UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
KANSAS CITY DIVISION

In Re:	§	**In Proceedings Under Chapter 11**
	§	
Farmland Industries, Inc., *et al.*,	§	**Case No. 02-50557-JWV**
	§	**Joint Administration**

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO ALTER OR AMEND MEMORANDUM OPINION AND ORDER APPROVING DEBTORS' MOTION FOR ORDER AUTHORIZING FIRST AMENDMENT TO DIP CREDIT AGREEMENT

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") of Farmland Industries, Inc., Farmland Foods, Inc., Farmland Transportation, Inc., Farmland Pipeline Company, and SFA, Inc. (collectively, the "Debtors") files this Motion (the "Motion") to Alter or Amend Memorandum Opinion and Order Approving Debtors' Motion for Order Authorizing First Amendment to DIP Credit Agreement (the "DIP Amendment Order"). In support of the Motion, the Committee would show as follows:

I.
BACKGROUND

1. On May 31, 2002 (the "Petition Date"), the Debtors filed separate voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Missouri, thereby commencing the above-styled cases.

2. The Debtors continue to operate their businesses and manage their assets as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. No trustee or examiner has been appointed.

3. On June 3, 2002, pursuant to Section 1102(a)(1) of the Bankruptcy Code, the United States Trustee (the "U.S. Trustee") appointed the Committee and the Official Committee of Bondholders (the "Bondholders Committee") (collectively, the "Committees"). No other official committees have been appointed.

4. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

5. The Debtors operate their businesses using funds provided by various lenders (the "Bank Group") pursuant to that certain Debtor-in-Possession Credit Agreement and Adequate Protection Stipulation (the "DIP Credit Agreement"), which was approved by this Court on July 5, 2002 by its Final Order (I) Authorizing Post Petition Financing and (II) Granting Super Administrative Priority Status (the "DIP Financing Order").

6. The DIP Credit Agreement and the DIP Financing Order were the subjects of intense negotiations between the Debtors, the Committees and the Bank Group. Although the Committees raised significant objections to the DIP Credit Agreement, a compromise was reached in order to satisfy the Debtors' repeated needs for the borrowing capacity provided by the DIP Credit Agreement. The DIP Credit Agreement, in relevant part, provided for the following:

- A two-tiered lending facility consisting of Tranche A, which was a $25,000,000 new revolving credit facility, and Tranche B, which was a $281,000,000 revolving credit facility pursuant to which the pre-petition revolving facility between the Debtors and the Bank Group will be repaid and effectively "rolled over" into Tranche B as a post-petition obligation of the Debtors and their estates.

- An expiration date of November 30, 2003.

- An "Event of Default" if the Debtors failed to file a plan of reorganization approved by the Bank Group, such approval not to be unreasonably withheld, on or before November 27, 2002.

- No timetables for the sales or monetization of the Debtors' assets.

- The payment of a $500,000 commitment fee, plus any other fees, costs, charges, commissions and expenses, including reasonable counsel fees.

7. With the entry of the DIP Financing Order, the Debtors were able to conduct transactions with hundreds of parties, each of whom have relied on the DIP Financing Order as assurance that the Debtors had sufficient funding to operate their businesses on a post-petition basis.

8. In January, 2003, the Debtors and the Bank Group entered into that certain First Amendment to First Amended and Restated Debtor-in-Possession Credit Agreement and Adequate Protection Stipulation (the "DIP Amendment"). The DIP Amendment provides significant benefits to the Bank Group without any corresponding benefits to the Debtors or their estates. In contrast, the DIP Amendment purports to confer only one "benefit" on the Debtors' estates: the Bank Group's waiver of the alleged default associated with the "unacceptable" plan of reorganization filed by the Debtors on November 27, 2002.

9. The Debtors filed the Motion for Approval of the DIP Amendment (the "DIP Amendment Motion") on January 14, 2003. Essentially, through the DIP Amendment Motion, the Debtors attempted to justify this one-sided transaction under the guise of avoiding the improperly and illegally declared default by the Bank Group and allowing the Debtors to continue their efforts to maximize value for the benefit of the Debtors and their estates.

10. The Committees timely objected to the DIP Amendment Motion, and, following comprehensive expedited discovery, this Court held a two-day evidentiary hearing on February 20, 2003 and February 25, 2003. During the hearings, the Committees presented competent and

uncontroverted expert testimony that questioned whether the DIP Amendment was in the best interest of the Debtors' estates – especially in light of the draconian deadlines imposed upon the Debtors for the sales of certain assets. Moreover, through the expert testimony and the cross-examination of witnesses presented by the Bank Group and the Debtors, the Committees demonstrated that the plan of reorganization filed by the Debtors on November 27, 2002 satisfied the clear and unambiguous requirements of the DIP Credit Agreement.

11. On March 3, 2003, this Court entered an Interim Order approving the DIP Amendment Motion. On April 17, 2003, the Court entered the DIP Amendment Order, granting in its entirety the DIP Amendment Motion and imposing upon these estates the restraints required by the DIP Amendment.

II.
SUMMARY OF MOTION

12. Faced with the vigorous objections of the Committees, the Court deferred to the "business judgment" of the Debtors and rewarded the Bank Group for its conduct surrounding the alleged default under the DIP Credit Agreement that was declared in December 2002. In doing so, this Court exchanged the fabricated defaults of the Bank Group under the DIP Credit Agreement for the concrete defaults created by the DIP Amendment. As the uncontroverted expert testimony showed, the deadlines imposed by the DIP Amendment for the sale of certain assets will have a deleterious effect on the value that will be received for such assets by the estate, and in the final analysis, the individual creditors represented by the Committees. Sadly, the fears raised in the expert testimony have already manifested themselves, as the threats of the Bank Group to declare events of default pursuant to the DIP Amendment have forced the Debtors into decisions that it otherwise would not (and should not) have made.

13. It is true that the Court, in the DIP Amendment Order, intimated that the intervention of this Court "might become necessary" if the Bank Group does not continue to be flexible and reasonable in its enforcement of the deadlines in the DIP Amendment. However, the ability of the Bank Group to immediately terminate funding of the Debtors' operations upon the declaration of an event of default would not allow the Committees or the Debtors sufficient time get this Court's intervention before disastrous consequences befall these estates. Therefore, rather than engaging the Bank Group in a game of "high stakes poker" in which the only losers are the individual creditors represented by the Committees, the Committee urges this Court to alter or amend the DIP Amendment Order by denying the DIP Amendment Motion in its entirety, or in the alternative, granting the Committees the limited ability to return to this Court on an expedited basis before the declaration of an event of default by the Bank Group irreparably damages these estates.

III.
ARGUMENT AND AUTHORITIES

14. Federal Rule of Civil Procedure 59(e), as made applicable to these bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023, allows a party to file a motion to alter or amend a judgment within ten days after entry of the judgment. FED. R. CIV. P. 59(e). A bankruptcy court's order is considered synonymous with a judgment. *See, e.g., In re Monson*, 87 B.R. 577, 586 (Bankr. W.D. Mo. 1988) (bankruptcy court entertained a motion to reconsider on order directing a trustee to make certain payments to a secured creditor under Federal Rule of Bankruptcy Procedure 9023). Federal Rule of Civil Procedure 59(e) is designed to permit this Court to reconsider and vacate or alter a prior order or judgment based on a showing of manifest error of law or fact or presentation of newly discovered evidence. *See In re Casagrande*, 143 B.R. 893, 900 (Bankr. W.D. Mo. 1992).

15. Under the standard of Federal Rule of Civil Procedure 59(e), this Court should alter or amend the DIP Amendment Order to deny the DIP Amendment Motion in its entirety. Since the entry of the DIP Amendment Motion, the Bank Group – armed with the clear events of default created by the milestones – has been able to strong-arm the Debtors into considering decisions regarding the sales of certain assets that may not have been in the best interest of these estates. The Committee believes that these actions by the Bank Group manifest inherent unreasonableness in its enforcement of the deadlines contained in the DIP Amendment, especially as the obligations under the DIP Credit Agreement are quickly shrinking as a result of asset sales by the Debtors.

16. The Bank Group's conduct since the entry of the DIP Amendment Order will not affect its ability to be paid in full in these bankruptcy cases but could drastically affect the recovery of the individual creditors represented by the Committees. As a result, these facts call into question the Court's determination in the DIP Amendment Order that the DIP Amendment did not "harm[] the unsecured creditors or take[] something away from them." *See* DIP Amendment Order at p. 43. The operation of the DIP Amendment has been – and if not rejected by the Court will continue to be – a drain on the value that will be received by unsecured creditors of the Debtors' estates. In light of these facts, the Court should reconsider the DIP Amendment Order and deny the DIP Amendment Motion in its entirety because it is not in the best interests of these estates and their creditors.

17. In addition to the foregoing, the DIP Amendment Order should be altered because the Court improperly determined that the DIP Amendment was negotiated in good faith and at arm's length because the Bank Group was unreasonable in rejecting the plan of reorganization filed by the Debtors on November 27, 2003. *See* Memorandum Order at pp. 45-46. The Court

correctly outlined the relevant provision of the DIP Credit Agreement requiring filing of the plan by the Debtors – Section 8.13 of the DIP Credit Agreement. The provision states that an "Event of Default" occurs upon the following:

> Failure of the Borrowers to file a plan of reorganization approved by all DIP Lenders [members of the Bank Group] (such approval not to be unreasonably withheld) by the date that is 180 days after the Petition Date (it being agreed, however, *that it shall be reasonable for DIP Lenders to withhold approval of any plan that does not provide for the payment (or cash collateralization in the case of Contingent Obligations) of all DIP Obligations and Prepetition Obligations in full in cash on the effective date thereof)*.

See DIP Credit Agreement § 8.13 (emphasis added). However, in applying the evidence presented during the hearings on the DIP Amendment, the Court broadened the standard of acceptance of the plan of reorganization beyond "reasonableness," as stated in the DIP Credit Agreement, to complete and unquestionable confirmability without further modification or amendment. Admittedly, the plan of reorganization filed by the Debtors was not perfect; much work was still required before it could proceed toward confirmation. However, had the DIP Credit Agreement truly required the absolute sales milestones subsequently demanded by the Bank Group in November and December 2002, it would have said so. It did not.

18. The DIP Credit Agreement is governed by New York law. *See* DIP Credit Agreement § 10.15. Under New York law, in adjudicating the rights of parties to a contract, courts may not fashion a new contract under the guise of contract construction. *Slatt v. Slatt*, 477 N.E.2d 1099, 1100 (N.Y. 1985). Ironically, by requiring the Debtors to include the sale deadlines in the plan of reorganization that eventually found their way into the DIP Amendment, the Court was fashioning a new contract between the Debtors and the Bank Group – one that, had it been disclosed to the Committees at the time of the negotiations of the DIP Credit Agreement, would have never been accepted by the Committees without a fight. This "new

contract" of the Court is precisely what the Bank Group might have wanted during the negotiations of the DIP Credit Agreement but was never disclosed to the Committees until October 2002, when counsel for the Bank Group first inferred via e-mail that the failure of the plan to contain provisions for a sale of one of the Debtors' major businesses would be an event of default under the DIP Credit Agreement.

19. The Debtors' alleged failure to file a disclosure statement before November 2002 does not bolster the Court's conclusion. Contrary to the Court's intimation that such an argument was "specious," it further stresses the necessity to return to the actual text of Section 8.13 – which makes no reference to a disclosure statement any where in its text. As the clear and unambiguous text of Section 8.13 of the DIP Credit Agreement shows, it was the Bank Group that "invited" a plan (and only a plan) to be filed when it drafted the DIP Credit Agreement, not the Debtors who invited rejection of the proposed plan by not filing of a disclosure statement.

20. In addition, the Court's criticism of the failure of the Debtors' plan to contain definitive milestones for the sale of assets, as demanded by the Bank Group, belies the undisputed sensitivity to the public dissemination of sales milestones. This Court, at the request of the Debtors and with the support of the Committees and the Bank Group, closed the hearings regarding the DIP Amendment Motion, in part because public knowledge of the deadlines for asset sales contained in the DIP Amendment could provide potential purchasers with undue leverage that could reduce the value received for such assets. In light of these concerns, the exclusion of milestones from the Debtors' plan was necessary to avoid harm to the creditors of the estate. Nonetheless, the Bank Group, in an effort to bolster its questionable rejection of the Debtors' plan, insisted that the very deadlines that it argued would damage the estates if made public in connection with the DIP Amendment be made a matter of the public record in the

Debtors' plan. Such contradictory positions by the Bank Group evidence its unreasonableness in rejecting the Debtors' plan. The Court, picking up the criticism of the Bank Group, insisted that the Debtors should have publicly filed these same milestones in their plan of reorganization – exposing the Debtors and their estates to the very risks that the Court sought to avoid by closing the hearing on the DIP Amendment.

21. Without altering or amending the DIP Amendment Order, the Court will have fashioned a new Section 8.13 of the DIP Credit Agreement to cause an event of default in the following situation:

> Failure of the Borrowers to file a plan of reorganization *[with sensitive sale deadlines and a disclosure statement totally and completely confirmable without further modification]* approved by all DIP Lenders (such approval not to be ~~unreasonably~~ withheld *[for any reason, including those not affecting the DIP Lenders or their ability to be paid in full on the Effective Date]*) by the date that is 180 days after the Petition Date (it being agreed, however, that it shall be reasonable for DIP Lenders to withhold approval of any plan that *[is not accompanied by a disclosure statement and]* does not *[appear to be imminently confirmable or otherwise does not satisfy the DIP Lenders]* ~~provide for the payment (or cash collateralization in the case of Contingent Obligations) of all DIP Obligations and Prepetition Obligations in full in cash on the effective date thereof~~).

The Bank Group, with its highly sophisticated lawyers and advisors, bargained for a plan of reorganization reasonably acceptable to them. Such a plan was precisely what the Bank Group received. Therefore, the Court's rewriting of the DIP Credit Agreement must be amended or altered to avoid the manifest error contained in the DIP Amendment Order.

IV.
CONCLUSION

22. The Committee recognizes that the dispute regarding the DIP Amendment was a difficult process for the Court – involving late nights listening to the evidence and arguments of counsel and countless more late nights writing the DIP Amendment Order. However, the

Committee has fought and continues to fight the DIP Amendment because, regardless of whether the DIP Amendment is approved, the Bank Group will be paid in full with interest. In contrast, the unsecured creditors represented by the Committees – none of whom will receive full payment on their individual claims – will suffer an inevitable and tangible erosion of their recovery as a result of the approval of the DIP Amendment. It is for their benefit that the Committee brings this motion and request that the Court alter or amend the DIP Amendment Order to preserve the value of the Debtors' estates for the benefit of *all* creditors.

WHEREFORE, PREMISES CONSIDERED, the Committee respectfully requests that the Court: (a) alter or amend the DIP Amendment Motion deny the Motion in its entirety; and (b) granting such other and further relief as is just and proper.

Respectfully submitted this 28th day of April, 2003.

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.

By: /s/ Christopher A. Artzer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served by first class mail, postage pre-paid on those parties on the Master Service List not receiving electronic notice on this 28th day of April, 2003.

/s/ Christopher A. Artzer
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