

AgFeed Judge Must Appoint Ch. 11 Examiner, Trustee Argues

By Jamie Santo

Law360, Wilmington (September 30, 2013, 9:49 PM ET) -- The U.S. Trustee's Office urged a Delaware bankruptcy judge Monday to appoint an examiner to probe the finances of AgFeed Industries Inc. China-based operations, while the bankrupt hog farmer and its stakeholders countered that doing so would threaten a planned \$50 million sale of its Chinese assets.

The Tennessee-based hog farmer lost millions of dollars in China between 2008 and 2011 because of allegedly fraudulent conduct of its Chinese management and an examiner is needed to investigate AgFeed's foreign finances and report the findings to the public, trustee's office attorney David L. Buchbinder said at a hearing in Wilmington.

AgFeed's Chinese units received \$70 million raised from a U.S. stock offering, Buchbinder said, but what became of those funds and the value of its overseas assets remain obscure because the company has never revealed the results of an internal investigation or restated years of financial filings which it told the U.S. Securities and Exchange Commission could no longer be relied on.

"The purpose of the examiner motion is not to reinvent the wheel," Buchbinder said, but to ensure that important information is disseminated to the public.

According to the trustee's motion, the alleged fraud included creating two sets of books, fabricating nonexistent businesses and selling off \$22 million in accounts receivables at a 40 percent discount. AgFeed announced Sept. 6 that the SEC had reached a preliminary decision to recommend bringing an enforcement action for alleged violations of anti-fraud provisions of securities laws, the trustee said.

AgFeed opposes the motion, believing appointment of an examiner could derail a sale of its foreign assets to Good Charm International Development Ltd—a stalking-horse deal valued at \$50.5 million, subject to adjustments — that would pay off creditors in full and provide a recovery for equity holders, according to court documents.

The question is not whether the alleged fraud should be looked into, but when and by whom, AgFeed attorney Robert S. Brady told the court.

The company's first goal has been to sell its assets, Brady said, and to the extent that there are estate causes of action they must "be considered and pursued at the right time by the right people."

AgFeed's creditors and equity holders are the parties who should determine when an investigation is brought, Brady said, and they do not believe benefits outweigh harm at this time. The proposed buyer has termination rights under the purchase agreement, Brady said, and parties with an economic interest don't want to risk upsetting a sale.

"The appointment of an examiner and pursuit of a sale process is not mutually exclusive," said Buchbinder, who was joined in his call for an examiner by shareholder James Regnante.

An independent, third-party examiner would be able to build on previous investigations, Buchbinder said, and could also help the court value the current sale offer and the complex cost-adjustment formula it contains.

AgFeed has spent millions of dollars investigating the problems with the Chinese operations and has fully cooperated with the SEC, Brady said, and the appointment of an examiner would tack on additional costs and chill bidding at the upcoming auction.

AgFeed received backing for its position from the official committees representing both unsecured creditors and equity holders, with the groups saying the decision to pursue an investigation and claims was issues for a later date.

The equity committee would prefer "cash over comfort," attorney Rafael X. Zahralddin-Aravena told the court, and "wants to make sure there is a recovery."

Unsecured creditors likewise oppose the examiner motion, creditors' counsel Matthew T. Gensburg said.

"We believe the appointment of examiner creates substantial risks and will be duplicative and counterproductive to the sale process," Gensburg said U.S. Bankruptcy Judge Brendan L. Shannon posed numerous questions about the effect an examiner would have on the case and noted that he was struggling with the "the utility of the exercise."

“No one has stood at the podium and said everything is hunky-dory,” Judge Shannon said. “The question is how to pursue an investigation and who makes that call.”

Judge Shannon said he would issue a ruling at a telephonic hearing Tuesday.

Founded in 1995 as an agricultural feed producer in China, AgFeed entered Chapter 11 in July with a stalking horse agreement to sell the bulk of its U.S. assets to industry rival The Maschhoffs LLC.

High Plains Pork LLC, Cohoma Pork LLC and Murphy-Brown LLC subsequently topped the Maschhoffs' bid at auction, and Judge Shannon approved the \$79.2 million deal Aug. 29.

AgFeed is represented by Robert S. Brady, Donald J. Bowman Jr., Robert F. Poppiti Jr. and Ian J. Bambrick of Young Conaway Stargatt & Taylor LLP.

The creditors committee is represented by Sandra G. M. Selzer, Nancy A. Peterman, Matthew T. Gensburg and Paul T. Fox of Greenberg Traurig LLP and Jeffrey D. Prol and Timothy R. Wheeler of Lowenstein Sandler LLP.

The equity committee is represented by Rafael X. Zahraiddin-Aravena and Eric M. Suttty of Elliott Greenleaf and Aaron L. Hammer and Mark S. Melickian of Sugar Felsenthal Grais & Hammer LLP.

The case is In re: AgFeed USA LLC, case No. 1:13-bk-11761, in the U.S. Bankruptcy Court for the District of Delaware.

--Additional reporting by Matt Chiappardi, Drew Singer and David McAfee. Editing by Chris Yates.