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3 **NOT FOR PUBLICATION**

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5 **UNITED STATES BANKRUPTCY COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7 **MODESTO DIVISION**

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9 In re) Case No. 09-93774-E-12
10 LUIS T. BENTO and)
11 MARIA C. BENTO,) DCN: WFH-5
12 Debtor(s).) Date: January 25, 2012
Time: 10:30 a.m.
Dept: E (Modesto)

13 **MEMORANDUM OPINION AND DECISION**
14 ***EX PARTE* MOTION TO DISBURSE MONIES**

15 Farmers and Merchants Bank of Central California ("Farmers &
16 Merchants") filed an *ex parte* motion for authorization to disburse
17 the proceeds from the sale of the Debtors' Milk Quota which it has
18 been holding pending further order of this court. The court's
19 issued an order on August 24, 2011 authorizing Nelson Enmark, the
20 Chapter 12 Trustee, to execute the documents necessary to complete
21 the sale, ordered the Debtors, and their respective agents and
22 representative, not to interfere with the sale, and that the
23 proceeds of the sale be deposited at Farmers and Merchants Bank
24 directly from the sale escrow for the sale as previously ordered by
25 this court pursuant to a June 23, 2011 order, Dckt. 241. Dckt.
26 266. This August order was necessary because the Debtors failed to
27 complete the sale of the Milk Quota as previously authorized by the
28 court.

1 The Debtors originally sought on June 22, 2011, and obtained
2 from the court an emergency order to sell the Milk Quota, asserting
3 that the Milk Quota must be sold immediately and that Farmers &
4 Merchants had a lien on the Milk Quota. Dckt. 230. The emergency
5 motion also sought authority to sell other collateral which secured
6 the Farmers & Merchants' claim, and use the sales proceeds to feed
7 and care for their dairy herd. Farmers & Merchants was unable to
8 provide their consent to the sale or use of cash collateral.
9 Farmers and Merchants did not assert that it opposed the sale, but
10 the representatives at court for the June 23, 2011 hearing stated
11 that they were not authorized to consent (or object) to the sale of
12 some of the herd and the use of the sales proceeds to provide feed
13 and care to the remaining herd (which continued to be Farmers and
14 Merchants' collateral).

15 After a hearing on the emergency motion, the court approved
16 the sale of a portion of the herd and the use of the cash
17 collateral proceeds to purchase feed for the remaining herd. The
18 court also approved the sale of the Debtors' Milk Quota for a sales
19 price of at least \$120,000.00. The order approving the sale
20 further provides,

21 The \$120,000.00 [Milk Quota Sales Proceeds] shall be
22 deposited into a blocked account for the Chapter 12
23 Debtors at Farmers and Merchants Bank, from which no
24 disbursement shall be made except upon further order fo
25 the court. The lien of any creditor against the Milk
Pool Quota which is released by the creditor to allow the
sale to be concluded shall attach to the proceeds for the
sale in the same validity, extent, amount, and priority
as it existed in the Milk Pool Quota.

26 Dckt. 241, court's June 23, 2011 order.

27 Though the Debtors utilized that portion of the order which
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1 allowed them to sell cattle and use the proceeds to feed the
2 remaining herd, they failed to sell the Milk Quota for which they
3 had sought and obtained emergency authorization. This necessitated
4 the court's August 24, 2011 order authorizing the Chapter 12
5 Trustee to execute the documents to sell the Milk Quota. The sale
6 having been authorized pursuant to 11 U.S.C. § 363(b), any
7 creditors who asserted a lien in the Milk Quota were required to
8 remove their lien, with such lien attaching to the Milk Quota
9 proceeds. Dckt. 241, court's June 23, 2011 order.

10 **ADVERSARY TO DETERMINE LIENS**

11 Farmers and Merchants commenced an adversary proceeding
12 against Abilio Nunes and Bernadette Nunes. Adv. No. 11-9070. On
13 December 27, 2011, the court entered an order granting summary
14 judgment for Farmers and Merchants, determining that it held the
15 senior lien on the Milk Quota proceeds to the interest asserted by
16 Abilio Nunes and Bernadette Nunes. No other creditors are a party
17 to the adversary proceeding. On December 27, 2011, the court
18 entered the judgment in the adversary proceeding.

19 **MOTION TO DISBURSE MONEY FROM BLOCKED ACCOUNT**

20 Having obtained the judgment, Farmers and Merchants filed the
21 present ex parte Motion for an order authoring the disbursement of
22 the Milk Quota sale proceeds of \$127,771.40 from the blocked
23 account required in the order approving the sale (Dckt. 241). The
24 Motion states that the monies to be disbursed are from the sale of
25 the Milk Quota. The Motion does not identify the blocked account
26 into which the monies have been deposited, but does generally
27 reference is the "blocked account pursuant to the Court's prior
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1 orders of June 23, 2011 and August 24, 2011" Motion, Dckt. 329.

2 **OPPOSITION TO MOTION**

3 Because Farmers and Merchants sought an order of the court
4 relating to property of the estate, this motion has been filed in
5 the Debtors' bankruptcy case, not merely the adversary proceeding.
6 It was served on the creditors in this case. One creditor,
7 Yosemite Land Bank, FLCA ("Yosemite") filed an opposition. The
8 opposition filed by Yosemite states the following:

- 9 1. Yosemite has a lien on all milk and milk products, together
10 with all accounts, accounts receivable, chattel paper, and
11 general intangibles.
- 12 2. Yosemite perfected its lien by filing a UCC-1 with the
13 California Secretary of State on July 18, 2002, and by filing
14 a UCC continuation statement on February 22, 2007.
- 15 3. Yosemite is not a party to the adversary proceeding, though it
16 has a lien in accounts and milk proceeds.
- 17 4. Yosemite disputes that the adversary proceeding resolved all
18 lien disputes related to milk proceeds and cash proceeds,
19 since it was not a party to the adversary proceeding.
- 20 5. Yosemite also claims a security interest in rents and crops
21 under a Deed of Trust.
- 22 6. Farmers and Merchants Motion to disburse funds is procedurally
23 defective because such relief must be sought through an
24 adversary proceeding.
- 25 7. Farmers and Merchants has improperly attempted to obtain an
26 order compelling the Chapter 12 Trustee to turn over funds to
27 the prejudice of other creditors.

1 8. During the pendency of the case, the Debtors have remitted
2 funds from various sources to the Chapter 12 Trustee, which
3 funds have been commingled and used to make plan payments.
4 Any funds held by the Chapter 12 Trustee cannot be clearly
5 identified as proceeds from the sale of the Milk Quota.

6 Farmers and Merchants responds to the opposition, asserting that
7 Yosemite is mistaken and no request is sought ordering the Trustee
8 to turn over any monies. Rather, the Motion only seeks
9 authorization to disburse the proceeds from the sale of the Milk
10 Quota which are being held in a blocked account at Farmers and
11 Merchants. It is further contended that counsel for Yosemite
12 appeared telephonically at the June 23, 2011 emergency hearing and
13 did not assert a lien in the Milk Quota. Finally, in a foot note
14 Farmers and Merchants contends that even if Yosemite has a lien on
15 the Milk Quota proceeds, the court has now ruled that Farmers and
16 Merchants' lien was perfected in 1999.

17 On this last point, Yosemite (as it points out) was not a
18 party to the adversary proceeding and no determination has been
19 made concerning any dispute concerning the respective liens as
20 between Yosemite and Farmers and Merchants.

21 **COURT ORDERED HEARINGS**

22 This ex parte Motion has been filed to obtain the disbursement
23 of monies from a blocked account at Farmers and Merchants. The
24 court allowed this procedure, presuming that it was a routine
25 matter now that the adversary proceeding had been resolved.
26 Unfortunately, it is not routine, with Yosemite raising several
27 procedural and substantive objections.

1 In this Chapter 12 case there have been a series of emergency
2 motions and parties attempting to act with limited notice. For
3 some, the parties were ultimately able to obtain a common ground
4 and proceed. In others, when the parties could not come to an
5 agreement to care and feed the herd, the court was required to act
6 to prevent not only the suffering of the herd, but to maintain the
7 creditors' collateral.

8 **Hearing on Motion For Disbursement of Monies**

9 Though the opposition filed by Yosemite appears to have little
10 merit, the court does not clearly have before it evidence of the
11 blocked account, funds in the blocked account, and how Farmers and
12 Merchant accounts for the monies in the blocked account. To
13 preclude a larger fight and having to unwind the disbursement of
14 the monies from Farmers and Merchants, the court sets the Motion
15 for a final hearing.

16 Farmers and Merchants shall file supplemental evidence on or
17 before January 6, 2012, identifying the account, receipt of the
18 proceeds from the sale of the Milk Quota, whether any other monies
19 are or have been held in the blocked account with the Milk Quota
20 proceeds, and if any such other funds have been held in the blocked
21 account, an account for the receipt and disbursement (if any) of
22 such monies.

23 Yosemite shall file and serve supplemental evidence and
24 authorities in opposition to the Motion on or before January 17,
25 2012. This supplemental opposition shall clearly state the basis
26 for Yosemite asserting a lien in the Milk Quota proceeds, if any.

1 **Hearing on Basis for Objection**

2 The court also sets for hearing at the same time as the
3 hearing on the Motion, a hearing on the opposition filed by
4 Yosemite. In addition to the supplemental evidence and
5 authorities, Yosemite shall file and serve a Statement of Basis of
6 Opposition which shall address the following:

- 7 1. The basis for asserting that the Farmers and Merchants' Motion
8 asserts that all lien disputes related to milk proceeds and
9 cash proceeds were determined in the adversary proceeding.
10 (Which shall include specific citation to portion of Motion so
11 alleging.)
- 12 2. The basis for asserting that the rents and profits clause in
13 the Deed of Trust is a basis for asserting a lien against the
14 Milk Quota sales proceeds.
- 15 3. The procedural and substantive basis for asserting that the
16 Motion to authorize disbursement from a blocked account must
17 be filed as an adversary proceeding. (Which shall
18 specifically identify the relief requested in the Motion for
19 which an adversary proceeding is required.)
- 20 4. The basis for asserting that "Farmers and Merchants has
21 improperly used an ex parte matter in an effort to obtain an
22 order compelling the Chapter 12 Trustee to turnover funds to
23 [Farmers and Merchants], to the prejudice of all other
24 creditors who claim an interest in the funds."
- 25 5. The attempts to communicate with counsel for Farmers and
26 Merchants concerning the Motion, identification of the Milk
27 Quota sale proceeds, and what monies, if any, were to be
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