

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

AgFeed USA, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 13-11761 (BLS)

Jointly Administered

Hearing Date: May 28, 2014, at 1:30 p.m. (ET)

Objection Deadline: May 5, 2014, at 4:00 p.m. (ET)

**MOTION OF DEBTORS FOR ENTRY OF A FOURTH ORDER
PURSUANT TO SECTION 1121(d) OF THE BANKRUPTCY CODE FURTHER
EXTENDING THE EXCLUSIVE PERIODS FOR THE FILING OF A CHAPTER 11
PLAN AND SOLICITATION OF ACCEPTANCES THEREOF**

AgFeed USA, LLC ("AgFeed USA") and its above-captioned affiliated debtors and debtors in possession (collectively, the "Debtors"), by and through their undersigned counsel, hereby file this motion (the "Motion") for entry of an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order"), pursuant to section 1121(d) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), further extending the Exclusive Periods (as defined below) for the filing of a chapter 11 plan and solicitation of acceptances thereof, and respectfully represent as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the "Amended Standing Order"). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final

¹ The Debtors and the last four digits of their federal tax identification numbers are: AgFeed USA, LLC (8748), AgFeed Industries, Inc. (7168); TS Finishing, LLC (8748); New York Finishing, LLC (8748); Pork Technologies, LC (2076); New Colony Farms, LLC (9246); Heritage Farms, LLC (8141); Heritage Land, LLC (8129); Genetics Operating, LLC (1921); M2P2 Facilities, LLC (8748); MGM, LLC (8748); M2P2 General Operations, LLC (8748); New Colony Land Company, LLC(5834); M2P2 AF JV, LLC (8748); Midwest Finishing, LLC (8748); and Genetic Land, LLC (1921). The Debtors' mailing address is 816 Congress Avenue, Suite 1280, Austin, TX 787101.

order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are section 1121(d) of the Bankruptcy Code, Rule 9006 of the Federal Rules of Bankruptcy Procedure and Rule 9006-2 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware.

BACKGROUND

3. On July 15, 2013 (the “Petition Date”), the Debtors filed voluntary petitions (collectively, the “Chapter 11 Cases”) for relief under chapter 11 of the Bankruptcy Code. The Debtors have continued in possession of their properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On July 23, 2013, the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed an official committee of unsecured creditors (the “Creditors’ Committee”). On August 23, 2013, the U.S. Trustee appointed an official committee of equity security holders (the “Equity Holders’ Committee,” and, together with the Creditors’ Committee, the “Committees”).

5. On August 1, 2013, the Court entered an order [Docket No. 103] (the “AgFeed USA Bidding Procedures Order”), approving, among other things, certain bidding procedures for the sale of substantially all of the assets of AgFeed USA and its Debtor subsidiaries (the “AgFeed USA Sale”). On August 26, 2013, in accordance with the AgFeed USA Bidding Procedures Order, the Debtors held an auction at which the bid submitted by High Plains Pork, LLC, Cohoma Pork, LLC, and Murphy-Brown, LLC (the “AgFeed USA Purchasers”) was identified as the Prevailing Bid (as defined in the AgFeed USA Bidding

Procedures Order) in connection with the AgFeed USA Sale. On August 29, 2013, the Court entered an order [Docket No. 257] approving the AgFeed USA Sale to the AgFeed USA Purchasers. The AgFeed USA Sale closed on September 12, 2013.

6. On October 10, 2013, the Court entered an order [Docket No. 436] (the “AgFeed Industries Bidding Procedures Order”), approving, among other things, certain bidding procedures for the sale of all of AgFeed Industries, Inc.’s stock in AgFeed Industries, Inc. (British Virgin Islands) (the “AgFeed Industries Sale”) and Good Charm International Development Ltd. (the “Proposed BVI Purchaser”) as the stalking-horse bidder. No other bids were received. In accordance with the AgFeed Industries Bidding Procedures Order, the bid submitted by the Proposed BVI Purchaser was identified as the Prevailing Bid (as defined in the AgFeed Industries Bidding Procedures Order) in connection with the AgFeed Industries Sale. On November 26, 2013, the Court entered an order [Docket No. 640] approving the AgFeed Industries Sale to the AgFeed Industries Purchaser. The AgFeed Industries Sale closed on December 6, 2013.

7. On December 18, 2013, the Debtors filed the *Debtors’ Joint Chapter 11 Plan of Liquidation* [Docket No. 699] (the “Plan”) and related disclosure statement [Docket No. 705] with the Court.

8. Additional information about the Debtors’ business and the events leading up to the Petition Date can be found in the *Declaration of Keith A. Maib in Support of First Day Motions* [Docket No. 4], filed on the Petition Date and incorporated by reference herein.

RELIEF REQUESTED

9. By this Motion, the Debtors request, pursuant to section 1121(d)(1) of the Bankruptcy Code, entry of an order further extending the periods within which only the Debtors

may file a chapter 11 plan and solicit acceptances thereof by approximately forty-five (45) days. Unless extended, the Debtors' Plan Period and Solicitation Period, each as defined below, will expire on April 21, 2014² and June 18, 2014, respectively. The Debtors seek to extend the Plan Period and Solicitation Period through and including June 5, 2014 and August 4, 2014, respectively, without prejudice to the Debtors' right to seek further extensions of the Exclusive Periods, as may be appropriate under the circumstances. This is the Debtors' fourth request for an extension of the Exclusive Periods.

BASIS FOR REQUESTED RELIEF

10. Section 1121(b) of the Bankruptcy Code provides for an initial period of one hundred and twenty (120) days after commencement of a chapter 11 case during which a debtor has the exclusive right to propose and file a chapter 11 plan (the "Plan Period"). 11 U.S.C. § 1121(b). Section 1121(c)(3) provides that, if a debtor has not filed a plan that has been accepted before one hundred and eighty (180) days after commencement of a chapter 11 case by each class of claims or interests that is impaired under the plan (the "Solicitation Period" and together with the Plan Period, the "Exclusive Periods"), any party in interest may file a competing plan. 11 U.S.C. § 1121(c)(3). Section 1121(d) permits the Court to extend the Exclusive Periods for "cause." For the reasons set forth herein, the Debtors believe that "cause" exists to extend the Exclusive Periods.

A. Section 1121(d) of the Bankruptcy Code Permits the Court to Extend the Exclusive Periods "For Cause"

11. A debtor's Exclusive Periods are designed to afford a debtor a full and fair opportunity to propose a consensual plan and solicit acceptances of such plan, without disruption

² Pursuant to Local Rule 9006-2, the filing of this Motion prior to the expiration of the current Plan Period shall automatically extend the Exclusive Periods until the Court acts on the Motion without the necessity for entry of a bridge order.

to the administration of the estate that may result from the filing of competing plans by non-debtor parties. To this end, where the Exclusive Periods prove to be unfeasible timeframes, section 1121(d) of the Bankruptcy Code allows the Court to extend such Exclusive Periods for cause. 11 U.S.C. § 1121(d).³ Although the Bankruptcy Code does not define the term “cause,” the legislative history indicates it is intended to be a flexible standard to balance the competing interests of a debtor and its creditors. *See* H.R. REP. NO. 95–595, at 231–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6191 (noting that Congress intended to give bankruptcy courts flexibility to protect a debtor’s interests by allowing unimpeded opportunity to negotiate settlement of debts without interference from other parties in interest).

12. Congress built flexibility into section 1121 of the Bankruptcy Code to give the debtor sufficient opportunity to stabilize its business operations at the outset of its chapter 11 case and to negotiate an effective plan with its creditors. *In re Newark Airport/Hotel Ltd. P’ship*, 156 B.R. 444, 451 (Bankr. D. N.J.), *aff’d*, 155 B.R. 93 (D.N.J. 1993) (noting that Congress designed chapter 11 provisions to enable a debtor to remain in control for some period of time, thereby making reorganization an attractive alternative to financially troubled companies); *Gaines v. Perkins (In re Perkins)*, 71 B.R. 294, 297–98 (W.D. Tenn. 1987) (Congress designed section 1121 to give the debtor time to reach an agreement with its creditors regarding a plan of reorganization).

13. In making the determination to affirm or deny a request to extend the Exclusive Periods for “cause,” courts have considered a variety of factors, including:

(a) The size and complexity of the debtor’s case;

³ Pursuant to section 1121(d)(1) of the Bankruptcy Code, the Plan Period may not be extended beyond a date that is eighteen (18) months after the commencement of a chapter 11 case. 11 U.S.C. § 1121(d)(1). Pursuant to section 1121(d)(2), the Solicitation Period may not be extended beyond a date that is twenty (20) months after the commencement of a chapter 11 case. 11 U.S.C. § 1121(d)(2).

- (b) The necessity of sufficient time to negotiate and prepare adequate information;
- (c) The existence of good-faith progress towards reorganization;
- (d) Whether the debtor is paying its debts as they become due;
- (e) Whether the debtor has made progress negotiating with creditors;
- (f) The length of time a case has been pending;
- (g) Whether the debtor is seeking an extension to pressure creditors; and
- (h) Whether or not unresolved contingencies exist.

In re Cent. Jersey Airport Servs., LLC, 228 B.R. 176, 184 (Bankr. D. N.J. 2002) (citations omitted); *see also In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) (citing to most of the factors listed above in determining whether to extend the exclusive periods); *In re United Press Int'l, Inc.*, 60 B.R. 265, 269 (Bankr. D. D.C. 1986) (holding that the debtor showed “cause” to extend its exclusive period based upon certain of above-quoted factors).

14. The facts and circumstances of these Chapter 11 Cases justify further extending the Exclusive Periods to provide the Debtors with an unimpeded opportunity to confirm a plan of liquidation.

B. Cause Exists for an Extension of the Exclusive Periods in these Chapter 11 Cases

15. Following the Petition Date, the Debtors’ initial focus was on concluding the sales of substantially all of their assets as quickly as possible to maximize recovery to stakeholders. As a result of these successful efforts, the Debtors anticipate that they will have sufficient funds to pay general unsecured creditors in full and to provide a substantial recovery to equity.

16. While the Debtors believe that the Plan filed on December 18, 2013 is confirmable, the Debtors remain in active and ongoing negotiations with a number of

constituencies in an effort to resolve the outstanding issues in connection with the Plan. During the most recent extension of the Exclusive Periods, the Debtors continued to make progress in these Chapter 11 Cases by working with both Committees and certain other constituencies on a revised chapter 11 plan. Since the Debtors hosted the mediation to address the outstanding issues regarding the Plan on February 13, 2014, the mediator, the Debtors, the Committees, and the other constituencies have continued their efforts to resolve the remaining issues.

17. Since the last extension, the Debtors have continued to make significant progress with various constituencies on the terms of a revised chapter 11 plan. While the Debtors intend to continue discussions with all interested parties to reach a fully consensual plan, the Debtors believe they are within striking distance with a critical mass of interests to merit moving forward with the confirmation process. Accordingly, the Debtors intend to file a revised chapter 11 plan and disclosure statement by April 30, 2014, with the goal of reaching plan confirmation by July 31, 2014. It is necessary to press forward even without full consensus to get money into the hands of creditors and equity holders sooner rather than later, with the hope that full consensus may be attainable during the solicitation process.

18. In light of the Debtors' accomplishments to date, and viewed in light of the various factors considered by courts in determining whether cause exists for an extension of the Exclusive Periods, the Debtors believe that each of the factors relevant to these Chapter 11 Cases weighs in favor of the relief requested herein.

19. Since the Petition Date, the Debtors have addressed a broad range of challenging issues. The Debtors, among other things, (i) closed two sales, including one for the stock of AgFeed BVI to a Chinese purchaser, (ii) successfully defended a motion to appoint an examiner, (iii) responded to discovery and negotiated a continuance of a motion to appoint a

chapter 11 trustee, (iv) reached a settlement with AF Sellco regarding its claim, (v) reached a settlement with the Securities and Exchange Commission (the “SEC”) pursuant to which the securities of AgFeed Industries, Inc. were deregistered; and (vi) continued negotiations and/or discussions with several constituencies, including the Committees, the United States Trustee, the SEC, counsel to the pending class action lawsuit, the Debtors’ D&O insurers, and various other creditors and parties in interest. The Debtors intend to use a further extension to achieve as much consensus as possible and begin the process of achieving plan confirmation on or before April 30, 2014.

20. To prepare for the solicitation and confirmation process, the Debtors have continued the process of analyzing over 400 proofs of claim filed in the Chapter 11 Cases. The Debtors have filed several non-substantive and substantive claim objections to clean up the claims register and have worked to supply analysis and information to the Equity Holders’ Committee as it conducts its review of several of the larger claims filed in the Chapter 11 Cases.

21. The Debtors have no ulterior motive in seeking an extension of the Exclusive Periods. The Debtors believe that they have worked diligently over the past nine months to maximize the value of their assets for stakeholders, and require the extension sought by this Motion in order achieve as much consensus as possible before proceeding to the plan confirmation process. Furthermore, termination of the Debtors’ Exclusive Periods would adversely impact the Debtors. If this Court were to deny the Debtors’ request for an extension of the Exclusive Periods, any party in interest would be free to propose a chapter 11 plan for the Debtors. Such a ruling would upset the delicate negotiating balance the Debtors have achieved and would foster a chaotic environment with no central focus and cause substantial, if not irreparable, harm to the Debtors’ efforts to preserve and maximize the value of their estates.

22. Based upon the foregoing, the Debtors respectfully submit that cause exists to extend the Debtors' Exclusive Periods pursuant to section 1121(d) of the Bankruptcy Code. Specifically, the Debtors request that the Plan Period and Solicitation Period be extended through and including June 5, 2014 and August 4, 2014, respectively, without prejudice to the Debtors' right to seek further extensions of the Exclusive Periods, as may be appropriate under the circumstances.

NOTICE

23. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) counsel to the Creditors' Committee; (iii) counsel to the Equity Holders' Committee; and (iv) all parties requesting notice in the Chapter 11 Cases pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure as of the date hereof. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter the Proposed Order and (b) grant such other and further relief as the Court may deem just and proper.

Dated: April 21, 2014
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Ian J. Bambrick

Robert S. Brady (No. 2847)

Donald J. Bowman, Jr. (No. 4383)

Robert F. Poppiti, Jr. (No. 5052)

Ian J. Bambrick (No. 5455)

Ashley E. Markow (No. 5635)

1000 N. King Street

Rodney Square

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Facsimile: (302) 571-1253

Counsel for the Debtors and Debtors in Possession