP bonus program includes up to \$2.015 million to insiders and the proposed KERP bonuses total approximately \$2.027 million) without violating the Final Cash Collateral Order.

8. Many employees received temporary hazard pay increases recently in connection with the COVID-19 health crisis, although not in the original budget. Additional pay increases now will only strain liquidity. Such a move by management is absurd at a time when the company is being marketed for sale. It is even more absurd in this historic recession when millions of Americans are either losing their jobs or taking pay cuts.

³ A copy of the current approved budget is attached as Exhibit “2” to the Final Cash Collateral Order.

9. The KEIP is likewise troubling. The Board's approval of \$2 million of "incentive" payments tied to an EBITDAR target measured only a month or so after the hearing raises more questions than answers, such as whether the EBITDAR targets will represent appreciable increases over EBITDAR for comparable periods and whether it translates into actual value realized by the Debtors' stakeholders who would fund these bonuses. Unlike the dozens of intended targets of the KERP, the KEIP seeks to provide a similar amount of \$2 million to eight senior executives before they are subject to negotiating the terms of any continued employment with their new owner on the other side of the sale process. Any pay increases should be determined by the current market and not insiders seeking to reward their own before handing over the keys. Indeed, locking in such a rich program now could negatively impact bidding.

10. As the proponents of the KERP and KEIP, the Debtors bear the burden of proving that such plans satisfy the applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 363(b) (requiring a sound business purpose); 11 U.S.C. § 503(c)(3) (requiring, *inter alia*, that a KEIP be "justified by the facts and circumstances of the case."); *In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236 (Bankr. N.D. Tex. 2009) (holding that, in adopting Bankruptcy Code section 503(c)(3) with respect to KEIPs, "Congress intended the court to play a more critical role in assessing transactions . . . that fall within the ambit of section 503(c)(3)."); *In re Dana Corp.*, 358 B.R. 567, 582 (Bankr. S.D.N.Y. 2006) (proponent must show that benchmarks "are difficult targets to reach and are clearly not 'lay-ups'."). The KERP/KEIP Motion fails in this regard because there are no measured performance benchmarks to be achieved that would entitle these eight executives to an earnout. The KEIP allegedly "is designed to incentivize the KEIP Participants . . . to preserve and maximize the value of Borden's business..." (¶ 24) but at this late stage there is very little prospective work to be done to maximize value or performance benchmarks to achieve, as the sale

process is nearing completion and the auction will occur in less than three weeks. Given the lack of proper incentives to satisfy the statutory requirements, the KERP/KEIP Motion should be denied.

WHEREFORE, Agent requests that the Court enter an order: (i) denying the Motion to Shorten; (ii) denying the relief requested in the KERP/KEIP Motion; and (iii) granting such other and further relief as is equitable and just.

Dated: May 12, 2020

Respectfully submitted,

BLANK ROME LLP

/s/ Regina Stango Kelbon

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