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

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| In re: | Chapter 11 |
| AgFeed USA, LLC, *et al.*,[1] | Case No. 13-11761 (BLS) |
| Debtors. | Jointly Administered<br>[PROPOSED]<br>**Hearing Date: October 27, 2014, at 10:30 a.m. (ET)**<br>**Objection Deadline: October 23, 2014, at 12:00 p.m. (ET)** |

**AGFEED INDUSTRIES, INC.'S MOTION FOR AN ORDER, PURSUANT TO SECTION 105(A) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019, AUTHORIZING AND APPROVING THE GLOBAL SETTLEMENT BY AND AMONG AGFEED INDUSTRIES, INC., GOOD CHARM INTERNATIONAL DEVELOPMENT, LTD., AND NINGBO TECH-BANK CO., LTD. AND RESOLVING RELATED LITIGATION**

AgFeed Industries, Inc. ("AgFeed Industries"), by and through its undersigned counsel, hereby submits this motion (the "Motion"), pursuant to section 105(a) of title 11 of the United State Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order"), approving the global settlement[2] entered into by and among AgFeed Industries, Good Charm International Development, Ltd. ("Good Charm"), and Ningbo Tech-Bank Co., Ltd. (together with Good Charm, the "Purchaser") and resolving related litigation. In support of the Motion, AgFeed Industries respectfully represents as follows:

[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 Genetics Land, LLC (1921). The mailing address for the Debtors is 816 Congress Ave., Suite 1280, Austin, Texas 78701.

[2] The settlement is currently in the process of being documented. This 9019 Motion is being filed to approve the salient economic terms of the settlement. Debtors intend to present the documented settlement agreement to the Court prior to or at the hearing.

## JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157 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 matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a).

## GENERAL BACKGROUND

2. On July 15, 2013 (the "Petition Date"), AgFeed Industries and the above-captioned affiliated debtors and debtors in possession (collectively, 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.

3. 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").

4. On December 18, 2013, the Debtors filed the *Debtors' Joint Chapter 11 Plan of Liquidation* [Docket No. 699] and related disclosure statement [Docket No. 705] with the Bankruptcy Court for the District of Delaware (the "Court"). On May 9, 2014, the Debtors filed

the *Debtors' First Amended Chapter 11 Plan of Liquidation Supported by the Official Committee of Equity Security Holders* [Docket No. 1075] and the related disclosure statement [Docket No. 1076]. On July 22, 2014, the Debtors filed the *Debtors' Second Amended Chapter 11 Plan of Liquidation Supported by the Official Committee of Equity Security Holders* [Docket No. 1075] and the related disclosure statement [Docket No. 1076]. On September 12, 2014, the Debtors filed the *Debtors' Revised Second Amended Chapter 11 Plan of Liquidation Supported by the Official Committee of Equity Security Holders* [Docket No. 1192] and the related disclosure statement [Docket No. 1193], the conformed versions of which are on file as Docket Nos. 1370 (the "Plan") and 1371 (the "Disclosure Statement"). The Court approved the Disclosure Statement on September 15, 2014 [Docket No. 1367]. A hearing to consider confirmation of the Second Amended Plan (the "Confirmation Hearing") is scheduled for October 27, 2014.

5. 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.

## RELEVANT BACKGROUND

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' stock in AgFeed Industries (British Virgin Islands) (the "AgFeed Industries Sale") and the proposed stock purchase agreement (the "SPA") by and among AgFeed Industries and the Purchaser as the stalking horse bid. No other bids were received. In accordance with the AgFeed Industries Bidding Procedures Order, the Purchaser's bid was identified as the Prevailing Bid (as defined in the AgFeed Industries Bidding Procedures Order) and on November 26, 2013, the Court entered an order [Docket No. 640] (the "AgFeed

Industries Sale Order") approving the AgFeed Industries Sale to the Purchaser. The AgFeed Industries Sale closed on December 6, 2013 (the "Closing").

7. Subsequent to the Closing, the Purchaser submitted a calculation of the Post-Closing Adjustment[3] contemplated by the SPA that indicated that the Purchaser was entitled to an adjustment in excess of $2,000,000. Moreover, the Purchaser further asserted that it was entitled to be reimbursed for certain professional fees paid prior to the Closing. AgFeed Industries asserted, *inter alia*, that the Post-Closing Adjustments was (a) incorrect, (b) untimely, and (c) not calculated using the correct methodologies. AgFeed believed that no Post-Closing Adjustment was owed to Purchaser since it could not meet the $1,000,000.00 minimum threshold.

8. After initial efforts to resolve the matter were unsuccessful, on July 7, 2014, AgFeed Industries filed *AgFeed Industries, Inc.'s Motion for Entry of an Order (I) Enforcing the Sale Order in Connection with the AgFeed Industries, Inc. Stock Sale, (II) Directing U.S. Bank National Association, as Escrow Agent, to Release the Escrowed Funds Which Represents the Unpaid Closing Payment to AgFeed Industries, Inc., and (III) Granting Related Relief* [Docket No. 1165] (the "Motion to Enforce"), by which AgFeed Industries sought to enforce the terms of the AgFeed Industries Sale Order. Subsequent to the filing of the Motion to Enforce, AgFeed Industries has been involved in extensive litigation, including discovery, relating to the asserted Post-Closing Adjustment.

9. On September 23, 2013, AgFeed Industries filed *AgFeed Industries, Inc.'s Motion in Limine for Entry of an Order (I) Determining and Limiting the Scope of Issues Relating to the Post-Closing Adjustment, and (II) Limiting Fact and Expert Discovery to the*

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion to Enforce (defined below) or the SPA, as applicable.

*Issues as Limited* [Docket No. 1380] (the "Motion in Limine"), pursuant to which AgFeed Industries sought to limit the scope of issues in connection with the Motion to Enforce. The Purchaser objected to the Motion in Limine and, following oral argument on October 2, 2014, the Court entered the *Order Denying, Without Prejudice, AgFeed Industries, Inc.'s Motion in Limine for Entry of an Order (I) Determining and Limiting the Scope of Issues Relating to the Post-Closing Adjustment, and (II) Limiting Fact and Expert Discovery to the Issues as Limited* [Docket No. 1430] (the "Order Denying the Motion in Limine"). Subsequent to the entry of this Order, AgFeed Industries and the Purchaser (collectively, the "Parties"), negotiated a settlement to resolved all matters between AgFeed and the Purchaser related to the SPA.

10. As a result of these negotiations, the Parties agreed resolve all disputes relating to the SPA by payment of $300,000 to the Purchaser from the escrow account set up at the Closing in full satisfaction of any and all claims the Purchaser may have arising out of or otherwise related to the SPA including, but not limited to, any Post-Closing Adjustment or payment of professional fees.

## RELIEF REQUESTED

11. By this Motion, and in accordance with section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, AgFeed Industries respectfully requests that the Court enter the Proposed Order (i) approving the settlement substantially in the form attached hereto and (ii) authorizing AgFeed Industries to take any and all actions necessary to effectuate the settlement.

## BASIS FOR RELIEF REQUESTED

12. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estates, and providing for the efficient resolution of bankruptcy cases. *See In re Martin,* 91 F.3d 389, 393 (3rd Cir. 1996) (noting that settlements are favored in bankruptcy because they "minimize litigation and expedite the administration of

the bankruptcy estate"); *Tindall v. Mavrode (In re Mavrode),* 205 B.R. 716, 719 (Bankr. D.N.J. 1997) ("Settlements are generally favored in bankruptcy proceedings, in that they provide for an often needed and efficient resolution of the bankruptcy case." (citing *In re Penn Cent. Transp. Co.*, 596 F.2d 1102, 1113 (3d Cir. 1979))). To achieve these results, Bankruptcy Rule 9019(a) empowers a bankruptcy court to approve a settlement or compromise by a debtor after notice and a hearing. *See* Fed. R. Bankr. P. 9019(a).

13. In applying this rule, a bankruptcy court should approve a settlement if it is fair and equitable and is in the best interest of the estate. *See Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.),* 336 B.R. 87, 93 (Bankr. D. Del. 2005). To properly make this determination, a bankruptcy judge "must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate." *Id.* at 92; *see Martin,* 91 F.3d at 393.

14. The United States Court of Appeals for the Third Circuit has provided four criteria that a bankruptcy court must consider to approve a settlement. Specifically, the bankruptcy court must examine: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors. *See Martin,* 91 F.3d at 393.

15. When applying the above criteria to the facts of a particular case, a bankruptcy court "is not supposed to have a mini-trial on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness." *Key3Media Grp., Inc.,* 336 B.R. at 93. The court does not have to be convinced that the settlement is the best possible compromise. Rather, the court must conclude that the settlement

is within the reasonable range of litigation possibilities. *See In re World Health Alt., Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006).

16. In AgFeed Industries' judgment, the settlement is reasonable and in the best interest of AgFeed Industries, its estate, its creditors, and other parties-in-interest. Moreover, a review of the above-referenced *Martin* factors clearly demonstrates that the terms of the Settlement are reasonable under the circumstances.

17. The settlement will fully resolve all claims that the Purchaser may have arising out of or otherwise related to the SPA including, but not limited to, any Post-Closing Adjustment, without the need for additional protracted litigation. If the settlement is not approved, AgFeed Industries may spend significant time and resources on further discovery and litigation. Furthermore, AgFeed Industries' success in any potential litigation in not certain, and potential failure carries the risk that AgFeed Industries would have a larger liability than the amount to be paid in the settlement.

18. In light of the above, AgFeed Industries believes that (i) the settlement is fair, equitable, and in the best interests of its creditors and estate; (ii) the settlement represents an exercise of its sound business judgment; and (iii) the settlement should be approved pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019.

**NOTICE**

19. 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; (iv) counsel to the Purchaser; and (v) all parties requesting notice in the Chapter 11 Cases pursuant to Bankruptcy Rule 2002 as of the date hereof. In light of the nature of the relief requested herein, AgFeed Industries submits that no other or further notice is necessary.

**WHEREFORE**, AgFeed Industries respectfully requests that the Court enter the Proposed Order granting the relief requested herein and granting AgFeed Industries such other and further relief as is just and proper.

Dated: October 14, 2014
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Donald J. Bowman, Jr.*

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