IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
AgFeed USA, LLC, *et al.*,[1]	Case No. 13-11761 (BLS)
Debtors.	Jointly Administered
	Requested **Hearing Date: November 21, 2013 at 11:30 a.m. (ET)** ***Requested*** **Objection Deadline: November 18, 2013 at 4:00 p.m. (ET)**

DEBTORS' MOTION, PURSUANT TO SECTIONS 105(a), 363(b), AND 364 OF THE BANKRUPTCY CODE, FOR AN INTERIM AND FINAL ORDER AUTHORIZING THE DEBTORS TO (A) ACQUIRE INSURANCE COVERAGE FOR THEIR DIRECTOR AND OFFICER LIABILITY AND (B) ENTER INTO A POST-PETITION PREMIUM FINANCING AGREEMENT IN CONNECTION THEREWITH

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 submit this motion (the "Motion") for the entry of an interim order, substantially in the form attached hereto as Exhibit B (the "Interim Order"), and a final order, substantially in the form attached hereto as Exhibit C (the "Final Order"), authorizing the Debtors to (a) acquire new insurance coverage for their director and officer liability and (b) enter into a post-petition premium financing agreement in connection therewith. In support of the Motion, the Debtors respectfully represent as follows:

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

[1] The Debtors and the last four digits of their federal tax identification number 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 location of the corporate headquarters for AgFeed Industries, Inc. is 100 Bluegrass Commons Blvd., Suite 310, Hendersonville, Tennessee 37075. The location of the corporate headquarters for the remaining Debtors is 510 South 17th Street, Suite 104, Ames, Iowa 50010.

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 this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105(a), 363(b), and 364 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code").

BACKGROUND

2. 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.

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 Security Holders' Committee") [Docket No. 195].

4. On August 1, 2013, the Court entered an order [Docket No. 103] (the "USA Bid 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 "USA Sale"). The USA Bid Procedures Order also approved the bid made by The Maschhoff's, LLC as the stalking-horse bid and approved bidding procedures for the USA Sale. On August 26, 2013, the Debtors held an auction, at the conclusion of which the bid submitted by High Plains Pork, LLC, Cohoma Pork, LLC, and Murphy-Brown, LLC (the "USA Purchasers") was identified as the highest and best bid. The Debtors valued the bid submitted by the USA

Purchasers, after payment of certain fees and expenses and proceeds to be received from the sale and collection of assets not being acquired, at approximately $79.23 million, which yielded approximately $11 million in value to the estates over the stalking-horse bid. On August 29, 2013, the Court entered an order [Docket No. 257] approving the USA Sale to the USA Purchasers. The USA Sale closed on September 12, 2013. Since the USA Sale closing, AgFeed USA and its Debtor subsidiaries have been engaged in the process of winding down their business, which includes, but is not limited to, the sale of the remaining finishing herd, the collection of certain receivables, and the sale or collection of other assets, in each case that were not acquired by the USA Purchasers as part of the USA Sale.

5. On September 13, 2013, AgFeed Industries, as seller, Good Charm International Development Ltd., as purchaser (the "Proposed BVI Purchaser"), and Ningbo Tech-Bank Co., Ltd., as parent of the Proposed BVI Purchaser, executed a stock purchase agreement (the "SPA"), subject to higher and better offers and Court approval, for the sale (the "Industries Sale") of AgFeed Industries' stock in AgFeed Industries, Inc. (British Virgin Islands) ("AgFeed BVI"). The proposed purchase price is $50.5 million, subject to certain adjustments.[2] On October 10, 2013, the Court entered an order [Docket No. 436] which, among other things, approved the Proposed BVI Purchaser as a stalking-horse and certain bidding procedures for the Industries Sale, and scheduled an auction for AgFeed Industries' stock in AgFeed BVI for November 20, 2013, at 10:00 a.m. (ET). A hearing to consider the proposed Industries Sale is scheduled for November 21, 2013, at 11:30 a.m. (ET). The Debtors expect to close the Industries Sale in December of 2013. Following the close of the Industries Sale, the Debtors anticipate they will file and seek confirmation of a chapter 11 plan of liquidation.

[2] To the best of the Debtors' information and belief, there are no insider relationships between the Debtors and the Proposed BVI Purchaser or its parent, and the SPA is an arms'–length, third–party transaction.

6. 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

7. In the ordinary course of their businesses, the Debtors maintained two (2) directors' & officers' liability insurance policies with an aggregate policy limit of $10 million (together, the "D&O Insurance"). Specifically, the Debtors had a primary policy with National Union Fire Insurance Co. with a $5 million policy limit, an excess policy with XL Specialty Insurance Co. with a $5 million policy limit, each of which expired on October 22, 2013.

8. The Debtors have been involved in negotiations through an insurance broker who deals with various providers of director and officer insurance policies, with the objective of obtaining new coverage for their director and officer liability at the best price for the Debtors (the "D&O Coverage"). As the result of the subsequent negotiations, the Debtors, through the broker, have reached an agreement with Federal Insurance Co, Chubb Group (the "Insurer") on the terms of a new directors' & officers' liability insurance policy, which will provide $5 million in coverage for the Debtors' directors and officers (the "Directors & Officers") for claims for wrongful acts and omissions committed within their capacity as a director or officer of the Debtors for a one (1) year term beginning on October 23, 2013 (the "D&O Policy"). The premium for the D&O Policy is $450,000 (the "Premium") and the Insurer requires that the Premium be paid by December 15, 2013.

9. The quote from Federal Insurance Co, Chubb Group (the "Insurer") was the most favorable the Debtors found. Given the Debtors' status as a debtor-in-possession, the broker has advised that the pricing is competitive from a market standpoint and that it would be

extremely difficult to find alternative markets to provide a more competitive option than what is being offered through the D&O Policy.

10. In addition, in their business judgment, the Debtors have determined that it is not economically advantageous for the Debtors to pay the Premium on an annualized basis. Pursuant to a proposed premium financing agreement (the "Premium Financing Agreement")[3] with Bank Direct Capital Finance ("Bank Direct"), upon execution of the agreement, the Debtors shall pay Bank Direct a $150,000 down-payment, with the remaining $300,000 financed over a six month period, resulting in $3,720.90 in finance charges. In addition, the Premium Financing Agreement provides for six (6) monthly installment payments of $50,620.15, the first of which will be due on November 23, 2013.

RELIEF REQUESTED

11. By this Motion, the Debtors request entry of the Interim Order and Final Order (a) authorizing the Debtors to purchase the D&O Coverage provided pursuant to the D&O Policy and (b) authorizing the Debtors to enter into the Premium Financing Agreement in connection therewith.

BASIS FOR THE RELIEF

A. The Court Should Authorize the Debtors to Obtain the D&O Coverage.

12. Section 105(a) of the Bankruptcy Code empowers the court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of section 105(a) is to ensure a "bankruptcy court's power to take whatever action is appropriate or necessary in aid of the exercise of [its] jurisdiction." 2 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 105.01 (16th ed.)

[3] A copy of the Premium Financing Agreement is attached hereto as Exhibit A.

(footnote omitted). Additionally, section 105(a) of the Bankruptcy Code allows the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

13. Section 363(b)(1) of the Bankruptcy Code provides that a debtor in possession "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363 of the Bankruptcy Code, a debtor in possession may use, sell, or lease property of the estate outside the ordinary course of business if (i) it has an articulated business justification; (ii) it provides adequate notice to all creditors; and (iii) a hearing is held on the use, sale, or lease. See, e.g., In re Delaware and Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

14. Once a debtor articulates a valid business justification, the business judgment rule creates "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the Debtors." Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) *overruled in part on other grounds by* Gantler v. Stephens, 965 A.2d 695, 713 fn. 54 (Del. 2009). The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. See e.g., In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtors' management decisions.").

15. The Debtors submit that maintenance of adequate liability insurance protection for the Directors & Officers is crucial during the winding down (the "Wind Down") of the Debtors' affairs. The Directors & Officers could be exposed to a myriad of potential claims both known and unknown. In the ordinary course of business, the Directors & Officers have been protected from the exposure of such actions by the D&O Insurance. Moreover, pursuant to

certain agreements between the Debtors and the Directors & Officers, the Debtors have agreed to indemnify the Directors & Officers for the costs and damages incurred with any litigation relating to an alleged breach of their duties. Certain of these obligations may be administrative expense in nature. Absent the D&O Coverage, these estates could be exposed to potentially substantial costs and damages as a result of the indemnification obligation, which would dilute the potential recovery of other creditors and stakeholders.

16. In addition, the Debtors have maintained D&O Insurance prepetition. Maintaining such a policy provided comfort to the Directors & Officers that they would be protected from the exposure of certain actions. Here, purchasing the D&O Coverage would continue to provide such comfort to the Directors & Officers, who are crucial to the Wind Down of the Debtors' affairs, which includes, but is not limited to: (i) consummating the Industries Sale, (ii) preparing and negotiating a plan and disclosure statement, (iii) reviewing claims for the purpose of making distributions, (iv) prosecuting the Chapter 11 Cases, and (v) closing the Chapter 11 Cases.

17. The Debtors have determined in their business judgment that it is in their and their creditors' interests to obtain the D&O Coverage. As described above, the indemnification obligations of the Debtors could result in substantial expense to these estates if litigation were brought against the Directors & Officers and the Debtors had failed to purchase the D&O Coverage. In addition, failure by the Debtors to purchase the D&O Coverage may undermine the commitment to the estates by the Directors & Officers, whose dedication and cooperation will be critical to the Wind Down.

18. The Debtors' broker negotiated to obtain the most cost effective insurance coverage that is adequate for a corporation that is in the Debtors' position and has to deal with numerous complex issues the Debtors will be faced with as they wind down their affairs. The

Debtors submit that the aggregate premium for the D&O Coverage is reasonable in light of the market rate for such policies and the potential exposure to indemnity claims and potential exposure to the Debtors' estates if the D&O Coverage is not purchased.

19. The Debtors submit that the authority to purchase the D&O Coverage is supported by sound business judgment and is in the best interests of the Debtors, their estates, the creditors, and parties in interest. Accordingly, for the foregoing reasons, the Debtors request authority, pursuant to Bankruptcy Code sections 105(a) and 363(b), to purchase the D&O Coverage.

B. The Court Should Authorize the Debtors to Enter Into the Premium Financing Agreement in the Ordinary Course of Business.

20. The Court should also authorize the Debtors to enter into the Premium Financing Agreement. Section 363(c)(1) of the Bankruptcy Code provides that "the trustee [or a debtor in possession] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). The Debtors believe that the execution of the Premium Financing Agreement constitutes a transaction in the ordinary course of business, within the meaning of section 363(c)(1) of the Bankruptcy Code, that does not require prior bankruptcy court approval.

21. Neither the Bankruptcy Code nor its legislative history provides a framework for analyzing whether a transaction is in the ordinary course of business. The Court of Appeals for the Third Circuit, however, has developed a two-part inquiry, which consists of a "horizontal dimension" test and a "vertical dimension" test, for determining whether a transaction is in the ordinary course of business under section 363(c)(1). See In re Roth Am., Inc., 975 F.2d 949, 952 (3d Cir. 1992); see, e.g., In re Nellson Nutraceutical, Inc., 369 B.R. 787,

791 (Bankr. D. Del. 2007); Braunstein v. McCabe, 571 F. 3d 108, 124-25 (1st Cir. 2009). The horizontal dimension test focuses on whether, from an industry wide perspective, the transaction is "of the sort commonly undertaken by companies in that industry." In re Roth Am., Inc., 975 F.2d 202 at 953. The vertical dimension test (or creditor's expectation test) focuses on "the vantage point of a hypothetical creditor and [inquires] whether the transaction subjects a creditor to economic risk of a nature different from those [the creditor] accepted when [it] decided to extend the credit." Id.

22. The Debtors believe that the entry into the Premium Financing Agreement satisfies the "horizontal dimension" test, because maintaining insurance coverage is a common industry practice. Drabkin v. A.I. Credit Corp., 800 F.2d 1153, 1154 (Fed. Cir. 1986) (finding that premium financing agreements are a "common commercial arrangement."). The "vertical dimension" test is also satisfied because the Debtors' maintenance of insurance under the Premium Financing Agreement does not subject the Debtors' creditors to any economic risk, but rather, serves to protect the Debtors' creditors from economic risk. Accordingly, the entry into the Premium Financing Agreement constitutes an "ordinary course" use of estate property under Section 363(c)(1) of the Bankruptcy Code. See In re Roth Am., 975 F.2d at 952 n.4 (citing U.S. v. Estate of Deutscher, 115 B.R. 592, 598-99 (M.D. Tenn. 1990), for the proposition that "trustee's use of fund to . . . reinstate insurance was in ordinary course of business").

23. Indeed, the Debtors submit that it may be outside the ordinary course of business for them to fail to enter into the Premium Financing Agreement. See In re Lavigne, 114 F.3d 379, 384 (2d Cir. 1994) (cancellation of insurance policy was not in the ordinary course of business). Nevertheless, out of an abundance of caution, the Debtors have filed this Motion seeking entry of the Interim Order and Final Order approving, to the extent necessary under

section 363 of the Bankruptcy Code, the Debtors' execution of the Premium Financing Agreement.

24. Additionally, under the Premium Financing Agreement, Bank Direct requires that the Debtors grant a security interest in the unearned premiums under the D&O Coverage. This Court may also authorize the Debtors to enter into the Premium Financing Agreement pursuant to section 364(c)(2) of the Bankruptcy Code. Section 364(c)(2) authorizes, after notice and a hearing, a debtor in possession to obtain debt secured by a lien on property of the estate. See 11 U.S.C. § 364(c)(2).

25. Section 364(c)(2) authorizes a debtor, in the exercise of its business judgment, to incur secured debt if the debtor has been unable to obtain unsecured credit and the borrowing is in the best interests of the estates. See, e.g., In re Gen. Growth Props., Inc., 412 B.R. 122, 125–6 (Bankr. S.D.N.Y. 2009) (granting motion for post-petition financing upon finding that a) "no comparable credit [was] available on more favorable terms"; b) that the debtors needed post-petition financing to "to preserve [their] assets and continue their operations;" and c) that "the terms and conditions of the DIP Documents had been negotiated in good faith"); In re Budget Group, Inc., Case No. 02-12152, 2002 Bankr. LEXIS 1050, *11–13 (Bankr. D. Del. Aug, 1, 2002) (authorizing funding of acquisition of property on a secured basis where acquired property was necessary to maintain operations and debtor could not obtain such funding on an unsecured basis); In re Ames Dept. Stores, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (with respect to postpetition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties") (citations omitted). Because borrowing to maintain essential insurance coverage is in the best interests of the Debtors' estates, the Court should authorize the Debtors to enter into the Premium Financing Agreement.

NOTICE

26. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) counsel to the Debtors' prepetition secured lenders; (iii) counsel to the Creditors' Committee; (iv) counsel to the Equity Security Holders' Committee; and (v) all parties requesting notice in these Chapter 11 Cases pursuant to Rule 2002-1(b) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware 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.

NO PRIOR REQUEST

27. The Debtors have not previously sought the relief requested herein from this or any other Court.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court enter the Interim Order, substantially in the form attached hereto as Exhibit B, and the Final Order, substantially in the form attached hereto as Exhibit C, authorizing the Debtors to purchase the D&O Coverage provided pursuant to the D&O Policy, authorizing the Debtors to enter into the Premium Financing Agreement in connection therewith granting the relief requested herein such other and further relief as the Court may deem just and proper.

Dated: November 6, 2013
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Ian J. Bambrick

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