

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

In re:	§	
	§	
FARMLAND INDUSTRIES, INC., et al.,	§	Case No. 02-50557-JWV
	§	Joint Administration
Debtors,	§	
	§	

**AMERICAN PLANT FOOD CORPORATION’S MOTION FOR
STAY PENDING APPEAL**

American Plant Food Corp. (“American”), by its undersigned counsel, respectfully moves the Court pursuant to Fed. R. Bankr. P. 8005 and 7062 for an order staying the Court’s Orders reopening bidding and approving final auction and bid procedures, and would respectfully show the Court the following:

1. American participated in an auction on September 9, 2002, to purchase a fertilizer warehouse owned by Farmland Industries, Inc. (“Farmland”). The sale was conducted in accordance with auction and bid procedures approved by the Court on August 29, 2002. At the auction, American made the highest and best bid of \$2,120,000. Farmland accepted the bid and prepared to present it for confirmation by the Court.

2. Among the bidders present on September 9 was Roy Richard, a representative of ConAgra Trade Group, Inc. (“ConAgra Trade Group”), which had previously submitted a “stalking horse” bid of \$1,420,000. The following morning, September 10, a few hours before the hearing to confirm the sale to American, Farmland announced that it had become aware of a contractual right of first refusal to

purchase the warehouse held by United Agri Products, Inc. (“UAP”), an affiliate of ConAgra Trade Group, and that UAP itself had not received notice of the auction or an opportunity to bid.

3. At the bankruptcy court’s invitation, Christopher K. Hildreth, vice president of UAP, submitted an affidavit stating that (1) to his knowledge, neither UAP nor the individual designated to receive notice for UAP (a person named Moses Vernon) had received a service copy of the Debtor’s Sales Procedure Motion or a copy of the Court’s order approving the auction and bid procedures, and (2) to his knowledge, UAP did not have notice of the sale of the Greenville warehouse property until September 10.

4. James B. Witthaus, director of marketing and business development of Farmland, submitted an affidavit stating that (1) he had engaged in detailed conversations with Moses Vernon of UAP concerning the sale of the warehouse, (2) he had negotiated a confidentiality agreement with Vernon so that Vernon could receive information regarding the warehouse, (3) on or about May 31, 2002, Witthaus received a bid of \$1,420,000 from another ConAgra company (which became the ConAgra Trade Group “stalking horse” bid) in response to material he sent to Vernon, (5) Witthaus subsequently met with Vernon and Richards—who attended the bidding—to negotiate the details of ConAgra Trade Group’s purchase of the warehouse, and (6) Witthaus discussed with Vernon the Debtor’s intentions to file a motion with the Court to obtain approval of the sales procedures.

5. The Witthaus affidavit showed that UAP received notice of the impending auction of the Greenville warehouse. Nevertheless, in its Memorandum Opinion and Order issued on September 17, 2002 (document #776), the bankruptcy court found that, because neither UAP nor Vernon was sent a service copy of Farmland’s Sales Procedures Motion or the Order approving the sales procedures, UAP

did not receive notice of the auction. Accordingly, the bankruptcy court failed to confirm the sale to American and reopened the bidding.

American and other parties filed motions to reconsider, demonstrating the factual issues raised by the failure of the Hildreth affidavit to deny actual notice in UAP and the affirmative proof in the Witthaus affidavit that UAP had actual notice. In response, the bankruptcy court held a “status conference”, at which it in fact heard argument but no further evidence on the matter. Adding to the dispute, the unsuccessful third bidder on September 9, Equaliezer, Inc. argued that it had received incomplete information from Farmland and should be allowed to participate in any reopened bidding, announcing that it would submit a higher bid than American’s.

6. At that point Farmland obtained ConAgra/UAP’s agreement to waive its alleged right of first refusal, and in return stated that Farmland would support a reopened auction. This deal was presented to the bankruptcy court as a “compromise” for approval under Bankruptcy 9019, even though American’s rights as successful bidder were to be defeated. On September 25, the bankruptcy court issued an Order (document #850) setting final auction of the warehouse and approving auction and bid procedures. American has filed a Notice of Appeal of the September 17 and September 25 Orders and seeks a Stay of the Orders Pending Appeal.

7. Based on Bankruptcy Rule 8005, the Court should suspend rebidding on the warehouse in order to protect the rights of all parties in interest. American seeks to preserve the status quo while its rights pertaining to ownership of the warehouse are determined on appeal. The factors to be applied under Rule 8005 are similar to those to be considered in ruling on an application for a preliminary injunction. *In re Forty-Eight Insulations, Incorporated*, 115 F.3d 1294 (7th Cir. 1997). First, whether the movant has

demonstrated a substantial likelihood of success on the merits; second, whether the movant will suffer irreparable injury absent the stay; third, whether a stay would substantially harm other parties in the litigation; fourth, whether a stay is in the public interest. *Id.* at 1300. *In re Sunflower Racing, Inc.*, 225 B. R. 225 (D. Kan. 1998); *In re KAR Development Associates, L.P.*, 182 B. R. 870 (D. Kan. 1995).

8. American believes that the Order failing to approve the Court-approved auction and bid was clearly erroneous, and that American will ultimately prevail and be awarded possession of the warehouse. This result would be frustrated, however, by permitting the rebidding—in which American has no intention of participating—to go forward. Approving the sale and transferring the property to another bidder through this process would represent irreparable harm to American. Moreover, suspending the rebidding pending American’s appeal will not result in substantial harm to any other parties. If American’s appeal is unsuccessful, the rebidding may take place under the Court’s final auction plan and will be unaffected by American’s appeal. To ensure that Farmland will not lose the benefit of American’s winning bid, American will submit to the Court a letter of credit in the amount of \$2,120,000. Finally, it is in the best interest of the public that the stay be granted. Public confidence in court-approved auction and bid procedures would be undercut if winning bidders could be thwarted by losing bidders who wait until after the sale to arrive with higher bids.

9. Alternatively, American seeks a Stay from the Order as of right upon submitting a supersedeas bond pursuant to Federal Rule of Civil Procedure 62(d) as incorporated by Bankruptcy Rule 7062. Although the Orders are not money judgments, they are not of the type excepted from Rule 62 under subsection (a), *i.e.* judgments in actions for injunctions, judgments in receivership actions, and judgments or orders directing an accounting in an action for infringement of letters patent. *In re Gleasman*,

111 B. R. 595 (W.D. Tex. 1990) (appeal as of right where judgment determined interest in property);
COLLIER ON BANKRUPTCY ¶ 7062.06 at 7062-8 (15th ed. 2002 rev.)

10. The Orders determine American's interest in the warehouse property, to the extent that they fail to approve transfer of possession from Farmland to American. In accordance with Rule 62(d), American will put up a letter of credit or bond in the amount of its bid, which will protect Farmland during the appeal by securing a minimum sale price of \$2,120,000. Based upon the foregoing, American respectfully requests the entry of an order providing adequate protection as set forth above.

WHEREFORE, American Plant Food prays an order of this court staying the scheduled auction presently scheduled for the 22nd day of October, 2002, or in the alternative, for a stay from the court's prior order, pending appeal and for adequate protection as set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing was served upon all persons requesting electronic notification on October 17, 2002, and via facsimile to

Via Facsimile 402/341-0216

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