

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION**

In re:

COHARIE HOG FARMS, INC.

Debtor

Chapter 11

Case No. 09-09737-8

**MOTION OF DEBTOR-IN-POSSESSION FOR EMERGENCY
AND FINAL ORDER (1) AUTHORIZING THE DEBTOR-IN-POSSESSION (A) TO
ENTER INTO POST-PETITION LOAN SECURED BY LIENS AND AUTHORIZED AS
A FIRST PRIORITY ADMINISTRATIVE EXPENSE UNDER AND PURSUANT TO 11
U.S.C. § 364(c) AND (B) TO USE CASH COLLATERAL PURSUANT TO 11 U.S.C. §
363 AND (2) GRANTING RELATED RELIEF, INCLUDING WITHOUT
LIMITATION, ADEQUATE PROTECTION**

Coharie Hog Farm, Inc., debtor and debtor-in-possession in the above-captioned cases (the "Debtor" or "Coharie Farm"), hereby moves the Court for entry of emergency and final Orders, pursuant to sections 105, 345(b), 361, 363 and 364 of title 11 of the U.S. Code (the "Bankruptcy Code") and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing use of cash collateral securing and entry into a Revolving Credit Facility with Cape Fear Farm Credit, ACA (the "Lender") in the amount of \$1,500,000 (the "Motion") as follows:

- (a) authorizing the Debtor to obtain post-petition credit and incur debt to the Lender pursuant to a \$1.5 million Revolving Credit Facility (the "Revolver") which is contemplated by a Revolving Credit Note (the "Note"), secured by a lien on the all of the Debtor's assets pursuant to §§ 364(c)(2) and 364(c)(3) of the

Bankruptcy Code, and with priority, as to administrative expenses, as provided in § 364(c)(1) of the Bankruptcy Code, as set forth more fully herein;

- (b) authorizing the Debtor to use the cash collateral of the Lender;
- (c) providing adequate protection to the Lender or the use of its cash collateral, as set forth more fully herein; and
- (d) scheduling a final hearing (“Final Hearing”) with respect to each of the foregoing matters.

In support of this Motion, the Debtor respectfully states as follows:

JURISDICTION

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of these proceedings and the Motion is proper under 28 U.S.C. § 1408.

2. The statutory bases for the relief requested herein are sections 105, 345(b), 361, 363, and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001 and 9014.

3. On November 6, 2009 (the “Petition Date”), the Debtor commenced its case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

4. The Debtor has continued in the possession of its property and is operating and managing its business as a debtor and debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No request for a trustee or examiner has been made and a creditors’ committee has not yet been appointed in this case.

6. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is core within the meaning of 28 U.S.C. §§ 157(b)(2)(A) and (O).

7. Venue of this case and this Motion is proper in this district pursuant to 28 U.S.C. § 1408.

8. The statutory predicates for the relief sought herein are sections 105, 361, 364, 507, and 552 of the Bankruptcy Code and Rule 4001(c) of the Bankruptcy Rules.

THE DEBTOR'S BACKGROUND AND BUSINESS

9. The earliest predecessor to Coharie Farms was founded in 1972 by Lauch Faircloth and Nelson Waters. Since that time, Coharie Farms has grown to be one of the top swine producers in the United States. Coharie Farms is 75% owned by Anne B. Faircloth and 25% owned by Nelson Waters. The corporate headquarters is located in Clinton, North Carolina.

10. Coharie Farms has 170 employees in operations including company farms, feed mill, grain elevators, transportation, land development, maintenance, and administrative personnel. Coharie Farms operates in 11 counties in eastern North Carolina which include Sampson, the base county, Bladen, Columbus, Craven, Cumberland, Duplin, Greene, Johnston, Lenoir, Onslow, and Wayne counties. In addition we have contract growers in Jay and Wells counties in Indiana.

11. Currently, Coharie Farms has over 30,000 sows between company and contract grower facilities. Swine production is the company's leading asset, producing over 140 million pounds of quality pork annually in North Carolina. Coharie Farms is the largest independent grower supplying Smithfield Food's Clinton plant with over 500,000 market hogs per year. In addition, Coharie Farms sells over 50 million pounds of Indiana market hogs to packing plants in Indiana and surrounding states.

12. There are 101 farm families that contract with Coharie Farms across eastern North Carolina and Indiana in pork production. These consist of sow, nursery, and finishing facilities in North Carolina, and wean-finish quad facilities in Indiana. Coharie Farms' feed mill operation produces 260,000 tons of feed per year.

13. In addition to swine production, Coharie Farms has six grain storage facilities, with a storage capacity of approximately 3.9 million bushels of commodities.

14. In 2008 feed costs skyrocketed, with corn reaching an all-time high of \$8 per bushel, which raised the Debtor's growing cost to as high as 60 cents per pound. This alone created a loss of approximately \$20 per hog sent to market. Because of this sharp rise in feed costs, the Debtor experienced losses of approximately \$13.3 million in 2008. It should be noted that the sharp rise in feed costs has negatively affected the entire industry, which currently teeters on the edge of disaster.

15. In 2009 the economic outlook has grown even darker as an outbreak of the H1N1 flu virus was erroneously referred to as "Swine flu." Even though this virus is spread by humans and not by hogs or pork, the outbreak caused a sharp drop in pork sales by domestic consumers and seriously damaged the international export market. While feed prices have stabilized some in recent months, the demand for pork remains extremely low while supply has remained high. During most of 2009, the Debtor has lost approximately \$29 per hog sent to market. A total of \$17 million has been lost year to date.

16. During the past few months, Ms. Faircloth has provided millions of dollars to the Debtor to fund operations. However, the continued negative projection for feed and pork prices does not permit the Debtor to project other than significant losses for the future, and the Debtor and its owners cannot sustain or continue to fund the negative cash flow any longer.

Due to the pressures of the market and creditors, the Debtor has determined that the Chapter 11 filing is required to liquidate its swine herd in an orderly fashion that insures that the livestock is fed, safely transported and sold at the best market price. The Debtor's other assets will be sold in manner to provide the best return for creditors.

17. The Debtor has employed DR Consulting to serve as Chief Restructuring Office during the chapter 11 case. Mr. Dennis Rippe of DR Consulting began working with the Debtor in October, 2009 to develop a liquidation strategy.

18. In order to liquidate its swine herd and to obtain the best possible prices at the least cost to the estate, the Debtor will require the use of cash collateral securing the Lender and possible additional funding from the Lender as will be discussed herein.

PRE-BANKRUPTCY SECURED LENDING BACKGROUND

19. Prior to the Petition Date, the Debtor, Mr. Waters and Ms. Faircloth (the "Borrowers") and Coharie Hog Farms Partnership¹ were party to a Loan Agreement dated September 3, 2008 with the Lender wherein the Borrowers entered a Revolving Line of Credit Note ("RLOC") and a Term Loan Note with the Lender. Each loan facility will be discussed below:

- (i) The RLOC provided for advances to Coharie Farms in the lesser amount of \$45 million or the Borrowing Base which was the sum of 80% of Eligible Receivables and 75% of Eligible Inventory less certain defined amounts. The Debtor has no availability under the RLOC based upon the Borrowing Base formula. The RLOC Maturity Date was September 1, 2009, and this Maturity Date was extended until November 1, 2009 as the RLOC was reduced to \$30 million. The RLOC bears interest at a contract rate

¹ This is a North Carolina General Partnership. Mr. Lauch Faircloth is a 75 % general partner and Mr. Waters is a 25% general partner. CHFP provided collateral to secure the Term Loan as discussed herein.

of defined as the London Interbank Offered Rate plus an Applicable Margin as defined in the RLOC Note. The outstanding principal balance due on the RLOC is \$24,600,000, plus accrued interest of \$72,788.97, for a total balance of \$24,672,788.97.

(ii) The Term Loan is evidenced by a Term Loan Note in the amount of \$11,600,000. Under the Term Loan Note, principal was due and payable in 2009 in the amount of \$143,209.87 per month, plus accrued interest on all outstanding principal amounts. The interest rate is a fixed rate determined by the ratio of assets to liabilities. In July and August, 2009, the Lender deferred principal payments, but as of November 1, 2009, both principal and interest payments were due, and are unpaid. As of the Petition Date, the principal balance due on the Term Loan Note was \$10,675,540.55 and accrued interest totaled \$78,009.64. The maturity date of the Term Loan Note is September 1, 2015.

(iii) On March 6, 2007, the Lender provided the Borrowers a loan for \$2.0 million ("Term Loan Two"). Term Loan Two required fixed principal payments of \$23,809.52 per month, plus interest payments of 7.05% per annum.

20. The Debtor acknowledges that as of the Petition Date (a) the aggregate amount outstanding on the RLOC Note was \$24,672,788.97, (b) the aggregate amount outstanding on the Term Loan Note totaled \$10,675,540.55, and (c) the amount outstanding on Term Loan Two was \$1,342,862.21 (all such amounts, together with interest on the foregoing and fees, expenses and other charges incurred in connection therewith as provided in the "Pre-Petition Obligations").

21. The Debtor acknowledges that, to secure the Pre-Petition Obligations, the Debtor has granted to Lender first priority liens and security interests (collectively, the "Pre-Petition Liens") in substantially all of the Debtor's personal property, including the livestock and the proceeds therefrom, pursuant to that certain Security Agreement dated September 3, 2008.

22. CHFP also executed a Security Agreement dated September 3, 2008 providing Cape Fear a security interest in all of the CHFP personal property. A Security Agreement was also provided by CHFP on January 4, 2007 providing certain personal property as collateral.

23. As further security, the Debtor and CHFP granted to the Lender a secured position on real property pursuant to Real Estate Deed of Trusts recorded in the Sampson County Register of Deeds, Book 001718, Page 0782 and Book 01661, Page 0793; the Johnson County Register of Deeds, Book 3597, Page 769; and the Onslow County Register of Deeds, Book __, Page __. (Collectively, the Security Agreement and Deeds of Trust are referred to as the "Pre-Petition Collateral".)

24. In May, 2006, the Debtor entered into a Loan Agreement with Branch Banking and Trust Company ("BB&T") which provided for a Term Loan of \$5 million, a Reducing Revolver Line of Credit ("Line of Credit") in the maximum amount of \$4.5 million, a Deed of Trust, a Security Agreement, and other loan documents (the "BB&T Pre-Petition Agreements"). Nelson Waters and CHFP were guarantors under the Loan Agreement. Each loan facility will be discussed below:

- (i) The Term Loan is evidenced by a Promissory Note dated May 3, 2006 in the amount of \$5,000,000. The Promissory Note matures on August 1, 2012. Principal is due in the amount of \$41,666.67 per month, plus interest at Libor plus 350. As of the

Petition Date, the principal balance due on the Promissory Note was \$3,874,991.91 and interest was current.

(ii) The Line of Credit for \$4.8 million has been reduced to \$3.8 million, and bears interest at Libor plus 350. The balance due as of the Petition Date should approximate \$2,774,553.09. The Line of Credit matures on August 1, 2012.

(iii) The Debtor entered a Swap Agreement with BB&T to hedge against fluctuations in the interest rate under the Term Loan.

25. The obligations of the Debtor under the BB&T Pre-Petition Agreements have been guaranteed by Mr. Nelson Waters and CHFP.

26. The Debtor acknowledges that as of the Petition Date, the aggregate principal amount of approximately \$6,649,000 (not including the Swap Agreement) was outstanding in respect of loans made by BB&T to the Debtor pursuant to the BB&T Pre-Petition Agreements (the "BB&T Pre-Petition Indebtedness").

27. In order to secure the BB&T Pre-Petition Indebtedness, Debtor granted to BB&T a Deed of Trust on certain real property and fixtures (the "Feed Mill") located in Book 01625, Page 0756 in Sampson County. The Debtor also provided an Assignment of Rents and Leases related to the Feed Mill, which was recorded in Sampson County, and provided a Security Agreement pledging as collateral all equipment located on the site (the "BB&T Pre-Petition Collateral").

28. Except with regard to those liens held by the Lender, the Debtor reserves any and all of their respective rights regarding the liens asserted against their respective assets, and the identification of the existence of such purported liens is not an admission as to validity, perfection, priority or the extent of such lien or interest.

EXECUTORY CONTRACTS, UNSECURED DEBT, AND ASSETS

29. As of the Petition Date, Debtor was utilizing a total of 101 contract growers in North Carolina and Indiana. Each of the growers has an executory contract with the Debtor. As the livestock are sold, the growers will be paid based upon their existing contracts with the Debtor. All contracts will be rejected when the animals are removed from the grower's premises.

30. As of the Petition Date, Debtor's unsecured indebtedness totals approximately \$8 to 10 million, not including any rejection damages from executory contracts or deficiency claims to secured creditors discussed above.

31. The Debtor's livestock are expected to bring approximately \$24 million if sold as planned by the Debtor.

**NEED FOR POST-PETITION FINANCING AND
USE OF CASH COLLATERAL**

32. By this Motion, the Debtor seeks the entry of the Interim Order and the Final Order regarding the relief requested herein. Such Interim and Final Orders, *inter alia*, will authorize the Debtor to use cash collateral in an aggregate amount of \$3,000,000 for the weeks beginning November 9, November 16, November 22, and November 30, on an interim basis in accordance with the Approved Budget attached as Exhibit "A."

33. The Approved Budget enumerates expenses including feed, transportation for the animals, grower payments and other expenses directly related to the animals. General and administrative costs include but are not limited to, employee payroll and other benefits, corporate overhead, and other expenses related to operating the business.

34. Absent use of cash collateral securing the Lender, the Debtor will be unable to provide feed and care for its livestock much less wind down the business in an orderly manner. The Lender and other creditors, as well as the livestock, will suffer immediate and irreparable harm. A sale of the animals within a short period of time will result in a severe reduction in sale proceeds due to the market being flooded with animals. Other producers are also liquidating their sows and weaned pigs, so the market is already saturated.

35. Due to projected cash flow shortfalls that will occur as expenses become due before sales are accomplished, the Debtor will require the Revolver in the amount of \$1.5 million during the first three weeks in chapter 11 to enable it to pay operational costs on a timely basis. The Revolver will only be needed until the proceeds from the sale of livestock begins outpacing the expenses of the reduced operation, and the Revolver will be paid back in full quickly.

36. The use of cash collateral and availability of the Revolver will provide the Debtor with the necessary cash and credit support needed to maximize the value of the livestock. Of almost equal importance is the sense of confidence that such financing and use of cash collateral will instill in the Debtor's suppliers, customers and employees. Almost all vendors are requiring payment in advance or upon delivery because many, particularly the feed suppliers, are owed significant sums.

**DESCRIPTION OF PROPOSED POST-PETITION FINANCING AND USE OF
CASH COLLATERAL**

37. Set forth below is a summary of the most significant terms and conditions of the proposed Revolver, a Term Sheet for which is attached hereto in substantially final form as

Exhibit "A". Furthermore, attached as Exhibit "B" is the Approved Budget prepared by the Debtor:

I. The Revolver

- Borrowing: Subject to the other terms and conditions of the Revolver, Lender hereby agrees to make available to Debtor the DIP Facility in the total amount of up to \$1.5 million consisting of a revolving credit facility that represents additional credit to Debtor to fund its ongoing working capital needs and other general business purposes, but only for the items allowed herein and under the Approved Budget (the "Revolving Credit Facility").
- Priority and Liens: The Lender shall have a super-priority administrative expense claim pursuant to Section 364(c)(1) of the Bankruptcy Code, subject only to the Carve-Out Expenses, a lien and security interest in all unencumbered property of Debtor under Section 364(c)(2) of the Bankruptcy Code, valid, enforceable, non-avoidable and fully perfected, and first priority priming liens under Section 364(d)(collectively, the "Post-Petition Liens") in all property of the estate (or any successor trustee or other estate representative in the Bankruptcy Case), and all "property of the estate" (within the meaning of the Bankruptcy Code) of the Debtor (or any successor trustee or other estate representative in the Bankruptcy Case), of any kind or nature whatsoever to secure the Obligations, subject and subordinate only BB&T and other Permitted Priority Liens. The Collateral will include all assets of the Debtor as will be specifically listed in the Revolver and avoidances and recovery actions under Chapter 5 of the Bankruptcy Code that Debtor may have against any party.
- Permitted Priority Liens: means mortgages, deeds of trust and/or statutory liens which as of the Petition Date satisfied all the following criteria: (a) had attached to the Debtor's real estate or personal property; (b) were valid, existing, recorded and perfected; and (c) had priority over the Lender's Pre-Petition Liens. BB&T liens are specifically identified as Permitted Priority Liens.
- The Post-Petition Liens shall not at any time be (i) made subject or subordinate to, or made pari passu with, any other Lien or claim existing as of the Petition Date, or created under Bankruptcy Code Sections 363 or 364 or otherwise, other than the Permitted Priority Liens or (ii) subject to any Lien that is avoided and preserved for the benefit of the Debtor's estate under Bankruptcy Code Section 551.
- Carve-Out Expenses means amounts payable pursuant to 28 U.S.C. §1930(a)(6), all fees required to be paid to the Clerk of the Bankruptcy Court, and the allowed reasonable fees, expenses and costs of attorneys, accountants and other professionals retained in the Bankruptcy Case by Debtor or any official committee of unsecured creditors pursuant to Bankruptcy Code Sections 327,

328, 330, or 331 (the "Bankruptcy Professionals") and owed pursuant to such Bankruptcy Professionals engagement letters (other than any success fees, transaction fee, or similar fees) to the extent provided in and permitted under the Approved Budget for such respective Bankruptcy Professionals in the Bankruptcy Case, which are actually incurred prior to the Termination Date, to the extent approved by the Bankruptcy Court pursuant to Section 330 or 331 of the Bankruptcy Code, provided however, that none of the Carve-Out Expenses may be used by any such official committee or Debtor to investigate, contest, or otherwise challenge the validity, priority or enforceability of the Lender's Pre-Petition Loans, Pre-Petition Lender Claim, Pre-Petition Liens or Post-Petition Liens. Provided further, that the Carve-Out Expenses for the period through the week beginning November 30, 2009, may not exceed \$135,000 for Bankruptcy Counsel and \$42,000 for DR Consulting. In addition no greater than \$25,000 shall be available for any Professional employed by an official committee of unsecured creditors.

- The "Interest Rate" will be an annual rate of interest of Libor plus 10.00%.
- Debtor shall pay to Lender an up front fee of \$50,000 and a non-use fee on the Revolving Credit Facility, which shall accrue at 1.00% per annum on the average daily unused amount of the Revolving Credit Commitment during the period from the Closing Date until the Termination Date. All accrued non-use fees shall be due and payable on the Termination Date. All non-use fees shall be computed for the actual number of days elapsed on the basis of a year consisting of three hundred sixty (360) days, including the Closing Date and excluding the Termination Date.
- The entire outstanding principal balance of the Revolving Credit Loans, together with all unpaid accrued interest thereon, shall be due and payable on the Termination Date.
- Termination Date means six months from the initiation of funding of the Revolver or the occurrence of an Event of Default which, if subject to cure, has not been cured by the expiration of any notice period relating thereto. Lender may extend the Termination Date by giving written notice to Debtor of such extension. No extension by Lender shall be deemed effective or enforceable unless in writing.

II. Lender Cash Collateral Usage

- The Debtor will use cash collateral on an interim basis during the period from the Petition Date through the week beginning November 30, 2009 based on the Approved Budget attached hereto as Exhibit B. All post-petition collections would be deposited (with the proceeds of the post-petition loans described above) into a deposit account maintained with BB&T (the "DIP Account") on

which Lender would have a senior lien. Post-petition payments would be funded out of the DIP Account in accordance with the Budget.

- B. Lender will be adequately protected by the feeding, care and sale of its collateral in an orderly manner with only those expenses incurred that are needed to effectuate the liquidation in a prompt manner. However, Lender will have replacement lien on the proceeds of its collateral sold post-petition.
- C. The Debtor shall maintain or cause to be maintained "all risk" insurance on its Property against fire, casualty and such other hazards in such amounts, with such deductibles and with such insurers as are customarily used by companies operating in the same industry as Debtor or which Debtor has historically used (and which is reasonably acceptable to Lender). The policies of all such insurance shall contain standard Lender loss payable and additional insured clauses issued in favor of Lender pursuant to which all losses thereunder shall be paid to Lender as Lender's interests may appear. Such policies shall expressly provide that the requisite insurance cannot be materially altered or canceled without thirty (30) days prior written notice to Lender and shall insure Lender notwithstanding the act or neglect of the insured.
- D. Debtor shall, during regular business hours upon reasonable advance notice, permit any of Lender's officers or other representatives to visit and inspect Debtor's Property, to examine and audit all of Debtor's books of account, records, reports and other papers, to make copies and extracts therefrom and to discuss its affairs, finances and accounts with its managers, officers, employees and independent certified public accountants and attorneys.
- E. Debtor's current management team shall remain in place to operate Debtor's business and to negotiate and conduct any sales or other dispositions of Debtor's assets, unless a replacement management team satisfactory to Lender is installed after appropriate written notice by current management to Lender. Debtor's management and Debtor's equity holders shall cooperate fully in the efforts to solicit potential purchasers of Debtor's assets and in effectuating or consummating one or more sales of Debtor's assets, in either case on terms acceptable to Lender.
- F. Debtor shall not establish any new deposit, checking, savings, securities, investment, hedging, commodity trading or other similar accounts, maintain any account other than those accounts approved by the Lender, deposit proceeds from the sale of Collateral in any account other than a deposit account approved by Lender.²

² The Debtor's cash management system and bank accounts are described in greater detail in the Motion for Order Authorizing (I) Maintenance of Existing Bank Accounts, (II) Continued Use of Existing Business Forms and Records, and (III) Waiver of Deposit Requirements.

G. Financial Statements and Reports:

- (i) as soon as available, but in any event within five (5) days after the end of each week the actual weekly financial information compared to each line item in the Budget for each such week;
- (ii) as soon as available, but in any event within fifteen (15) days after the end of each calendar month, internally prepared financial statements of Debtor for such calendar month, which present fairly Debtor's financial condition, including balance sheet, statement of operations, statement of members' equity and statement of cash flows, prepared in accordance with GAAP (subject to the absence of footnotes);
- (iii) as soon as available, but in any event within five (5) days after the end of each week, a schedule of inventory of Debtor as of the end of such week; and
- (iv) such other data, reports, statements and information (financial or otherwise) as Lender may reasonably request.

RELIEF REQUESTED

38. By this Motion, the Debtor requests entry of an Order (i) authorizing it to obtain requested post-petition secured financing pursuant to section 364 of the Bankruptcy Code by entering into the Revolver, (ii) authorizing the Debtor to grant the Lender protection under sections 364(c) and (d) of the Bankruptcy Code, including a lien on unencumbered assets and a perfected first priority lien on all assets, subject to the Permitted Priority Liens and the Carve-Out Expenses, a superpriority administrative expense claim, (iii) approving the use of cash collateral and the provision of adequate protection to the Lender for the sale of its collateral; and (iv) setting the final hearing on the relief requested herein pursuant to Bankruptcy Rule 4001(c).

BASIS FOR RELIEF REQUESTED

A. Debtor in Possession Loan

39. Section 364 of the Bankruptcy Code allows a debtor to (a) obtain unsecured credit in the ordinary course of business, (b) obtain unsecured credit out of the ordinary course

of business and (c) obtain credit with specialized priority or with security. If a debtor in possession cannot obtain post-petition credit on an unsecured basis, the Court may authorize the obtaining of credit or the incurring of debt, repayment of which is entitled to a superpriority administrative expense status or is secured by a lien on the debtor's property, or a combination of the foregoing.

40. The evidence at the interim hearing will show that, since substantially all of the Debtor's assets are already encumbered, and given the Debtor's current financial condition, it is not possible for the Debtor to obtain credit on either an unsecured basis, or solely on the basis of granting junior liens. Indeed, the terms proposed by the Guarantors represent the only financial package currently available to the Debtor. As will be shown, the potential sources of an adequate DIP Financing for the Debtor, obtainable on an extremely expedited basis and on reasonable terms, were practically nonexistent. In these circumstances, "[t]he statute imposes no duty to seek credit from every possible Lender before concluding that such credit is unavailable." Bray v. Shenandoah Federal Sav, and Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986).

41. A debtor need only demonstrate "by a good faith effort that credit was not available" without the protection of section 364. Id. The Debtor believes that the evidence at the interim hearing will satisfy the requirement of section 364 that credit on other terms was not available to the Debtor.

42. The Debtor has been unable to obtain adequate secured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, or secured credit in the amount and on as favorable terms as are contemplated herein.

B. Use of Cash Collateral

43. The Debtor, pursuant to section 363(c)(2) of the Bankruptcy Code, hereby requests authority, immediately and on an ongoing basis, to use the cash proceeds of its livestock including without limitation, the collection of any accounts, and the cash proceeds thereof to pay the expenses of operating the business and other administrative expenses during the pendency of the case.

44. The Debtor's use of property of the estate is governed by section 363 of the Bankruptcy Code, which provides in pertinent part:

If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the [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).

45. Section 363(c)(2) permits the Debtor in possession to use, sell or lease cash collateral only if either (i) each entity that has an interest in such cash collateral consents; or (ii) the court, after notice and hearing, authorizes such use, sale or lease in accordance with the provisions of this section. 11 U.S.C. § 363(c)(2). If the secured creditor does not consent to the use of its cash collateral, the Court can authorize the debtor to use such cash collateral under section 363(c)(2)(B) if the court determines that the Debtor has provided "adequate protection" of the secured creditors' interests. 11 U.S.C. § 363(e).

46. The Lender's asserted secured interest and lien in cash collateral is adequately protected by the fact that the proceeds will be used to care and feed the livestock and provide for transport of the animals for sale. The overhead structure of the Debtor is as streamlined as

possible to effectuate the orderly liquidation of the livestock over the next twenty-six (26) weeks or less.

C. Waiver of Requirements of Section 345(b) and Local Rule 2070-1

47. As described herein, the Debtor proposes to continue its existing bank accounts which shall be denominated “DIP Accounts” in which the Debtor will deposit the proceeds of the DIP Loan. Thus, the Debtor anticipates that the account balance for the DIP Accounts will exceed \$100,000.

48. Bankruptcy Code section 345(a) authorizes deposits or investment of money “as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.” For deposits or investments that are not “insured or guaranteed by the United States or by a department agent or instrumentality of the United States or backed by the full faith and credit of the United States,” section 345(b) of the Bankruptcy Code requires that the estate must require from the entity with which the money is deposited or invested a bond in favor of the United States secured by the undertaking of an adequate corporate surety. 11 U.S.C. § 345(b).

49. This section also permits a court to relieve a debtor in possession from these restrictions for “cause.” In determining whether “cause” is present, courts consider a “totality of the circumstances” test utilizing the following factors:

- a. The sophistication of the debtor’s business;
- b. The size of the debtor’s business operations;
- c. The amount of investments involved;
- d. The bank ratings (Moody’s and Standard and Poor’s) of the financial institutions where debtor-in-possession funds are held;

- e. The complexity of the case;
- f. The safeguards in place within the debtor's own business of insuring the safety of the funds;
- g. The debtor's ability to reorganize in the face of a failure of one or more of the financial institutions;
- h. The benefit to the debtor;
- i. The harm, if any, to the estate; and
- j. The reasonableness of the debtor's request for relief from section 345(b) requirements in light of the overall circumstances of the case.

In re Serv. Merch. Co., Inc., 240 B.R. 894, 896 (Bankr. M.D. Tenn. 1999) (citations omitted).

50. Local Rule 2070-1 continues to reference a maximum balance of \$100,000.00, even though federal deposit insurance now covers amounts up to \$250,000.00. The Debtor requests a waiver of these requirements relating to \$100,000.00 out of an abundance of caution. The Debtor further seeks a waiver of the deposit requirements to the extent that the account balance of the DIP Accounts exceed the \$250,000.00 limit.

51. Cause exists here to grant a waiver of the section 345 requirements for several reasons. First, the amount of cash flowing through the accounts is relatively large. Second, the Debtor's DIP Account will be held at BB&T, a bank with strong ratings. Third, federal deposit insurance is now available to funds up to \$250,000.00. Therefore, the Court may grant a waiver of the section 345 requirement.

D. Interim Authorization

52. Bankruptcy Rule 4001 permits a court to approve a debtor's request for financing and use of cash collateral on an interim basis following the filing of a motion requesting authorization to use cash collateral and financing, "only . . . as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Bankruptcy Rule 4001. In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. *See, e.g. Simasko*, 47 B.R. at 449; *see also Ames*, 115 B.R. at 38.

53. Pursuant to Bankruptcy Rules 4001(b) and (c), the Debtor requests that the Bankruptcy Court conduct an expedited preliminary hearing on this Motion and authorize the Debtor to use \$3,000,000 in cash collateral and borrow up to \$1,500,000 under the Revolver on an interim basis through the week beginning November 30, 2009 pending entry of a Final Order, in order to maintain and finance the ongoing operations of the Debtor, and avoid immediate and irreparable harm to the Debtor's estate and all parties-in-interest, and schedule a hearing to consider entry of a Final Order. Prior to the hearing on the Final Order, the Debtor will present a more long-term Budget supporting continued use of cash collateral during the liquidation process.

54. The Debtor further submits that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

55. To successfully implement the foregoing the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) with respect of the Interim Order and a waiver of the ten-day stay under Bankruptcy Rule 6004(h).

NOTICE

56. The Debtor requests the Court's approval to serve this Motion on: (a) the Lender; (b) BB&T (c) the top twenty unsecured creditors; and (d) the Bankruptcy Administrator for the Eastern District of North Carolina, and believes this notice is sufficient and that such service shall constitute adequate notice of a hearing on the Motion; and

57. No previous application for the relief sought herein has been made to this or any other court.

58. The Debtor requests that this Court retain jurisdiction to hear and determine all matters arising from or related to this Motion.

59. Except as specifically set forth herein, nothing in this Motion should be construed as (a) an admission as to the validity or priority of any claim against the Debtor, (b) a waiver of the Debtor's rights to dispute any claims, or (c) an approval or assumption of any agreement, contract or lease, pursuant to Section 365 of the Bankruptcy Code.

WHEREFORE, the Debtor respectfully requests that this Court enter an order granting the relief requested herein and that it grant the Debtor such other and further relief as is just and proper

Dated: November 6, 2009

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Terri L. Gardner
Terri L. Gardner
N.C. State Bar No. 9809
Joseph M. Lischwe
N.C. State Bar No. 13308
Post Office Box 30519
Raleigh, NC 27622-0519
(919) 329-3000
Attorneys for Coharie Hog Farm, Inc.

EXHIBIT A – TERM SHEET

COHARIE HOG FARM, INC. TERM SHEET

Discussion Sheet

Borrower: Coharie Hog Farm, Inc.

Guarantors: Coharie Hog Farm, a North Carolina general partnership, Anne Bryan Faircloth, William Nelson Waters, Jr.

Lender: Cape Fear Farm Credit, ACA (“DIP Lender”)

Facility: A non-patronage revolving credit facility (“DIP Facility”) to be sized in accordance with the liquidity needs of the Company. Subject to further due diligence, it is currently contemplated that the size of this facility will be \$1,500,000. The DIP Facility would be secured by a superpriority lien on all collateral pursuant to Section 364(d).

Purpose: The purpose of this facility is to provide short term financing as part of a pre-arranged bankruptcy filing.

Maturity: The DIP Facility shall have a maturity of six (6) months from the date of the bankruptcy filing. All commitments of the DIP Lender shall terminate and all obligations due to the DIP Lender shall be due at this time.

Pricing/Fees: The DIP Facility shall accrue interest at a LIBOR Rate at LIBOR plus 10 percent and a loan service fee of \$50,000. The unused commitment fee shall be 1%.

Collateral: “Debtor” is defined as Coharie Hog Farm, Inc.. The DIP Lender will be granted post-petition replacement liens on all property of the estate and all after-acquired property of the Debtor pursuant to Section 363 to secure its pre-petition obligations.

All indebtedness and obligations under the DIP Facility, including all fees and expenses will be secured by a security interest and liens granted pursuant to Section 364(c) and priming liens under Section 364(d) of the Bankruptcy Code upon all property of the estate, whether pre-petition or post-petition assets subject only to valid, perfected and unavoidable security interest, liens, claims and encumbrances as of the petition filing date, including a lien on property of the estate not otherwise subject to a lien pursuant to Section 364(c)(2) and a junior lien on property of the estate, whether pre-petition or post-petition assets, that is subject to a lien pursuant to Section 364(c)(3). The Debtor shall not create any new liens without express written consent of DIP Lender.

The Collateral is generally described as follows : All Debtors’ Accounts, Chattel Paper, Deposit Accounts, Documents, Equipment, Fixtures, Inventory, General Intangibles, Instruments, Investment Property, Letter of Credit Rights, Farm Products, Payment Intangibles, Commercial Tort Claims, Software, Goods, cash, swine (and any right, title and interest in any swine, and all additions, replacements, offspring, increase and unborn thereof), insurance proceeds, hedging accounts, cash accounts, and margin accounts, now existing or hereafter arising, wherever located, and all products and proceeds thereof, (ii) the property and interests subject to the Deed of Trust. Eight (8) sow facilities and three (3) finishing facilities, and improvements and all easements, rights and appurtenances thereto (including, without limitation, waste management and/or sprayfield easements), which real estate comprises approximately 1,468.74 acres. Any and all products and proceeds of any of the foregoing (including, but not limited to, any claims to any items referred to in this definition, and any claims of the Debtor against third parties for loss of, damage to or destruction of any or all of the collateral or for proceeds payable under, or

unearned premiums with respect to, policies of insurance) in whatever form, including, but not limited to, cash, negotiable instruments and other instruments for the payment of money, chattel paper, security agreements and other documents and the proceeds of such proceeds.

- Closing Costs:** The Borrower will be responsible for all costs associated with the DIP Facility, including attorney' fees, title searches and title insurance premiums, if any, and other costs and expenses reasonably incurred by the Lender in connection with the structuring, negotiation, documentation, and Closing of the transaction, including the Loan Agreement.
- Covenants:** Customary for debtor-in-possession financings, Coharie shall be required to file and prosecute the Plan of Reorganization according to an agreed timeline. As a precondition to funding the DIP Lender shall approve a budget for the period of the DIP Facility (the "Budget").
- Conditions:**
- 1) The DIP Lender shall be granted a super-priority administrative expense claim pursuant to Section 364(c)(1) over any and all other administrative claims or expenses against the Debtor, its estate or the Trustee, including without limitation, claims under Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) and 726 of the Bankruptcy Code and shall have priority over any claims arising under Section 506(c) subject and subordinate only to the Carve Out Expenses approved in the Budget and by the Bankruptcy Court.
 - 2) Coharie Hog Farm Partnership, to be 100% guarantors on all existing Cape Fear Farm Credit debts and the DIP Facility. All assets of Coharie Hog Farm Partnership pledged to pre-petition debts will also secure the DIP Facility.
 - 3) Anne Bryan Faircloth and William Nelson Waters, Jr. to reaffirm guaranty agreements on pre-petition indebtedness and to 100% guarantee DIP Facility.
 - 4) Entry of an Interim DIP order approving the DIP loan in form and substance to DIP Lender.
 - 5) Interim DIP order granting all liens and priority expense status as requested by DIP Lender.
 - 6) Approval by Bankruptcy Court in Interim and Final DIP Orders upon terms approved by the DIP Lender including without limitation, granting the right of the DIP Lender to (a) bid at any sale of assets and the right to credit bid its DIP Facility claim at such sale in whole or in part or (b) to propose a plan of reorganization.
- Default and Remedies:** To be documented and defined in documents customary for debtor-in-possession financing and approved by DIP Lender.
- Attorney's Opinion:** The written opinion(s) of counsel for the Borrower, addressed to the Lender confirming the legal status and authority of the Borrower(s) and Guarantor(s); the due authorization, validity and enforceability of the Loan Documents; and such other matters as the Lender requests. Such counsel and opinions must be satisfactory to the Lender.

Signature of agreement by Borrowers:

By: _____
Coharie Hog Farm, Inc.

Signature of Agreement by Lender:

By: _____
Cape Fear Farm Credit, ACA

Signature of agreement by Guarantors:

By: _____
Coharie Hog Farm, a North Carolina general partnership

Anne Bryan Faircloth

William Nelson Waters, Jr.

**THIS IS NOT AN OFFERING MEMORANDUM OR PROSPECTUS AND SHOULD NOT BE TREATED
AS OFFERING MATERIAL OF ANY SORT AND IS FOR INFORMATION PURPOSES ONLY**

EXHIBIT B – APPROVED BUDGET

