

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE:)	Bankruptcy No. 20-22889-JAD
)	
THE CRACKED EGG, LLC,)	Chapter 11
)	
Debtor,)	
_____)	
)	
COUNTY OF ALLEGHENY, a political)	
subdivision of the Commonwealth of)	
Pennsylvania,)	
)	
Movant,)	
)	
v.)	
)	
THE CRACKED EGG, LLC,)	
)	
Respondent.)	

MOTION FOR RELIEF FROM AUTOMATIC STAY

Movant, County of Allegheny, through the Allegheny County Health Department (“ACHD” or “Department”), by and through its undersigned counsel, hereby files its Motion for Relief from Automatic Stay pursuant to Section 362(b)(4) of the U.S. Bankruptcy Code. In support of this Motion, the Department hereby incorporates by reference as if fully set forth herein the averments and exhibits contained in the Department’s Complaint in Civil Action - Equity (the “Complaint” and which has been attached hereto as Exhibit “A”).

I. SUMMARY OF RELEVANT FACTS

1. Movant is the County of Allegheny, a home rule county and political subdivision of the Commonwealth of Pennsylvania, acting by and through the Allegheny County Health Department (hereinafter “ACHD”), a local health department organized under the Local Health

Administration Law, 16 P.S. §§ 12001-12029, (hereinafter “LHAL”) whose powers and duties include the enforcement of laws relating to public health and food and environmental safety within Allegheny County.

2. Upon information and belief, Debtor The Cracked Egg, LLC operates a food facility, The Crack’d Egg, at 4131 Brownsville Road, Pittsburgh, PA 15227 (lot and block number 0188-N-00133).

3. The Crack’d Egg operates from property owned by Tri-River Associates II, LLC.

4. The LHAL requires that whenever the ACHD’s Director finds a nuisance detrimental to the public health, the Director must order that that nuisance be abated. 16 P.S. § 12012(d).

5. The LHAL also directs the ACHD to execute “the rules and regulations of the State Department of Health and other departments, boards, or commissions of the State government.” 16 P.S. § 12010(a).

6. Pursuant to the Pennsylvania Disease Prevention and Control Law of 1955 (hereinafter “DPCL”), the ACHD has primary responsibility for the prevention and control of communicable and non-communicable diseases in Allegheny County. 35 P.S. § 521.3(a).

7. Section 5 of the DPCL states, “Upon the receipt by a local board or department of health or by the department, as the case may be, of a report of a disease which is subject to isolation, quarantine, or any other control measure, the local board or department of health or the department shall carry out the appropriate control measures in such a manner and in such a place as is provided by rule or regulation.” 35 P.S. § 521.5.

8. The DPCL authorizes the State Advisory Health Board to promulgate rules and regulations concerning “...the communicable diseases which are to be subject to isolation,

quarantine, or other control measures...” 35 P.S. § 521.16(a)(3).

9. The ACHD is a “local health authority” as that term is defined by State Advisory Health Board promulgated regulations. *See* 28 Pa. Code § 27.1.

10. As a county department of health organized under the LHAL, the ACHD is a “local morbidity reporting office” or “LMRO”, as that term is defined by the State Advisory Health Board at 28 Pa. Code § 27.1.

11. The State Advisory Health Board has issued a regulation regarding communicable disease control measures which states:

a. The Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection; and any other disease control measure the Department or the local health authority considers to be appropriate for the surveillance of disease, when the disease control measure is necessary to protect the public from the spread of infectious agents.

b. The Department and local health authority will determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection.

c. If a local health authority is not an LMRO, it shall consult with and receive approval from the Department prior to taking any disease control measure.

28 Pa. Code § 27.60.

12. The novel coronavirus 2019 (hereinafter “COVID-19”) is a highly infectious, communicable disease caused by a new coronavirus not previously seen in humans. It is a respiratory disease with symptoms including fever, cough, shortness of breath, and difficulty breathing.

13. On March 6, 2020, Pennsylvania Governor Tom Wolf, finding that threat from COVID-19 constitutes a threat of imminent disaster to the health of the citizens of the

Commonwealth, made a statewide disaster declaration concerning the COVID-19 pandemic.

14. On March 12, 2020, Allegheny County made a county-wide emergency declaration due to the COVID-19 pandemic according to the ratification by county council.

15. On July 1, 2020, the Commonwealth of Pennsylvania issued an *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings* which required the use of face coverings at indoor locations where the public is generally admitted and while engaged in work, including at restaurants (hereinafter “Universal Face Coverings Order”).

16. On July 15, 2020, the Commonwealth of Pennsylvania issued an *Order of the Secretary of the Pennsylvania Department of Health Directing Mitigation Measures* which required restaurants to limit occupancy to 25% of stated fire code maximum occupancy for indoor dining and to limit occupancy at discrete indoor events or gatherings to 25 persons; include restaurant staff in occupancy limit; and employ social distancing, masking, and other mitigation measures to protect workers and patrons (hereinafter “Mitigation Order”) (the Universal Face Coverings Order and the Mitigation Order shall hereinafter collectively be referred to as the “COVID-19 Control Measure Orders”).

17. Section 7 of the Mitigation Order states as follows:

Enforcement of this Order will begin on the effective date. All Commonwealth agencies involved in the licensing or inspection of any of the above-described facilities are directed to increase their enforcement efforts to ensure compliance with these critical mitigation measures. All local officials currently involved or able to be involved in the Commonwealth’s enforcement efforts are called upon to enforce these critical mitigation measures.

18. On June 19, 2020, the ACHD received the first of many complaints from the public regarding The Crack’d Egg’s failure to comply with COVID-19 control measures issued by the Commonwealth of Pennsylvania.

19. On July 1, 2020, ACHD representatives inspected The Crack’d Egg and observed

public-facing employees and patrons not wearing face masks.

20. On July 28, 2020, ACHD representatives re-inspected The Crack'd Egg and observed employees and patrons not wearing face masks.

21. On August 5, 2020, ACHD representatives re-inspected The Crack'd Egg and observed food safety violations of the ACHD Rule and Regulation Article III, "Food Safety", (hereinafter "Article III") and COVID-19 violations, including public-facing employees working without wearing face masks, patrons admitted into facility without face masks, permitting the use of a bar area, and failure to sufficiently space apart outdoors seats.

22. On August 7, 2020, ACHD representatives re-inspected The Crack'd Egg and observed food safety violations of Article III and continuing COVID-19 violations, including public-facing employees working without wearing face masks, patrons admitted into facility without face masks, and failure to sufficiently space apart outdoors seats.

23. On August 11, 2020, ACHD representatives re-inspected The Crack'd Egg and observed public-facing employees working without wearing face masks and a patron admitted into the facility without a face mask.

24. Due to the imminent danger to the public health caused by continued non-compliance with the Governor's orders regarding COVID-19 control measures, on August 11, 2020, the ACHD immediately suspended The Crack'd Egg's permit to operate and ordered the facility to close (hereinafter "August 11th Closure Order").

25. In violation of this suspension, The Crack'd Egg has continued to operate, conceal its closure sign, and remove the sign, as observed by ACHD representatives on August 24, 2020 through August 28, 2020, inclusive, August 31, 2020 through September 4, 2020, inclusive, and September 10, 2020.

26. Upon information and belief, Debtor The Cracked Egg, LLC has deliberately continued operations in direct violation and contravention of the August 11th Closure Order.

27. At the time of the Chapter 11 filing, the Debtor was the subject of various investigations and proceedings instituted by the Allegheny County Health Department.

II. ARGUMENT

28. The averments set forth in Paragraphs 1-27 are incorporated by reference as though fully set forth below.

29. The “purpose” of an automatic stay is to momentarily pause debtor’s obligation to creditors and “to protect creditors by preventing a race for the debtor's assets.” *Commonwealth Oil Ref. Co., Inc. v. United States Env'tl. Prot. Agency*, 805 F.2d 1175, 1182 (5th Cir. 1986) citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin.News 5963, 6296–97. However, the automatic stay is *not* unconditional. *Commonwealth Oil Ref. Co., Inc.* at 1182. *See also* 11 U.S.C. § 362(b).

30. One statutory exemption to the automatic stay allows for “the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.” *In re Nortel Networks, Inc.*, 669 F.3d 128, 137 (3d Cir. 2011). *See also* 11 U.S.C. § 362(b)(4).

A. Allegheny County is a Governmental Unit.

31. The term “governmental unit” is defined as “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” *See* 11 U.S.C. § 101(27).

32. The County of Allegheny is a “governmental unit”, as defined by 11 U.S.C. § 101(27), because it is a home rule county and political subdivision of the Commonwealth of Pennsylvania.

B. Allegheny County is Enforcing Police and Regulatory Power.

33. To determine whether a proceeding falls in the police power exception to the automatic stay, circuit courts apply two tests, the pecuniary purpose test and the public policy test:

The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. If the purpose of the law is to promote public safety and welfare or to effectuate public policy, then the exception to the automatic stay applies. If, on the other hand, the purpose of the law is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights, then the exception is inapplicable.

In re Nortel Networks, Inc. at 139-40. *See also Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385-86 (6th Cir. 2001).

34. Regulatory proceedings related to health and safety violations fall into the police power exception to the automatic stay. *In re Nortel Networks, Inc.* at 140. *See also Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 388 (3d Cir. 1987) citing H.R.Rep. No. 595, 95th

Cong., 2nd Sess. 343, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5963, 6299; *see also* S.Rep. No. 989, 95th Cong., 2nd Sess. 52, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5838. (“The legislative history explains that paragraph (4) provides an exception to the automatic stay ‘where a governmental unit is suing a debtor to stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law.’”); *See also United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086-87 (3d Cir. 1987). (EPA permitted to enforce relevant environmental statute, regulations, and consent decree provisions against Chapter 11 debtor because they are actions to enforce its police and regulatory power, and thus, satisfy the § 362(b)(4) exception to the automatic stay.); *See also Commonwealth Oil Ref. Co., Inc.* at 1183-84. (Automatic stay does not apply because EPA’s “actions to enforce police and regulatory powers...fall[] within the § 362(b)(4) exception to the automatic stay.”)

35. The exception to the automatic stay in Section 362(b)(4) is not limited to situations where the harm to the public health is imminent. *See Commonwealth Oil Ref. Co., Inc.* at 1184. (“The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where ‘imminent and identifiable harm’ to the public health and safety or ‘urgent public necessity’ is shown.”)

36. Moreover, spending money to ensure the facility prevents *future* harm to employees and customers and to restore the work site to a safe condition does not prevent the application of the exception to an automatic stay. *See Brock* at 389. (“...companies that have sought bankruptcy protection are not automatically insulated from orders to abate, which may have as great or greater financial consequences than direct money judgments. Nevertheless, an entity that operates in a regulated sphere is obliged to comply with the relevant regulations; otherwise, it must exit the

field.”) *See also Wheeling-Pittsburgh Steel Corp.* at 1087. (“[E]conomic infeasibility is not a proper basis for staying compliance with the Clean Air Act.”)

37. The LHAL, DPCL, and the COVID-19 Control Measure Orders direct the ACHD to enforce state laws.

38. The purpose of the COVID-19 Control Measure Orders is to “protect the public from the spread of COVID-19.”

39. Enforcing the COVID-19 Control Measure Orders to prevent the transmission of COVID-19 is an acceptable exercise of the Commonwealth’s police power as well as the ACHD’s regulatory authority because its purpose is to protect the health and safety of the public against a highly infectious virus.

40. In this case, the ACHD seeks to abate health and safety violations by requiring The Cracked Egg, LLC to comply with the August 11th closure order until it submits a satisfactory COVID-19 compliance plan and adheres to relevant regulations, statutes, and orders.

41. Abatement and compliance with the COVID-19 Control Measure Orders will greatly reduce risk of *future* transmission of COVID-19 at The Crack’d Egg.

C. Allegheny County is Not Attempting to Enforce a Money Judgment.

42. A money judgment “is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a sum of money to the plaintiff. Essentially, it need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant.” *Penn Terra Ltd. v. Dep't of Env'tl. Res, Commonwealth of Pennsylvania.*, 733 F.2d 267, 275 (3d Cir. 1984).

43. The ACHD has *not* assessed a civil penalty against The Cracked Egg, LLC.

44. The ACHD's relief requesting the Court to order The Crack'd Egg to close operations until a satisfactory COVID-19 plan has been submitted and approved by the ACHD does *not* achieve what a money judgment would attempt to accomplish. The purpose of this relief is to protect against *future* transmission of COVID-19, not compensate for past wrongful acts. *Id.* at 277. ("Thus, it is unlikely that any action which seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment, or one to enforce a money judgment.")

45. If this Court should find that a relief for civil penalties consistent with ACHD Rules and Regulations Article XVI § 1605 and Article III § 337.4(D) prevents the application of 11 U.S.C. § 362(b)(4), then the ACHD is willing to forgo this monetary request and preserve the remaining relief requested in order for the automatic stay to be lifted.

III. CONCLUSION

WHEREFORE, Movant County of Allegheny, through the Allegheny County Health Department, herein moves this Honorable Court to issue an order, in the form herein attached, relieving the automatic stay in its proceeding against Debtor The Cracked Egg, LLC at Docket Nos. Adversary 20-02166-JAD and GD-20-9809.

Date: December 11, 2020

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