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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re  
  
NORPAC Foods, Inc. [TIN 9330],  
Hermiston Foods, LLC [TIN 3927], and  
Quincy Foods, LLC [TIN 7444],  
  
Debtors.

Lead Case No. 19-62584-pcm11  
(Jointly Administered with Case Nos.  
19-33102-pcm11 and 19-33103-pcm11)

Adv. Pro. No.



OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS OF NORPAC  
FOODS, INC., *et al.*,

Plaintiffs,

v.

COBANK, ACB,

Defendant.

**COMPLAINT TO DETERMINE THE  
EXTENT, VALIDITY, PRIORITY, AND  
PERFECTION OF CERTAIN LIENS AND  
SECURITY INTERESTS OF COBANK,  
ACB**

The Official Committee of Unsecured Creditors (the “**Committee**”) appointed in the Chapter 11 bankruptcy cases (the “**Chapter 11 Cases**”) of the above-captioned debtors and debtors-in-possession (the “**Debtors**”), on information and belief and to the best of its knowledge, respectfully alleges as follows:<sup>1</sup>

**NATURE OF THE ACTION**

1. This is an adversary proceeding brought by the Committee pursuant to Federal Rule of Bankruptcy Procedure 7001(a), sections 105(a) and 506(a) of Title 11 of the United States Code (the “**Bankruptcy Code**”), and 28 U.S.C. § 2201, seeking a declaratory judgment determining the extent, priority, and validity of certain liens asserted against the Debtors’ property by the Debtors’ prepetition secured lender and postpetition DIP lender, CoBank, ACB (“**CoBank**”).

2. The Committee seeks a declaration that CoBank does not hold valid, perfected, or enforceable prepetition liens against: (i) real property located at 12494 Dieckman Lane SE, Aumsville, Oregon, Marion County Tax Lot 091W20 00200; (ii) 21 foreign trademarks owned by

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Final DIP Order.

the Debtors; (iii) 135 vehicles owned by the Debtors; (iv) the Debtors' commercial tort claims, including any potential claims against the Debtors' directors, officers, and/or insiders; (v) 21 life insurance policies and/or annuities owned by the Debtors; (vi) prepayments and deposits made for the benefit of third parties, including for utilities, insurance policies, consultants and counsel, and for city, county, and state taxes; (vii) capital credits relating to the Debtors' investment in CoBank; and (viii) net operating losses relating to federal, state, county, and city taxes (collectively, the "Lien Challenge Assets").

### JURISDICTION AND VENUE

3. On August 22, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Oregon (the "Court").

4. The Debtors' Chapter 11 Cases are being jointly administered under Case No. 19-62584-pcm11.

5. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a). Venue is proper under 28 U.S.C. §§ 1408 and 1409(a). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (K).

### THE PARTIES

6. Plaintiff, the Committee, was duly appointed in these Chapter 11 Cases on August 30, 2019, by the Office of the United States Trustee pursuant to section 1102 of the Bankruptcy Code, which appointment was subsequently amended from time to time. The Committee is vested with, among other things, the powers described in section 1103 of the Bankruptcy Code. Pursuant

to Paragraph 21 of the Final DIP Order (defined herein) the Committee has standing to commence this action.

7. Defendant CoBank is the Debtors' prepetition and postpetition secured lender.

## RELEVANT FACTS

### **A. General Background**

8. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors-in-possession.

9. Information regarding the Debtors' history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of these Chapter 11 Cases can be found in the *Declaration of Shawn Campbell in Support of First Day Motions* [ECF No. 16] and in the *Declaration of Winston Mar in Support of First Day Motions* [ECF No. 17].

### **B. The Debtors' Prepetition Secured Obligations**

10. On September 13, 2019, the Court entered a *Final Order Granting Debtors' Motion for Authorization to Secured Credit* (the "**Final DIP Order**") [ECF Doc. No. 147]. In the Final DIP Order, the Debtors acknowledged, represented, stipulated, and agreed, *inter alia*, that:

- a. CoBank, as administrative agent, is the holder of a prepetition claim against the Debtors in the approximate sum of \$125,179,773.94 consisting of borrowings of \$123,226,611.31, accrued interest of \$1,948,564.12, accrued fees of \$4,598.51, plus all other costs, fees, and obligations owing, including, without limitation, all costs and expenses of administration, collection, and enforcement incurred by CoBank prior to the Petition Date (the "**Prepetition Indebtedness**");
- b. The Pre-Petition Indebtedness is evidenced by a credit agreement dated November 15, 2017 by and between the Debtors and CoBank, in its capacity as administrative agent,

together with all other documents, instruments, forbearances, and amendments thereto (the “Prepetition Credit Agreement”); and

- c. The Prepetition Indebtedness is secured by a security interest and lien in substantially all of the Debtors’ real and personal property (the “Prepetition Collateral”).

*See* Final DIP Order ¶ 4.

11. The Debtors’ admissions were made subject to certain challenge rights:

The acknowledgements and admissions of Debtors in paragraph 4 hereof shall be binding on their Estates and all parties in interest . . . unless the Committee or other party in interest has filed an adversary proceeding or contested matter challenging any such acknowledgements or admissions (each, a “Challenge”), no later than October 17, 2019 subject to extension or written consent of CoBank and the Committee or order of the court for cause. The Committee shall have standing to commence a Challenge.

*Id.* ¶ 21.

12. In addition, Paragraph 22 of the Final DIP Order addressed issues of disgorgement and recharacterization of payments made to CoBank:

Any and all payments made to CoBank pursuant to this Order including, but not limited to interest, fees, and expenses, shall be subject to disgorgement and/or recharacterization (for example, a payment of interest may be recharacterized to pay down principal) upon a successful Challenge.

*Id.* ¶ 22.

13. Pursuant to Paragraph 8 of the Final DIP Order, CoBank was granted certain claims and security interests to secure Postpetition Indebtedness (as defined in the Final DIP Order). *See* Final DIP Order at ¶ 8(a)(i) and (ii). However, such postpetition liens and security interests granted to CoBank are expressly made subject to the Committee’s Challenge rights, as well as the

rights to disgorge and recharacterize any payments to CoBank, pursuant to Paragraphs 21 and 22 of the Final DIP Order. *See* Final DIP Order at ¶ 8(a)(ii).

14. On October 17, 2019, the Court entered a *Stipulated Order re Limited Extension of Deadline for Challenges* [ECF No. 254], which extended the Challenge deadline with respect to the Lien Challenge Assets from October 17, 2019, to November 15, 2019.

15. On November 15, 2019, the Court entered a *Stipulated Order re Further Limited Extension of Deadline for Challenges* [ECF No. 401], which further extended the Challenge deadline with respect to the Lien Challenge Assets from November 15, 2019, to December 13, 2019.

16. CoBank has refused to agree to the Committee's request to further extend the Challenge deadline with respect to the Lien Challenge Assets.

**COUNT I**  
**(Declaratory Judgment Regarding Real Property)**

17. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

18. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

19. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien in the Debtors' real property located at 12494 Dieckman Lane SE, Aumsville, Marion County, Oregon, and designated as Marion County Tax Lot 091W20 00200 (the “**Property**”).

20. CoBank assets that it holds a first priority perfected security interest and/or lien against the Property.

21. Upon information and belief, CoBank does not hold a valid, perfected, or enforceable deed of trust and/or mortgage encumbering the Property.

22. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien in the Debtors' Property.

23. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors' Property.

**COUNT II**  
**(Declaratory Judgment Regarding Foreign Trademarks)**

24. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

25. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

26. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against 21 of the Debtors' trademarks registered in Canada (7), China (4), South Korea (4), Saudi Arabia (2), the United Arab Emirates (2), and Mexico (2) (collectively, the “**Foreign Trademarks**”).

27. CoBank assets that it holds a first priority perfected security interest and/or lien against the Foreign Trademarks.

28. Liens granted in copyrights, patents, trademarks and other intellectual property created under the laws of a foreign jurisdiction may be subject to the laws of those jurisdictions, which laws may state that the laws of such foreign jurisdiction, and not the laws of the United States, govern liens granted in such intellectual property.

29. Upon information and belief, CoBank does not hold a valid, perfected, or enforceable lien encumbering the Foreign Trademarks because CoBank has failed to register such Foreign Trademarks in the various foreign jurisdictions.

30. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien in the Debtors' Trademarks.

31. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors' Trademarks.

**COUNT III**  
**(Declaratory Judgment Regarding Vehicles)**

32. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

33. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

34. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against 135 of the Debtors' motor vehicles (the “**Vehicles**”).



35. CoBank assets that it holds a first priority perfected security interest and/or lien against the Vehicles.

36. Liens against motor vehicles are properly perfected upon the issuance by the applicable motor vehicle agency of a certificate of title to the listed lienholder.

37. Upon information and belief, no certificates of title to any of the Vehicles were ever issued in CoBank's name.

38. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien against the Debtors' Vehicles.

39. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors' Vehicles.

**COUNT IV**  
**(Declaratory Judgment Regarding Commercial Tort Claims)**

40. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

41. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

42. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against the Debtors' commercial tort claims, including potential claims against the Debtors' directors, officers, and/or insiders (the **“Commercial Tort Claims”**).

43. CoBank assets that it holds a first priority perfected security interest and/or lien against the Commercial Tort Claims.

44. A UCC financing statement filing is sufficient to perfect a security interest in commercial tort claims held by a borrower only if such claims are described with specificity; simply listing “commercial tort claims” as a collateral type is insufficient.

45. Upon information and belief, CoBank’s UCC financing statement(s) do not list any Commercial Tort Claims with specificity.

46. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien in the Debtors’ Commercial Tort Claims.

47. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors’ Commercial Tort Claims.

**COUNT V**  
**(Declaratory Judgment Regarding Life Insurance Policies and Annuities)**

48. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

49. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

50. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against the Debtors’ life insurance policies and annuities (the “**Life Insurance Policies and Annuities**”).

51. CoBank assets that it holds a first priority perfected security interest and/or lien against the Life Insurance Policies and Annuities.

52. A lien on life insurance policies and annuities must be perfected under applicable non-UCC law by the assignment of the policy and acknowledgement of such assignment by the issuer.

53. Upon information and belief, the Debtors never assigned the Life Insurance Policies and Annuities to CoBank.

54. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien in the Debtors' Life Insurance Policies and Annuities.

55. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors' Life Insurance Policies and Annuities.

**COUNT VI**  
**(Declaratory Judgment Regarding Prepayments and Deposits)**

56. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

57. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

58. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against the Debtors' prepayments and

deposits, including for utilities, insurance policies, consultants and counsel, and for city, county, and state taxes (the “**Prepayments and Deposits**”).

59. CoBank assets that it holds a first priority perfected security interest and/or lien against the Prepayments and Deposits, however, CoBank has failed to provide any evidence concerning whether the Debtors are entitled to reimbursement of such Prepayment and Deposits or how CoBank attempted to perfect against such amounts.

60. Upon information and belief, CoBank does not hold a valid, perfected, or enforceable security interest or lien in the Debtors’ Prepayments and Deposits.

61. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors’ Prepayments and Deposits.

**COUNT VII**  
**(Declaratory Judgment Regarding Net Operating Losses)**

62. The Committee repeats and realleges the foregoing allegations as if set forth at length herein.

63. Pursuant to 28 U.S.C. § 2201, “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

64. There is a real, substantial, and justiciable controversy regarding whether CoBank has a valid and enforceable security interest and lien against the Debtors’ net operating losses (“**NOLs**”).

65. CoBank assets that it holds a first priority perfected security interest and/or lien against the Debtors’ NOLs.

66. NOLs are not considered a property right to which a security interest can attach, but rather are considered tax attributes that attach to a debtor corporation.

67. Accordingly, CoBank does not have a valid, perfected, or enforceable security interest or lien in the Debtors' NOLs.

68. The Committee is entitled to a declaratory judgment that CoBank has no valid, perfected, or enforceable lien and security interest in the Debtors' NOLs.

**WHEREFORE**, the Committee requests that the Court enter a judgment against CoBank declaring that CoBank has no valid, perfected, or enforceable lien or security interest in the Debtors' (i) Property, (ii) Foreign Trademarks, (iii) Vehicles, (iv) Commercial Tort Claims, (v) Life Insurance Policies and Annuities, (vi) Prepayments and Deposits, and (vii) NOLs, and granting the Committee such other and further relief as the Court deems just and proper.

Dated: December 13, 2019

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