



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Central States Bankruptcy Workshop

Business Track

Benefits and Pitfalls to Restructuring, Recapitalizing or Selling Out of Court

Daniel F. Dooley, Moderator

MorrisAnderson & Associates, Ltd.; Chicago

Hon. Janet S. Baer

U.S. Bankruptcy Court (N.D. Ill.); Chicago

Susan M. Cook

Warner Norcross + Judd LLP; Midland, Mich.

Sheryl S. Toby

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Brian P. Welch

Burke, Warren, MacKay & Serritella, P.C.; Chicago

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ABI Central States Conference
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Comparison of Bankruptcy & Alternatives

	OUT OF COURT	UCC ARTICLE 9	ASSIGNMENT for the BENEFIT of CREDITORS (ABC)	STATE COURT RECEIVERSHIP	FEDERAL COURT RECEIVERSHIP	CHAPTER 11 BANKRUPTCY	CHAPTER 7 BANKRUPTCY
VENUE	Out of Court	Out of Court	Out of Court or in State Court depending on the state	State Court	Federal Court	U.S. Bankruptcy Court, a Federal Court	U.S. Bankruptcy Court, a Federal Court
PURPOSE	Company sale of equity or assets, or liquidation by Company	Sale of collateral (Company assets or equity) by Secured Lender	Sale or liquidation of Company assets by Assignee	Sale or liquidation of Company assets by Receiver or Receiver act as custodian of assets pending certain event	Sale or liquidation of Company assets by Receiver or Receiver act as custodian of assets pending certain event	Plan of Reorganization, or sale or liquidation of assets by Company as Debtor In Possession	Liquidation of assets by Chapter 7 Trustee
PARTIES INVOLVED	Company and buyer; potentially creditors	Secured Lender, Company, buyer, and junior lien holders; potentially creditors	Assignee and buyer; potentially creditors	Parties to the lawsuit requesting appointment of a Receiver or in some cases all stakeholders of Company	Parties to the lawsuit requesting appointment of a Receiver or in some cases all stakeholders of Company	All stakeholders of Company	All stakeholders of Company and Chapter 7 Trustee
VOLUNTARY or INVOLUNTARY	Voluntary	Voluntary or involuntary	Voluntary	Voluntary or involuntary; can be contractually agreed remedy	Voluntary or involuntary; can be contractually agreed remedy	Voluntary or involuntary	Voluntary or involuntary
LEGAL AUTHORITY	Statutory and corporate authority	Article 9 of the UCC under applicable State law	State statute or common law	State statute or common law	Federal statute or common law or potentially State law where Federal Court resides	Bankruptcy Code	Bankruptcy Code
JURISDICTION	Not Applicable	May be limited to applicable State law.	If State Court proceeding, orders and powers may be limited to enforcement within State unless other States recognize orders	Orders and powers may be limited to enforcement within State unless other States recognize orders	Self diversity of citizenship of Plaintiff and Defendants or Federal question, then national jurisdiction	National jurisdiction	National jurisdiction
LAW WELL DEVELOPED	Well developed	Well developed	Well developed in States where ABCs are commonly used and less developed or not developed in other States	Well developed where State Court Receivers are commonly used or statute updated, less developed or not developed in other States	Limited Federal statute with developing Federal common law. If State law where Federal Court resides applies, depends on State law	Well developed	Well developed
JUDICIAL OVERSIGHT	None	None	No judicial oversight unless required by State ABC statute, then State Court oversight	State Court	Federal Court	U.S. Bankruptcy Court, a Federal Court	U.S. Bankruptcy Court, a Federal Court

Authors – Fredrikson & Byron and MorrisAnderson 5/30/2019

2019 CENTRAL STATES BANKRUPTCY WORKSHOP

Comparison of Bankruptcy & Alternatives

	OUT OF COURT	UCC ARTICLE 9	ASSIGNMENT for the BENEFIT of CREDITORS (ABC)	STATE COURT RECEIVERSHIP	FEDERAL COURT RECEIVERSHIP	CHAPTER 11 BANKRUPTCY	CHAPTER 7 BANKRUPTCY
ADMINISTRATIVE OVERSIGHT	None	None	None	None	None	U.S. Trustee's office	U.S. Trustee's office
FINANCING OF CASE	Secured Lender	Secured Lender	Secured Lender subject to agreement with Assignee	Secured Lender subject to agreement with Receiver	Secured Lender subject to agreement with Receiver	Secured Lender subject to agreement with Company (DIP loan) or Cash Collateral (could either be agreed or non-consensual)	Secured Lender subject to agreement with Chapter 7 Trustee
MANAGEMENT or CUSTODIAN IN CONTROL of COMPANY and ASSETS	Company remains in control	Company remains in control until Secured Lender forecloses but Secured Lender manages asset sale process	Assignee	Receiver	Receiver	Company or, in rare circumstances, Chapter 11 Trustee if ordered by the Bankruptcy Court	Chapter 7 Trustee
SELECTION of MANAGEMENT or CUSTODIAN	N/A	N/A	Company selected	Court appointed with parties' preferences usually honored	Court appointed with parties' preferences usually honored	Company remains in control unless, in rare circumstances, Chapter 11 Trustee is ordered and appointed by Bankruptcy Court. Chapter 11 Trustee selected by U.S. Trustee or elected by creditors (rare)	U.S. Trustee appointed Chapter 7 Panel Trustee unless creditors elect a different Trustee (rare)
CONTINUOUS BUSINESS OPERATIONS	Yes	Yes unless voluntary foreclosure, then likely disruption of business operations	Yes	Yes	Yes	Yes	No
PROFESSIONAL REQUIREMENTS	None other than generally applicable rules of professional responsibility	None other than generally applicable rules of professional responsibility	Professionals must be free of conflicts. Note- it's difficult to first represent Company or Secured Lender in a case and then become the Assignee	Professionals must be free of conflicts. Note- it's difficult to first represent Company or Secured Lender in a case and then become the Receiver	Professionals must be free of conflicts. Note- it's difficult to first represent company or Secured Lender in a case and then become the Receiver	Professionals must be free of conflicts and be disinterested	Professionals must be free of conflicts and be disinterested

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AUTOMATIC STAY of LITIGATION	None	None	In a few States, limited statutory stay applicable within that State jurisdiction only	In a few States, limited statutory stay applicable within that State jurisdiction only. Other States allow limited stay under "custodial legis"- prevents creditors from establishing lien in property possessed by Receiver	Limited stay under "custodial legis"-prevents creditor from establishing lien in property possessed by Receiver	Broad stay	Broad stay
ASSIGNMENT of EXECUTORY CONTRACTS	Only have contractual rights	Only have contractual rights	Only have contractual rights	Only have contractual rights	Only have contractual rights	May assume and assign most contracts by curing monetary defaults and providing adequate assurance of ability to financially perform	May assume and assign most contracts by curing monetary defaults and providing adequate assurance of ability to financially perform
SALES of ASSETS FREE and CLEAR of LIENS and ENCUMBERANCES	No	No	In a few States, ABC statute authorizes sales free and clear.	In a few States, Receivership statute authorizes sales free and clear. Other State Courts may approve sales free and clear.	No Federal statute authority but Court may approve a sale free and clear.	Yes	Yes
SUCCESSOR LIABILITY EXPOSURE for BUYER	Yes	Yes	Limited exposure in Court supervised ABC depending on language in Sale Order; varies by State. Yes in non- Court supervised ABC	Limited exposure depending on State statute and language used in the Sale Order; varies by State	Limited successor liability exposure depending on language used in the Sale Order	No successor liability exposure except in isolated situations	No successor liability exposure except in isolated situations
ABILITY to BRING PREFERENCE LAWSUITS	No	No	In a few states, remedy available to Assignee	In a few States, remedy available to Receiver	Not available under Federal Receivership law.	Remedy Available to Company or Chapter 11 Trustee (rare)	Remedy available to Chapter 7 Trustee
ABILITY to BRING FRAUDULENT CONVEYANCE LAWSUITS	Remedy available to creditors directly	Remedy available to creditors directly	In some States, remedy available to Assignee	In most states, remedy available to Receiver	Remedy available to Receiver	Remedy available to Company or Chapter 11 Trustee (rare)	Remedy available to Chapter 7 Trustee
DEBTOR DISCHARGE of DEBTS	No	No	No	No	No	Upon confirmation of a Plan of Reorganization, yes	Limited to individual debtors

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TIME FRAME for SALE of COMPANY	Likely most expeditious if buyer consents to process	Very expeditious if buyer consents to process	Expeditious but ABC sales in States requiring Court oversight are typically slower	Expeditious but Court oversight means Court approval is required	Expeditious but Court oversight means Court approval is required	Slower as Courts allow Unsecured Creditors Committee formation which slows down the process. Sales as fast as 30 days possible	Generally slowest
DISTRIBUTION of ASSETS	Company receives funds, pays secured debt and then unsecured debt	After Secured Lender paid in full, excess proceeds, if any, returned to Company	Statutory priorities may be specified in state statute, common law, or if applicable, Court Order	Statutory priorities may be specified in state statute, Court Order, or common law.	Pursuant to Court Order or common law	Bankruptcy Code and pursuant to a Plan of Reorganization	Bankruptcy Code
SCALABLE to SIZE and COMPLEXITY of the CASE	Yes flexible	Yes flexible	Yes flexible	Yes flexible	Yes flexible	Minimal ability to adjust process to size and complexity of case	Minimal ability to adjust process to size and complexity of case
PUBLICITY of the COMPANY'S FINANCIAL DISTRESS	None	Minimal	Minimal	Moderate	Moderate	Significant and ongoing	Significant but one time event
COST of the PROCESS	Lowest cost	Lowest cost	Low Cost	Moderate Cost	Moderate Cost	Most expensive	Expensive
VALUE EXPECTATION for a COMPANY SALE	Highest net of costs in most cases	Limited as value will be discounted due to successor liability risk and likely disruption of business operations	Moderate depending on ability to sell free and clear and continue business operations	Moderate depending on ability to sell free and clear and continue business operations	Moderate depending on ability to sell free and clear and continue business operations	High due to statutory ability to sell free and clear and assign contracts, but Chapter 11 process may damage value of the going concern business and certain types of intangible assets	Lowest due to cessation of business operations, Chapter 7 Trustee may not be expert at maximizing value, and the time required to sell assets may be longer

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Proposed ORDER

ORDER APPOINTING RECEIVER

WHEREAS, this matter has come before this Court upon motion of the Plaintiff CHS Capital, LLC ("CHS Capital" or the "Plaintiff") to appoint a receiver in the above-captioned action; and,

WHEREAS, Boersen Farms AG, LLC, Boersen Farms Grain, Boersen Farms, Inc., Boersen Farms Properties, LLC, Arlan Boersen Farm, LLC, Arlan Dennis Farm, LLC, Arlan Ross Farm, LLC, Dennis Boersen Farm, LLC, Ross Boersen Farm, LLC, Ross Russell Farm, LLC, Dennis Russell Farm, LLC, Boersen AG Partners, LLC, Boersen Land Co., LLC, Ross Boersen Farms & Affiliates, LLC, Boersen Transport, Inc., Sandra Boersen Trust (the "Receivership Entities") are Defendants in the above-captioned case; and

WHEREAS, Dennis Boersen, Stacy Boersen, Arlan Boersen, and Sandra Boersen (the "Receivership Individuals" and with the Receivership Entities, the "Receivership Defendants") are Defendants in the above-captioned case; and

WHEREAS, the Court finds that, based on the record in these proceedings, that one or more defaults or Events of Default under that certain Forbearance Agreement dated May 3, 2017 between the Plaintiff and the Defendants have occurred and that the Forbearance Period (as defined in such agreement) has been properly terminated by the Plaintiff, and, as a consequence, the Plaintiff is no longer bound to forbear or otherwise refrain from pursuing or otherwise exercising

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all of its legal rights and remedies under the Forbearance Agreement, the loan documents between the Plaintiff and the Defendants and applicable law; and

WHEREAS, the Court further finds that the appointment of a receiver in this action is necessary and appropriate for the purposes of preserving the following assets of the Receivership Defendants, whether relating directly or indirectly to the Receivership Defendants' farming operations:

(a) all Goods, Accounts, Chattel Paper, Electronic Chattel Paper, Inventory, Equipment, Farm Products, Instruments, Investment Property, Documents, Deposit Accounts, Commodity Accounts, Cash Proceeds, Noncash Proceeds, Supporting Obligations, Fixtures, Letter of Credit Rights, Records and General Intangibles (all as defined in the Uniform Commercial Code in the State of Michigan), together with such additions, accessions, parts, replacements, substitutions, products and proceeds of or pertaining the any of the foregoing; and

(b) without limiting the generality of the assets specified in subsection (a), all of the Receivership Defendants' (i) harvested crops and the facilities in which such harvested crops are stored and all accounts, cash, entitlements and income generated by or arising from past or pending sales of harvested crops; (ii) growing crops and the Receivership Defendants' possessory interests in (and all contractual entitlements with respect to) the lands upon which such crops are situated; (iii) farm equipment (including vehicles and trailers with certificates of title), fuel, parts and supplies; (iv) livestock, born or unborn, and all feed, inventory, and supplies used in the care of or consumed by the livestock, and the Receivership Defendants possessory interests in (and all contractual entitlements with respect to) the lands and improvements used to raise such livestock; and

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(v) all business records relating to the Receivership Defendants' farming operations, and the Receivership Defendants' possessory interests in the offices and real property improvements where such business records are located; and

(c) the real properties subject to the Plaintiff's mortgagee interests, as described in Schedule A hereto,

(the "Receivership Property").

WHEREAS, this Court has subject matter jurisdiction over this action and personal jurisdiction over the Receivership Defendants, and venue properly lies in this district.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court hereby takes exclusive jurisdiction and possession of the Receivership Property.
2. O'Keefe & Associates Consulting, L.L.C. is hereby appointed to serve without bond as receiver (the "Receiver") of the Receivership Property, wherever located, and for the management and control of the farming operations of the Receivership Defendants for a period commencing on the date of this Order and ending upon termination of such appointment by further order of the Court. The Receiver's duty to act as receiver is subject to its written acceptance and approval of the terms of this Order.

I. Asset Freeze

3. Except as otherwise specified herein, all Receivership Property is frozen until further order of this Court. Accordingly, all persons and entities, including, but not limited to the Receivership Defendants, with direct or indirect control over any Receivership Property, other than the Receiver, are hereby restrained and enjoined from directly or indirectly secreting,

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transferring, setting off, garnishing, receiving, changing, selling, pledging, assigning, damaging, liquidating or otherwise disposing of or withdrawing such assets except as otherwise provided in this Order. This freeze shall include, but not be limited to, Receivership Property that is on deposit with financial institutions such as banks, brokerage firms and mutual funds. Notwithstanding the foregoing, secured creditors of Defendants' farm equipment with purchase-money security interests that have priority over Plaintiff's liens and security interests may repossess and/or sell such collateral in accordance with applicable law, with the Plaintiff reserving all rights to challenge claims of purchase-money priority.

II. General Powers and Duties of Receiver

4. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the Receivership Individuals and by the officers, directors, managers and general and limited partners of the Receivership Entities under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, and Fed.R.Civ.P. 66.

5. The Receivership Individuals and the directors, officers, managers, employees and agents of the Receivership Entities shall have no actual or implied authority with respect to the Receivership Property, except to the extent as may hereafter be expressly granted by the Receiver. The Receiver shall assume and control the operation of the Receivership Property and the management and control of the farming operations of the Receivership Defendants.

6. Subject to the specific provisions in Sections III through XV below, and other terms of this Order, the Receiver shall have the following general powers and duties:

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- A. To use reasonable efforts to determine the nature, location and value of all Receivership Property, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly;
- B. To take immediate exclusive custody, control and possession of all Receivership Property (other than as specified in this Order) and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;
- C. To manage, control, operate, preserve, repair and maintain all or any portion of the Receivership Property, to hold in its possession, custody and control all or any portion of the Receivership Property, and to lease and/or sell such Receivership Property pursuant to the terms of this Order;
- D. To use Receivership Property, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging its duties as Receiver;
- E. To take any action which, prior to the entry of this Order, could have been taken by the Receivership Individuals or by the officers, directors, partners, managers, trustees and agents of the Receivership Entities;
- F. To engage and employ persons in its discretion to assist it in carrying out its duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, appraisers, forensic experts, brokers, traders or auctioneers and other professionals as the Receiver may from time to time deem appropriate on such terms and conditions as the Receiver deems appropriate;
- G. To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;
- H. To issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure;
- I. To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging its duties as Receiver;

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- J. To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Property;
- K. To obtain advances or borrow funds from time to time from the Plaintiff for purposes relating to the operations of the Receivership Property without further Court order. Should the Receiver obtain advances or borrow any funds from the Plaintiff, the Plaintiff shall be secured in the same priority and in the same collateral as the indebtedness evidenced by the loan documents and, in addition, shall be further secured with a first priority "all asset" security interest in all Receivership Property, if any, that is not encumbered by existing liens, mortgages and security interests. The Receiver is authorized to execute and deliver loan and other security documents to the extent necessary to document, evidence and perfect such liens and encumbrances;
- L. To collect and receive all cash, on-hand cash, current and past due earnings, revenues, rents, issues and profits (whether unpaid, accrued, due or to become due), all claims to rents, issues, profits, income and cash collateral derived from the Receivership Property, if any;
- M. To prepare and maintain complete and accurate books, records and financial reports of the Receivership Property, including operating statements, income statements, balance statements, and all other statements typically prepared for commercial and farming operations;
- N. To retain, hire or discharge on-site employees;
- O. To establish pay rates for on-site employees, if any;
- P. To purchase insurance as the Receiver deems appropriate for the Receivership Property's preservation and protection;
- Q. To maintain a separate account with a federally insured bank in Michigan in the Receiver's own name, as receiver, from which the Receiver shall disburse all authorized payments as provided in this Order;
- R. To receive and endorse checks pertaining to the Receivership Property, either in the Receiver's name, or in any Receivership Defendant's name;
- S. To pay all real estate taxes, personal property taxes, and any other taxes or assessments against the Receivership Property;
- T. The Receiver shall not be responsible for the preparation and filing of any tax returns for the Receivership Defendants or any of their affiliates, other than to provide the Receivership Defendants with information in the

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Receiver's possession as may be necessary for the Receivership Defendants or their affiliates to prepare and file returns. The Receivership Defendants and their agents shall immediately upon request provide to the Receiver any information needed to file any tax returns for the Receivership Property. Any and all taxing authorities (including the Internal Revenue Service, the Michigan Department of Treasury, and the Unemployment Insurance Agency) are hereby authorized and directed to release and provide to the Receiver any and all tax information regarding the Receivership Property that the Receiver requests. The Receiver is hereby granted a power of attorney for each Receivership Defendant to obtain tax information relating to the Receivership Property;

- U. To enforce any existing contracts affecting the Receivership Property and to enter into new contracts and arrangements affecting the Receivership Property as may be necessary or desirable for administering the Receivership Property;
- V. To enforce, execute, or terminate contracts providing for the furnishing of materials for or services to the Receivership Property;
- W. Without further Order of the Court, the Receiver may cancel or reject all unprofitable or other contracts and may, in its discretion, terminate any and all listing agreements and management agreements relating to the Receivership Property without liability to any broker, realtor or manager. The Receiver may, but is not required to, seek Court approval of any cancellation or rejection of any contract;
- X. The Receiver, and only the Receiver, shall be entitled to receive and recover any and all deposits with any utility companies pertaining to the Receivership Property. The utility company may require the Receiver to make a deposit as a condition for obtaining utility services;
- Y. To take such other action as may be approved by this Court; and
- Z. To give the Receivership Defendants, access to the books and records of the Receivership Entities and the Receivership Individuals related to the Receivership Property and related business operations in order to comply with their obligations under this Order.

III. Access to Information

7. The Receivership Individuals and the past and/or present officers, directors, agents, managers, general and limited partners, trustees, attorneys, accountants and employees of the Receivership Entities, as well as those acting in their place, are hereby ordered and directed to

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preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers. In addition, the Receivership Defendants shall turn over to the Receiver immediately all of the following pertaining to the Receivership Property (but only to the extent that such items are in the possession, custody or control of Defendants and their agents): all keys, all existing service contracts, all pending bids for contractor work, all leases, financing, and rental agreements, and all security deposits and pre-paid rents, all insurance policies on the Receivership Property, and all tenant and vendor insurance certificates.

8. Within thirty (30) days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver and the Plaintiff a sworn statement, listing: (a) the identity, location and estimated value of all Receivership Property; (b) all employees (and job titles thereof), and independent contractors involved in the cultivation, farm management, harvesting, or storage of the Defendants' crops; and, (c) the party(ies) in possession, location, and quantity of all crops in storage in which any one or more of the Receivership Defendants claim a beneficial interest; and (d) the names, addresses and amounts of claims of all known creditors of the Receivership Defendants asserting claims or liens against the Receivership Property.

9. Within thirty (30) days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver a sworn statement and accounting, with complete documentation, covering the period from January 1, 2017 to the present:

- A. Of all Receivership Property, wherever located, held by or in the name of the Receivership Defendants, or in which any of them, directly or indirectly, has or had any beneficial interest, or over which any of them maintained or maintains and/or exercised or exercises control, including, but not limited to: (a) all securities, investments, or funds constituting the proceeds of

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crops, stating the location of each; and (b) any and all accounts, including all funds held in such accounts, with any bank, brokerage or other financial institution held by, in the name of, or for the benefit of any of them, directly or indirectly, or over which any of them maintained or maintains and/or exercised or exercises any direct or indirect control, or in which any of them had or has a direct or indirect beneficial interest, including the account statements from each bank, brokerage or other financial institution;

- B. Identifying all credit, bank, charge, debit or other deferred payment card issued to or used by the Receivership Defendants to purchase inventory or supplies for their farming operations, including but not limited to the issuing institution, the card or account number(s), all persons or entities to which a card was issued and/or with authority to use a card, the balance of each account and/or card as of the most recent billing statement, and all statements for the last twelve months;
- C. Of all transfers of crops in which the transferee did not remit the sale proceeds to Plaintiff.

10. Within thirty (30) days of the entry of this Order, the Receivership Defendants shall provide to the Receiver copies of the Receivership Defendants' federal income tax returns for 2016, to the extent prepared, as well as all relevant and necessary underlying documentation that may be requested by the Receiver.

11. The Receivership Individuals and the Receivership Entities' past and/or present officers, directors, agents, attorneys, managers, shareholders, employees, accountants, debtors, creditors, managers and general and limited partners, and other appropriate persons or entities shall answer under oath to the Receiver all questions which the Receiver may put to them and produce all documents as required by the Receiver regarding the Receivership Property, or any other matter relevant to the operation or administration of the receivership or the collection of funds due to the Receivership Defendants. In the event that the Receiver deems it necessary to require the appearance of the aforementioned persons or entities, the Receiver shall make its discovery requests in accordance with the Federal Rules of Civil Procedure.

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12. To issue subpoenas to compel testimony of persons or production of records, consistent with the Federal Rules of Civil Procedure and applicable Local Rules, except for the provisions of Fed.R.Civ.P. 26(d)(1), concerning any subject matter within the powers and duties granted by this Order.

13. The Receivership Defendants are required to assist the Receiver in fulfilling its duties and obligations. As such, they must respond promptly, truthfully, and completely to all requests for information and documents from the Receiver.

IV. Access to Books, Records and Accounts

14. The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, books and records and all other documents or instruments relating to the farming operations of the Receivership Defendants. All persons and entities having control, custody or possession of any such records are hereby directed to turn such property over to the Receiver.

15. The Receivership Defendants, as well as their agents, servants, employees, attorneys, any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, facsimile transmission or otherwise, having possession of the property, business, books, records, accounts or assets relating to the farming operations of the Receivership Defendants are hereby directed to deliver the same to the Receiver, its agents and/or employees.

16. All banks, brokerage firms, financial institutions, and other persons or entities which have possession, custody or control of any assets or funds derived from the farming operations of the Receivership Defendants that receive actual notice of this Order by personal service, facsimile transmission or otherwise shall:

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- A. Not liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon instructions from or consent by the Receiver;
- B. Not exercise any form of set-off, alleged set-off, right of recoupment, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court; and
- C. Cooperate expeditiously in providing information and transferring funds, assets and accounts to the Receiver or at the direction of the Receiver.

V. Access to Real and Personal Property

17. The Receiver is authorized and directed to take immediate and exclusive possession of all Receivership Property, wherever located, including but not limited to electronically stored information, computers, laptops, hard drives, external storage drives, and any other such memory, media or electronic storage devices, books, papers, data processing records, evidence of indebtedness, bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies and equipment.

18. The Receiver is authorized to take immediate possession of all real property of the Receivership Defendants included within the Receivership Property. Upon receiving actual notice of this Order by personal service, facsimile transmission or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are (without the express written permission of the Receiver) prohibited from: (a) entering such premises; (b) removing anything from such premises; or, (c) destroying, concealing or erasing anything on such premises.

19. In order to execute the express and implied terms of this Order, the Receiver is authorized to change door locks to the premises described above. The Receiver shall have

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exclusive control of the keys. The Receivership Defendants, or any other person acting or purporting to act on their behalf, are ordered not to change the locks in any manner, nor to have duplicate keys made, nor shall they have keys in their possession during the term of the receivership.

20. The Receiver is authorized to open all mail directed to or received by or at the offices or post office boxes of the Receivership Defendants, and to inspect all mail opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order.

21. Upon the request of the Receiver, the United States Marshal Service, in any judicial district, is hereby ordered to assist the Receiver in carrying out his duties to take possession, custody and control of, or identify the location of, any assets, records or other materials belonging to the Receivership Estate.

VI. Notice to Third Parties

22. The Receiver shall promptly give notice of his appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers and general and limited partners of the Receivership Defendants, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

23. All persons and entities owing any obligation, debt, or distribution with respect to the Receivership Property shall, until further ordered by this Court, pay all such obligations in accordance with the terms thereof to the Receiver and its receipt for such payments shall have the same force and effect as if the Receivership Defendant had received such payment; provided, however, that all persons and entities now or hereafter owing any obligation, debt, or distribution to any of the Receivership Defendants, the Receiver or the Receivership estate on account of sales

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and purchases of crops, including those persons and entities that purchase or have purchased crops and are in receipt of notices from the Plaintiff under the Food Security Act of 1985 (the "FSA Notices"), are authorized and directed to remit the proceeds on account of such sales and purchases to the Plaintiff in accordance with the FSA Notices or, if otherwise, to CHS Capital, LLC, 5500 Cenex Drive, Inver Grove Heights, Minnesota 55077, Attn: Jedd Wennerberg.

24. In furtherance of its responsibilities in this matter, the Receiver is authorized to communicate with, and/or serve this Order upon, any person, entity or government office that he deems appropriate to inform them of the status of this matter and/or the financial condition of the Receivership Property. All government offices which maintain public files of security interests in real and personal property shall, consistent with such office's applicable procedures, record this Order upon the request of the Receiver or the Plaintiff.

25. The Receiver is authorized to instruct the United States Postmaster to hold and/or reroute mail which is related, directly or indirectly, to the farming, operations or activities of any of the Receivership Defendants (the "Receiver's Mail"), including all mail addressed to, or for the benefit of, the Receivership Defendants. The Postmaster shall not comply with, and shall immediately report to the Receiver, any change of address or other instruction given by anyone other than the Receiver concerning the Receiver's Mail. The Receivership Defendants shall not open any of the Receiver's Mail and shall immediately turn over such mail, regardless of when received, to the Receiver. All personal mail of any individual Receivership Defendants, and/or any mail appearing to contain privileged information, and/or any mail not falling within the mandate of the Receiver, shall be released to the named addressee by the Receiver. The foregoing instructions shall apply to any proprietor, whether individual or entity, of any private mail box, depository, business or service, or mail courier or delivery service, hired, rented or used by the

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Receivership Defendants. The Receivership Defendants shall not open a new mailbox, or take any steps or make any arrangements to receive mail in contravention of this Order, whether through the U.S. mail, a private mail depository or courier service.

26. Subject to payment for services provided, any entity furnishing water, electric, telephone, sewage, garbage or trash removal services to the Receivership Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver.

27. The Receiver is authorized to assert, prosecute and/or negotiate any claim relating to the Receivership Property under any insurance policy held by or issued on behalf of the Receivership Defendants, or their officers, directors, agents, employees or trustees, and to take any and all appropriate steps in connection with such policies.

VII. Injunction Against Interference with Receiver

28. Except as expressly permitted by the terms of this Order, or further Order of the Court, the Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:

- A. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
- B. Hinder, obstruct or otherwise interfere with the Receiver in the performance of its duties; such prohibited actions include but are not limited to, concealing, destroying or altering records or information;

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- C. Dissipate or otherwise diminish the value of any Receivership Property; such prohibited actions include but are not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property, enforcing judgments, assessments or claims against any Receivership Property, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement, insurance or other agreement which affects any Receivership Property; provided, however, nothing contained herein shall limit an insurer's right to cancel or terminate insurance coverage for non-payment of premiums, provided the insurer provides the Receiver with 30 days' prior written notice of such action; or,
- D. Interfere with or harass the Receiver, or interfere in any manner with the exclusive jurisdiction of this Court over the Receivership estate.

29. The Receivership Defendants, and all employees, agents, officers, directors, members, partners and or representatives of the Receivership Defendants, shall cooperate with and assist the Receiver in the performance of its duties and take all necessary steps to comply with this Order and other orders of this Court. Among other things, this means that the Receivership Defendants and their agents will cooperate in adding the Receiver as additional named insured, and as the loss payee, on all insurance relating to the ownership, operation and management of the Receivership Property including fire, extended coverage, auto and van coverage, property damage, liability, fidelity, errors and omissions, and workers compensation, and modifying the policies if deemed appropriate by the Receiver and make themselves reasonably available to assist the Receiver as requested. The Receivership Defendants and their agents are prohibited from cancelling, reducing, or modifying any and all insurance coverage in existence with respect to the Receivership Property.

30. The Receiver shall promptly notify the Court of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

VIII. Stay of Litigation

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31. As set forth in detail below, the following proceedings, excluding the instant proceeding are stayed until further Order of this Court:

All civil legal proceedings of any nature, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving: (a) the Receiver, in its capacity as Receiver; or (b) any Receivership Property, wherever located (such proceedings are hereinafter referred to as "Ancillary Proceedings").

32. The parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process.

33. All Ancillary Proceedings are stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any action until further Order of this Court. Further, as to a cause of action accrued or accruing in favor of one or more of the Receivership Defendants against a third person or party, any applicable statute of limitation is tolled during the period in which this injunction against commencement of legal proceedings is in effect as to that cause of action.

34. The Receiver or any other party in interest may bring a motion in this Court to lift the stay of any particular Ancillary Proceeding. The Receiver or any other party in interest shall give notice of the motion to lift the stay to all parties to this case and all parties to the Ancillary Proceeding. If no party objects to the Receiver's or any other party in interest's motion to lift the stay within fourteen days of the date on which the motion is filed, this Court will order that the stay of the Ancillary Proceeding be lifted. If a party objects to the Receiver's or any other party in interest's motion, this Court will hold a hearing on the motion as soon as practicable.

IX. Managing Assets

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35. The Receiver shall establish one or more custodial accounts at a federally insured bank to receive and hold all cash equivalent Receivership Property that is not Cash Collateral (defined below) (the "Receivership Funds").

36. The Receiver shall also establish one or more custodial accounts at a federally insured bank to receive and hold cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the Receivership estate and an entity other than the Receivership estate have an interest and includes the proceeds, products, offspring, rents, or profits of property (the "Cash Collateral"). The Receiver must segregate Cash Collateral from Receivership Funds. The Receiver shall not use Cash Collateral without the express written consent of the Plaintiff.

37. The Receiver's deposit account(s) shall be entitled "Receiver's Account, Estate of [Name of Receivership Defendant]" together with the name of the action.

38. The Receiver may, without further Order of this Court, transfer, compromise, or otherwise dispose of any Receivership Property, other than real estate, in the ordinary course of business, on terms and in the manner the Receiver deems most beneficial to the Receivership estate, and with due regard to the realization of the true and proper value of such Receivership Property. Any sale shall be free and clear of liens and encumbrances, with any liens and encumbrances attaching to the sale proceeds in the same rank and priority as attached to the Receivership Property. The Court appoints and makes the Receiver each Receivership Defendants' attorney-in-fact, to which is coupled an interest, to sell or lease the Receivership Property on behalf of, and in the name of, each Receivership Defendant. A sale shall be a cash sale to a bona fide third party purchaser, and upon such other terms as are fair and reasonable. No sale shall be made to the Receiver, or to any person or entity with a beneficial interest in the

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Receiver, or to any person or entity in which the Receiver has a beneficial interest. The Receiver has the following authority with respect to any sale of Receivership Property: To do and perform all and every act desirable, proper or necessary with respect to any sale of the Receivership Property, including the authority to execute and deliver a purchase agreement, a deed of conveyance, and all other documents necessary or desirable to transfer the Receivership Property, all on behalf of, and in the name of, each Receivership Defendant. Any and all statutory, common law and/or equitable rights of redemption by any of the Defendants or any other person or entity with respect to any sale of the Receivership Property by the Receiver are terminated effective upon the date of any sale of the Receivership Property. A bona fide purchaser for value, its successors and assigns, and any title insurance company, may rely upon this termination of redemption rights and any such final order of sale approval. The net proceeds of sale of Receivership Property shall be disbursed as follows: (i) first, to the payment of any unpaid fees, if any, of the Receiver, and out of pocket expenses, if incurred in accordance with the terms of this Order; (ii) second, to the secured creditors of record, in the same rank and priority as now exists against the Receivership Property; (iii) third, to the Receiver, to be held pending further Order of the Court.

39. Subject to Paragraph 40, immediately below, the Receiver is authorized to locate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of any real property in the Receivership Property titled in one or more of the Receivership Defendants, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership estate, and with due regard to the realization of the true and proper value of such real property. Although the Receiver shall have possession and control of real property constituting the Receivership Property, the Receiver shall not, and does not, take title to the Receivership Property. The Receivership Defendants' title

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to the Receivership Property shall be transferred upon the sale of Defendants' interest in the Receivership Property as provided in this Order or by further order of this Court. The Receiver shall have no liability under any state or federal law for the presence in, on or under the Receivership Property for any pollutant, hazardous substance, or waste.

40. Upon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, any real property in the Receivership estate titled in one or more of the Receivership Defendants, with any liens and encumbrances attaching to the sale proceeds in the same rank and priority as attached to the Receivership Property.

41. The Receiver is authorized to take all actions to manage, maintain, and/or wind-down business operations of the Receivership estate, including making legally required payments to creditors, employees, and agents of the Receivership estate and communicating with vendors, investors, governmental and regulatory authorities, and others, as appropriate.

X. Investigate and Prosecute Claims

42. Subject to the requirement, in Section VII above, that leave of this Court is required to resume or commence certain litigation, the Receiver is authorized, empowered and directed to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in its discretion, be advisable or proper to recover and/or conserve Receivership Property.

43. Subject to its obligation to expend Receivership Funds in a reasonable and cost-effective manner, the Receiver is authorized, empowered and directed to investigate the manner in which the financial and business affairs of the Receivership Defendants' farm operations were conducted and (after obtaining leave of this Court) to institute such actions and legal proceedings,

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for the benefit and on behalf of the Receivership estate, as the Receiver deems necessary and appropriate; the Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order.

44. The Receiver hereby holds, and is therefore empowered to waive, all privileges, including the attorney-client and work product privilege, held by all the Receivership Entities with respect to the Receivership Property.

45. The Receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, his Retained Personnel (as that term is defined below), and the Receivership estate.

XII. Bankruptcy Filing

46. The Receiver may seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United States Code (the "Bankruptcy Code") for the Receivership Entities. If a Receivership Entity is placed in bankruptcy proceedings, the Receiver may become, and may be empowered to operate each of the resulting bankruptcy estates as, a debtor in possession. In such a situation, the Receiver shall have all of the powers and duties as provided a debtor in possession under the Bankruptcy Code to the exclusion of any other person or entity. Pursuant to Paragraph 4 above, the Receiver is vested with management authority for all entity Receivership Defendants and may therefore file and manage a voluntary Chapter 11 petition.

47. The provisions of Section VIII above bar any person or entity, other than the Receiver, from placing any of the Receivership Entities in bankruptcy proceedings, either voluntarily or involuntarily.

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XII. Liability of Receiver

48. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with its fiduciary obligations in this matter.

49. The Receiver and its agents, acting within scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as the Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

50. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities. All persons or entities are hereby enjoined from commencing any administrative, legal, or equitable proceedings against the Receiver without first seeking leave from the Court.

51. In the event the Receiver decides to resign, the Receiver shall first give written notice to the Plaintiff and the Court of its intention, and the resignation shall not be effective until the Court appoints a successor. The Receiver shall then follow such instructions as the Court may provide.

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XIII. Recommendations and Reports

52. The Receiver is authorized, empowered and directed to develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property (the "Liquidation Plan").

53. Within thirty (30) days of the filing of this action and thirty (30) days after the end of each calendar quarter thereafter, the Receiver shall file and serve a full report and accounting of the Receivership Estate (the "Quarterly Status Report"), reflecting (to the best of the Receiver's knowledge as of the period covered by the report) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership estate.

54. The Quarterly Status Report shall contain the following:

- A. A summary of the operations of the Receiver;
- B. The amount of cash on hand, the amount and nature of accrued administrative expenses, and the amount of unencumbered funds in the estate;
- C. A schedule of all the Receiver's receipts and disbursements (attached as Exhibit A to the Quarterly Status Report), with one column for the quarterly period covered and a second column for the entire duration of the receivership;
- D. A description of all known Receivership Property, including approximate or actual valuations, anticipated or proposed dispositions, and reasons for retaining assets where no disposition is intended;
- E. A description of liquidated and unliquidated claims held by the Receivership estate, including the need for forensic and/or investigatory resources; approximate valuations of claims; and anticipated or proposed methods of enforcing such claims (including likelihood of success in: (i) reducing the claims to judgment; and, (ii) collecting such judgments);
- F. A list of all known creditors with their addresses and the amounts of their claims;

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- G. The status of Creditor Claims Proceedings, after such proceedings have been commenced; and,
- H. The Receiver's recommendations for a continuation or discontinuation of the receivership and the reasons for the recommendations.

XIV. Fees, Expenses and Accountings

55. Subject to the provisions immediately below, the Receiver need not obtain Court approval prior to the disbursement of Receivership Funds for expenses in the ordinary course of the administration and operation of the receivership. Further, prior Court approval is not required to hire and pay employees or independent contractors to perform operations in the ordinary course of the administration and operation of the receivership.

56. Subject to Paragraphs 53 and 57, the Receiver is authorized to solicit third party consultants, attorneys, accountants, advisors and professionals ("Retained Professional") to assist it in carrying out the duties and responsibilities described in this Order. The Receiver shall not engage any Retained Professional without first obtaining an Order of the Court authorizing such engagement.

57. The Receiver is entitled to reasonable compensation and expense reimbursement from the Receivership estate as described in Schedule B to this Order. Such compensation shall require the prior approval of the Court.

58. Within forty-five (45) days after the end of each calendar month, the Receiver and Retained Professional shall apply to the Court for compensation and expense reimbursement from the Receivership estate (the "Monthly Fee Applications"). At least ten (10) days prior to filing each Monthly Fee Application with the Court, the Receiver will serve upon counsel for the Plaintiff and the Defendants a complete copy of the proposed application, together with all exhibits and relevant billing

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information in a format to be provided by the Receiver's staff. Counsel for the Receivership Defendants may apply to the Court for approval of reasonable compensation for the actual and necessary services performed at the prior written request of the Receiver for the benefit of the receivership estate.

59. All Monthly Fee Applications will be interim and will be subject to cost benefit and final reviews at the close of the receivership. At the close of the receivership, the Receiver will file a final fee application, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership.

60. Monthly Fee Applications may be subject to a holdback in the amount of 20% of the amount of fees and expenses for each application filed with the Court. The total amounts held back during the course of the receivership will be paid out at the discretion of the Court as part of the final fee application submitted at the close of the receivership.

61. Each Monthly Fee Application shall:

- A. Comply with the terms of Schedule A; and,
- B. Contain representations (in addition to the Certification required by the Billing Instructions) that: (i) the fees and expenses included therein were incurred in the best interests of the Receivership estate; and, (ii) with the exception of Schedule A, the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the Receivership Estate, or any sharing thereof.

62. At the close of the Receivership, the Receiver shall submit a Final Accounting, in a format to be provided by Receiver's staff, as well as the Receiver's final application for compensation and expense reimbursement.

XV. Receiver's Budget

63. Upon entry of this Order, the Receiver shall prepare and deliver to the Plaintiff its initial budget or make an initial funding request, which shall include and be based upon the

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Receiver's anticipated fees and expenses for a period of two weeks beginning with the date of its appointment. As soon as is reasonably practicable, the Receiver shall prepare and deliver to the Plaintiff an expanded detailed, monthly budget, which shall include (i) a description of the work streams the Receiver proposes to undertake during the budget period; (ii) the Receiver's anticipated monthly fees, costs, and expenses (including legal fees and costs); and (iii) a forecast of the necessary operating costs of the farming operation of the Receivership Defendants and reasonable expenses of the Receivership Property to the Plaintiff for approval (the "Receiver's Budget"). The Receiver and the Plaintiff may by agreement modify the contents of the Receiver's Budget from time to time without Court approval. The Receiver shall prepare and provide to the Plaintiff a Receiver's Budget on or before the first day of the first month following the delivery of the initial budget and every month thereafter (or such other period as may be agreed) until the Receivership is terminated by further Court order.

64. It is understood and expected that the Receiver will rely upon the Plaintiff to fund reasonable and necessary operating expenses of the receivership (referred to collectively as the "Receivership Expenses") to the extent proceeds available from the Receivership Property are insufficient to fund the same. The Receivership Budget shall be delivered to the Plaintiff by the Friday of each succeeding budget period at 4:00 p.m. CDT, together with a funding request asking the Plaintiff to agree to fund the Receivership Expenses per the terms of the Receivership Budget for the next two weeks. By Tuesday at 4:00 p.m. CDT following the delivery of the Budget and funding request (or as soon thereafter as is practicable), the Plaintiff shall notify the Receiver of its decision not to fund the Budget or any portion thereof. If the Plaintiff elects to fund in accordance with the Budget, it shall either (each a "Protective Advance"): (a) deposit funds in the Receiver's operating account an advance in an amount equal to the funding need identified in the

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Receivership Budget for the following two weeks, or (b) authorize the Receiver to use the Plaintiff's Cash Collateral in an approved amount for such purposes. Each Protective Advance and all other amounts that may be advanced by the Plaintiff to the Receiver, whether to fund Receivership Expenses or otherwise, are collectively referred to in this Order and considered "Protective Advances." Each Protective Advance shall, unless otherwise agreed, bear interest from the date of such Protective Advance is made at the rate of interest specified in the applicable loan documents between the Plaintiff and the Receivership Defendants and the obligation to repay the Protective Advance, together with interest accrued thereon, shall be secured as described in Paragraph 6(K) of this Order.

65. Subject to the terms and conditions of this Order, including without limitation Paragraph 64, the Receiver is authorized to use the Protective Advances and Cash Collateral for the period from the date hereof through the date which is earlier to occur of (a) the termination date of the receivership; (b) the discharge of the Receiver; or (c) dismissal of this case (the "Specified Period"). The authorization of the Receiver to use Protective Advances and Cash Collateral to which the Plaintiff has authorized or consented shall terminate at the expiration of the Specified Period. To the extent the Receiver's fees, costs, and expenses (including legal fees) do not exceed the amount of the Protective Advances made by the Plaintiff or Cash Collateral authorized for use by the Plaintiff and each case on deposit with the Receiver, any remaining amounts shall be refunded to the Plaintiff following the Receiver's discharge.

66. The Receiver shall be authorized to use such Protective Advances and Cash Collateral authorized for use in accordance with the Receivership Budget and should not use in excess of the amount allocated to the Receivership Budget by more than 10% in the aggregate without the consent of the Plaintiff.

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67. Except as and to the extent set forth in this Order the Plaintiff shall have no obligation to make any Protective Advances to the Receiver or consent to the use of its Cash Collateral. If the Plaintiff elects not to fund the receivership in accordance with the Receivership Budget, then:

(a) The Receiver is authorized to allocate available proceeds to the cost of performing such duties as the Receiver, with the consent of the Plaintiff, may reasonably determine, and to the extent other duties are not capable of performance by reason of such lack of proceeds, the Receiver shall be relieved of performing the same;

(b) The Receiver may seek and shall be entitled to its immediate discharge and may take whatever action he reasonably deems necessary in its sole and absolute discretion to avoid incurring unfunded obligations to third parties; and

(c) To the extent that there are insufficient proceeds from the Receivership Property to pay the Receivership Expenses set forth in the approved Receivership Budget prior to the Receiver's discharge, and to the extent there are insufficient proceeds from the Receivership Property to pay the fees and expenses of the Receiver, the Plaintiff agrees to pay the reasonable fees and expenses of the Receiver through the date of its discharge.

68. The Receiver is not obligated to advance its own funds to pay any Receivership Expenses.

IT IS SO ORDERED, this ____ day of _____, 2017.

[Judge's Name]
UNITED STATES DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHS CAPITAL, LLC,

Plaintiff,

v.

BOERSEN FARMS AG, LLC, ET AL.,

Defendants.

CASE NO. 1:17-CV-769

HON. ROBERT J. JONKER

ORDER

Plaintiff seeks appointment of a receiver with sweeping powers to harvest Defendants' crops and operate Defendants' farm business. Plaintiff says this is necessary because defendants owe plaintiff over \$145 million and are in no position to pay. More than that, Plaintiff says Defendants do not have the wherewithal on their own to harvest crops in the field now, and have fraudulently diverted the proceeds of previous crop sales.

The record does not reflect service on any Defendant, or any other potentially interested party. Plaintiff has, however, filed pre-litigation consents to appointment of a receiver signed by all but one defendant. In addition, another interested party, CNH Industrial Capital LLC has appeared to oppose at least some of the proposed powers of any receiver. In particular, CNH says it is owed about \$24 million on purchase money loans for farm equipment that plaintiff seeks to have its receiver use during harvest without specified rental payments. CNH says this would violate its secured party rights.

The Court does not intend to act on the pending motions regarding appointment of a receiver before Defendants have a chance to respond. The Court sees nothing of record that presents a convincing case for relief under Rule 65(b)(1) for emergent relief without notice to opposing parties. Even though all but one Defendant may have signed a pre-litigation consent, they should have the opportunity for hearing, especially when Plaintiff's case for a receiver rests, at least in part, on allegations of fraud. **Defendants are directed to file their response to Plaintiff's motions (ECF Nos. 5-6) not later than ten days following service on them of all filings to date by the Plaintiff, and to Plaintiff's complaint not later than 14 days following service.**

In addition, it is abundantly clear that there are naturally interested parties beyond Plaintiff and Defendants. One such party has already appeared (with a motion to intervene reportedly in the works) to object to at least portions of the proposed receivership order. There are undoubtedly other general unsecured creditors out there, and may be other secured creditors too, whether under private paper or statutory lien provisions. Farm laborers are also inevitably interested. The Court will be cautious in approving receivership at all, and certainly in approving powers that have the potential to tread on the interests of parties not present here. Of course, a well-recognized way to ensure notice to all interested parties, and orderly proceeding in large insolvency situations is bankruptcy. The Court welcomes submissions from any party as to why bankruptcy is not a preferable option in this situation.

Bankruptcy would also make it unnecessary for any party to supplement the record to confirm that the Court actually has subject matter jurisdiction. Plaintiff has made a good faith effort to satisfy the demanding requirements of federal diversity jurisdiction in cases, such as this one, involving LLC parties on both sides of the case. However, even though Plaintiff has

endeavored to establish the citizenship of each member of the LLC parties, Plaintiff has so far identified only the residence of various individual members and parties. Residence is not the same thing as citizenship for diversity purposes. *See Kaiser v. Loomis*, 391 F.2d 1007, 1009 (6th Cir. 1968). Moreover, if CNH is added to the case as an intervenor, it will be necessary to ferret out its citizenship for diversity purposes and its proper alignment in the case. At this point we only know that an N.V. Netherlands entity is involved, which raises a number of jurisdictional issues. *See Synergen Inc. v. FCA US LLC*, Case No. 1:15-cv-545 (W.D. Mich.) (ECF No. 48, PageID.1357–59) (discussing divergent authority on foreign entities generally, and Netherlands BVs and NVs in particular) (Feb. 9, 2016). Of course, a proper bankruptcy filing would obviate the need to resolve any of these jurisdictional questions before the Court has power to act.

Plaintiff shall serve this Order on defendants as required by law in the same manner as it is serving all other papers it has filed to date.

IT IS SO ORDERED.

Date: August 26, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHS CAPITAL, LLC,

Plaintiff,

v.

BOERSEN FARMS AG, LLC, ET AL.,

Defendants.

CASE NO. 1:17-CV-769

HON. ROBERT J. JONKER

MEMORANDUM OPINION AND ORDER

This is a diversity action brought by a Minnesota secured creditor against several of its Michigan debtors. The debtors obtained financing by executing security agreements and mortgages covering a variety of Defendants' assets, including growing corn and soybean crops on owned or leased fields in Michigan, Indiana, and Ohio. The creditor Plaintiff avers that Defendants have defaulted under the originating lending agreements and is entitled to the unpaid balance and possession of the collateral under the agreements. That much is pretty conventional secured lender litigation.

What makes this case unique is Plaintiff's request up front for the appointment of a receiver with sweeping power over all Defendants' property—regardless of whether Plaintiff has a first secured lien on the property—to allow CHS to protect, manage, harvest, and sell the crop currently set for harvest. Defendants consented to the appointment of the receiver as part of an earlier forbearance package and for the most part still appear to support the appointment. Other interested parties have begun to emerge with opposition to some or all of the proposed appointment.

The Court itself has had doubts about The requested remedy and solicited additional briefing. Meanwhile, harvest season approaches, and other creditors are pursuing their own remedies in other courts so this Court needs to make an early call.

The Court concludes the present record does not warrant the sweeping relief sought by CHS. However, the Court is satisfied that the unique circumstances of this case do support appointment of a receiver that would have only the limited power to file bankruptcy on behalf of the Defendants, some or all of whom may be “farmers” as defined by the Bankruptcy Code, and therefore beyond the risk of involuntary bankruptcy. Defendants may still see it in their interest to file voluntarily, and the Court sees no basis on the present record to strip Defendants of the rights they would normally have to file. Accordingly, a receiver will be appointed with the sole and non-exclusive authority to initiate bankruptcy proceedings on behalf of the Defendants. CHS’s motions (ECF Nos. 4,5, and 6) are denied in all other respects.

BACKGROUND

1. The Relationship Between CHS Capital and the Boersen Entities

In its amended complaint, CHS avers that on March 19, 2015, it entered into security agreements with all but two of the Boersen Defendants.¹ Those defendants signing the agreements had previously entered into loan agreements and promissory notes with CHS. In exchange for the financing received in those agreements, Boersen agreed to grant CHS Capital security interests in:

(A) all of Grantor’s current or future farm products (tangible, intangible and mixed), wherever located, and whether now owned or hereafter acquired, including, without limitation, all of the following assets of Borrower (including if designated as inventory and

¹ The Defendants who did not execute security agreements are Sandra Boersen as trustee of the Sandra Boersen Trust and Boersen Transport, Inc.

regardless of whether now owned or hereafter acquired): (i) crops, whether annual or perennial, whether grown, growing or to be grown and whether harvested or unharvested; (ii) grain; (iii) seed; (iv) fertilizer; (v) chemicals; (vi) other supplies owned or used by Borrower in its farming operations; (vii) any negotiable or nonnegotiable documents, scale tickets and the like resulting from the storage of any of the foregoing; (viii) accounts, contract rights (including proceeds from insurance policies), instruments, documents and general intangibles; (ix) hedging and commodity accounts and agreements now or hereafter in effect, together with all rights in and to such accounts and agreements and all payments due or to become due thereunder; and (x) to the extent not listed above as original collateral, all Proceeds (whether Cash Proceeds or Noncash Proceeds), Accessions, and substitutes of the foregoing, including, without limitation, the Proceeds of the foregoing and all insurance, eminent domain, and condemnation awards related to any of the foregoing; and (B) all personal property including, without limitation, all of the following property now owned or hereafter acquired, wherever located: (i) Accounts; (ii) Inventory; (iii) Equipment; (iv) Fixtures; (v) all additions, attachments, accessions, parts, replacements, substitutions, products, and proceeds of or pertaining to the foregoing (collectively, the “Collateral”).

(*See, e.g.*, ECF No.1-1, PageID.21.) Among several other warranties, Boersen also covenanted that:

Upon the request of Secured Party, Grantor shall provide to Secured Party the names and addresses of all buyers, commission merchants and selling agents to or through whom Grantor may sell Farm Products and Grantor shall not sell any Farm Products to or through anyone else. Grantor shall supplement the list of potential buyers, commission merchants and selling agents provided to Secured Party whenever necessary or requested by Secured Party. Grantor authorizes Secured Party to notify any and all potential buyers, commission merchants and selling agents named by Grantor of Secured Party’s interest in the Farm Products and to take any and all other measures required or allowed by Law to perfect and protect Secured Party’s interest in Farm Products. Grantor understands that if Grantor sells any farm products to or through a person that was not identified to Secured Party, Secured Party may assess Grantor a fee in an amount of the greater of \$10,000 or 15% of the sale price of farm Products, unless (x) Grantor notifies Secured Party in writing at least seven (7) days prior to such sale of the identity of the buyer, commission merchant or selling agent to or through whom such Farm

Products are being sold, or (y) unless Grantor accounts to Secured Party for the proceeds of such sale not later than ten (10) days after such sale. Nothing set forth in subsections (x) or (y) shall be construed as relieving the Grantor from complying with the disclosure requirements of this paragraph.

(*See, e.g.*, ECF No.1-1, PageID.22.)

Boersen thereafter defaulted under the agreements, but the parties were able to reach several forbearance agreements to allow Boersen to continue its farming operations. The most recent agreement was signed on May 3, 2017. Boersen has since defaulted under this agreement as well.

On June 6, 2017, CHS sent Boersen a Notice and Reservation of Rights letter, and on August 14, 2017, CHS sent a letter of Notice of Default, Termination, and Exercise of Rights to Boersen. In the August 14th communication, CHS stated it was unwilling to extend any further financing to Boersen. As a result, Boersen reportedly has insufficient funds to continue farming operations and pay its expenses. Of course, without funds, Boersen cannot harvest crops currently in the field. CHS contends that, as of August 11, 2017, it is owed \$145 million by Boersen, and that upon Boersen's default of the forbearance agreement, CHS is entitled to possession of its collateral. Collateral under the security agreements includes Boersen's crop presently in the ground, which CHS values at approximately \$50 million, and Defendants say is worth more than that. CHS claims that without the requested receivership, those crops will be lost. CHS filed this action on August 23, 2017.

2. CHS's Claims

CHS brings several claims in its amended complaint:

- Count I, for Claim and Delivery, requests the Court award CHS possession of all its collateral, restrain Boersen from damaging, destroying, concealing,

transferring, selling or disposing of the collateral, and award CHS its attorneys' fees and other just and equitable relief. (ECF No. 62, PageID.461.) CHS has not sought to advance any particular emergent relief under this Count.

- Count II, requests the appointment of a receiver. This claim is the only one presently before the Court, and is the subject of this Order.
- Count III alleges Breach of the Promissory Notes that were signed by Boersen. CHS avers it is entitled to recover on the outstanding balance owed under the notes. (ECF No. 62, PageID.467.) Plaintiff seeks fees, a money judgment of \$145,327,808.00, and per diem interest.
- Count IV alleges Breach of Guaranty regarding the guaranties that Boersen made in connection with the forbearance agreements. In this document, Boersen guaranteed it would pay its present and future indebtedness and obligations. (ECF No. 62, PageID.468.) Plaintiff seeks fees, a money judgment of \$145,327,808.00, and per diem interest.
- Count V alleges Conversion relating to a transfer by one or more of the Boersen Defendants of \$204,777.78 from CHS's cash collateral in order to purchase a personal residence. (ECF No.62, PageID.468.) CHS seeks a money judgment of \$204,777.78, fees, and a constructive trust against the personal residence.
- Count VI, alleges statutory conversion under MICH. COMP. LAWS § 600.2919(a)(1). This count relates the same events as those in Count V and

seeks treble damages under the act as well as fees. (ECF No. 62, PageID.469.)

3. The Proposed Receivership

The power to appoint receivers has been adopted from the English Court of Chancery and is presently found in a federal court's equity powers. A receiver is an officer of the court, and his powers "are coextensive with [the] order of appointment." *Liberte Capital Group, LLC v. Capwill*, 462 F3d 543, 551 (6th Cir. 2006). CHS seeks a receiver over a vast range of Boersen's property. The proposed receivership property includes:

- (a) all Goods, Accounts, Chattel Paper, Electronic Chattel Paper, Inventory, Equipment, Farm Products, Instruments, Investment Property, Documents, Deposit Accounts, Commodity Accounts, Cash Proceeds, Noncash Proceeds, Supporting Obligations, Fixtures, Letter of Credit Rights, Records and General Intangibles (all as defined in the Uniform Commercial Code in the State of Michigan), together with such additions, accessions, parts, replacements, substitutions, products and proceeds of or pertaining the any of the foregoing; and
- (b) without limiting the generality of the assets specified in subsection (a), all of the Receivership Defendants' (i) harvested crops and the facilities in which such harvested crops are stored and all accounts, cash, entitlements and income generated by or arising from past or pending sales of harvested crops; (ii) growing crops and the Receivership Defendants' possessory interests in (and all contractual entitlements with respect to) the lands upon which such crops are situated; (iii) farm equipment (including vehicles and trailers with certificates of titles), fuel, parts and supplies; (iv) livestock, born or unborn, and all feed, inventory, and supplies used in the care of or consumed by the livestock, and the Receivership Defendants possessory interests in (and all contractual entitlements with respect to) the lands and improvements used to raise such livestock; and (v) all business records relating to the Receivership Defendants' farming operations, and the Receivership Defendants' possessory interests in the offices and real property improvements where such business records are located; and
- (c) the real properties subject to the Plaintiff's mortgagee interests, [as elsewhere described].

(ECF No. 6-1, PageID.240-241.) Plaintiff acknowledges that it does not have a first lien on all this property. At least one of the creditors who does have a first lien on some of the property (farm equipment) has objected to the receivership exercising power over its collateral.

The exhaustive scope of the proposed receivership property is paralleled by the staggering authority the motion proposes to grant the receiver over that property. Indeed, as proposed, there is little that would escape the exclusive control of the receiver. Under the proposed order, for example, the Receiver would have the power:

- (a) To issue subpoenas for documents and testimony;
- (b) To enforce, execute or terminate contracts providing for the furnishing of materials for or services to the receivership property and, without any order of the Court, cancel or reject all unprofitable or other contracts, listing agreements, and management agreements;
- (c) To obtain answers, under oath, from all the Boersen individuals, officers, directors, agents, attorneys, managers, shareholders, employees, accountants, debtors, creditors, managers, general and limited partners, and any other “appropriate” persons;
- (d) To take immediate possession of all real property belonging to the Boersen defendants and change door locks to the premises;
- (e) To open all mail directed to or received by Boersen;
- (f) To receive the assistance of the United States Marshal Service in taking possession, custody, and control of any assets, records, or other materials belonging to the receivership estate;

- (g) To transfer, compromise, or otherwise dispose of any receivership property, other than real estate, free and clear of liens and encumbrances;
- (h) To transfer with clear title, albeit with further Court order, any real property in the receivership estate titled to one or more of the receivership defendants;
- (I) To have the exclusive authority to initiate bankruptcy proceedings for the receivership entities; and
- (j). To stay all civil legal proceedings of any nature involving the receiver or receiver property.

The receiver also proposes the Court empower it to exercise these powers without liability to others for the receiver's potential mistakes. Under the proposed-sixty page order, "[i]n no event shall the Receiver . . . be liable to anyone for their good faith compliance with their duties and responsibilities[.]" (ECF No. 6-1, PageID.259.) In fact the order enjoins all persons or entities "from commencing any administrative, legal, or equitable proceedings against the Receiver without first seeking leave from the Court." (*Id.*) These are only examples of the sweeping authority the proposed sixty-page order would grant the receiver, and the record simply does not support such relief at present.

4. Justifications for the Proposed Receivership

CHS asserts the proposed receivership is justified because (1) Boersen fraudulently induced CHS to enter into the forbearance agreement by misrepresenting the volume of its 2016 harvest; (2) Boersen has insufficient funds to harvest the 2017 crop which is a part of Plaintiff's collateral; (3) Boersen has entered into transactions to sell its 2016 harvested crop and has failed to

remit those proceeds to CHS Capital; (4) Other creditors have obtained orders that threaten the value and ability to harvest the 2017 crop; and (5) there is no equity cushion to protect CHS's collateral.

(a) *Alleged Fraud and Misrepresentation*

Boersen's operating expenses are paid, at least in part, by the revenue obtained from the prior year's harvest. Thus the proceeds from Boersen's 2016 harvest provide necessary funds for the current year's operations. When Boersen defaulted on the original loan agreements, Boersen and CHS entered into a series of forbearance agreements. The last agreement was signed on May 3, 2017, and included a budget for Boersen's continued operations. CHS asserts that when the budget was developed, Boersen fraudulently and intentionally misrepresented the volume of the harvested 2016 crop by over \$6 million in order to induce CHS Capital to enter the agreement. Only under the mistaken belief Boersen had these funds in reserve, CHS argues, did it agree to continue its relationship with Boersen. Having subsequently learned it was misled, CHS is unwilling to continue with Boersen absent a receiver. (ECF No. 62, PageID.462.) Some of the Boersen entities have responded to Plaintiff's motion. Those Defendants deny making any false misrepresentations about the 2016 inventory. They further assert that CHS is undervaluing the crop currently in the ground.

(b) *Insufficient Funds to Harvest the 2017 Crop.*

CHS asserts that Boersen has insufficient funds to harvest its 2017 crops, and CHS is unwilling to fund operations any longer. CHS has submitted an affidavit of Mark Briden, a Certified Public Accountant. In the affidavit, Mr. Briden asserts he is familiar with the operations and records of the Boersen defendants. Based on the materials he reviewed Mr. Briden stated that as of August 4, 2017, Boersen had a cash deficit of -\$35,000. He expected that Boersen would be able to take in between \$920,000 and \$1,591,000 in cash receipts prior to the 2017 harvest. (ECF

No. 3, PageID.212.) Boersen's weekly expenses, however, averaged \$862,000 over the last four weeks. Consequently, Mr. Briden concluded that Boersen would run out of operating capital by the end of August 2017. (ECF No.3, PageID.212-213.). CHS contends a receiver is necessary to step in and operate the farms, including harvesting the crops. Without a receiver, CHS says it will not fund operations, and the crop will go to waste.²

(c) *Boersen's Failure to Remit Proceeds*

Under the security agreements, Boersen agreed to provide CHS with certain information relating to those entities purchasing its grain. CHS avers it required this information in order to retain its interests in the property. Under the Federal Food Security Act of 1985 a purchaser of farm products in the ordinary course of business would take those products free of a lien unless, prior to such purchases, the lien holder provided the purchaser with notice of its lien. (ECF No. 62, PageID.463.) CHS asserts Boersen violated the security agreements by selling some of the collateral grain and failing to remit those proceeds to CHS, having previously made guarantees it would not do so. CHS contends a receiver is necessary to protect continue improper transfers of its collateral. (ECF No.62, PageID.463-465.)

(d) *Actions of Other Creditors Impair the Value of CHS Capital's Collateral*

² The Court notes that a rational lender—even one with doubts about the debtors—might conclude that funding weekly expenses of \$862,000 for as long as it takes to harvest \$50 million in crops is worth the investment. A creditor like CHS does not necessarily have the obligation to advance additional funds post default. But in evaluating whether equity supports the appointment of a receiver with sweeping power over all Defendants' property, it is certainly a fair consideration to evaluate other reasonable possibilities.

The instant suit is only one of several actions from creditors seeking to collect on Boersen's alleged defaults. Some of those creditors seek a return of the farming equipment Boersen uses, or will use, to maintain and harvest the current crop. CHS logically desires to prevent this from occurring as the absence of necessary equipment threatens the current crop. For example, CHS notes that TFG-Michigan L.P., an interested party in this case, has obtained a court order requiring Boersen to remove irrigation equipment from the fields prior to the harvest. Without a receivership order which stays Boersen's creditors from pursuing litigation to recover their equipment, CHS believes the harvest could go to waste or be destroyed when TFG-Michigan recovers its property. For their part, Boersen asserts that the inclusion of a stay within the proposed order was crucial to their decision to consent to the appointment of a receiver.

(e) *Lack of Equity Cushion*

CHS further argues a receiver is necessary because the value of its remaining collateral is less than the amount Boersen owes after accounting for all the loan agreements, forbearance agreements, and promissory notes. The value of its collateral is further waning through Boersen's alleged disposal of the collateral through sales to other parties and diverting sums towards the purchase of personal property.

Of course, the first question the Court had was why bankruptcy does not provide the obvious pathway to address CHS's concerns, and at the same time protect everyone else with interests in the matter. The Court asked the parties to address this. CHS responded by stating that the Boersen entities are farmers under the Bankruptcy Code, and they cannot involuntarily be placed into bankruptcy. (No one has affirmatively demonstrated that all defendants fall within the Code's definition of "farmer," but no one has tried to contest the point either.) Defendants apparently have

their own reasons for not voluntarily declaring bankruptcy, even though it would obtain the litigation stay they seek. At least some Defendants, however, say they would like to keep that option open, even though the proposed receivership order would preclude it.

For the reasons that follow, the Court is not satisfied that CHS has made the case for the sweeping relief it seeks.

STANDARD OF REVIEW

Federal law governs the appointment of receivers in diversity actions. *See Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 842-843 (9th Cir. 2009); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2983 (3d. ed. 2014). The Federal Rules of Civil Procedure “govern an action in which the appointment of a receiver is sought.” FED. R. CIV. P. 66. Once appointed, “the practice in administering an estate by a receiver . . . must accord with the historical practice in federal courts or with a local rule.” *Id.* “A district court enjoys broad equitable powers to appoint a receiver over assets disputed in litigation before the court.” *Liberte Capital Grp., LLC*, 462 F.3d at 551. However, the appointment of a receiver is an extraordinary remedy and should only be employed where clearly necessary to protect the plaintiff’s interests in the property. 12 FEDERAL PRACTICE AND PROCEDURE § 2983, at 18; *see also Pension Ben. Guar. Corp. v. Evans Tempcon, Inc.*, 630 F. App’x 410, 414 (6th Cir. 2015); *Wells Fargo Bank, N.A. v. Finelli*, No. 5:06-CV-1922, 2006 WL 3085649, at *2 (N.D. Ohio Oct. 27, 2006); *Commodity Futures Trading Comm’n v. Comvest Trading Corp.*, 481 F. Supp. 438, 441 (D. Mass. 1979).

The purpose of a receivership is “to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the

assets if necessary.” *Liberte Capital Grp., LLC*, 462 F.3d at 551. A receivership is not an end in itself; a district court may appoint a receiver only when the appointment is ““ancillary to some form of final relief.”” *Resolution Trust Corp. v. Fountain Circle Assocs. Ltd. P’ship.*, 799 F.Supp. 48, 49-50 (N.D. Ohio 1992) (quoting *Gordon v. Washington*, 295 U.S. 30, 38 (1935)).

When considering whether to appoint a receiver, a district court must weigh several factors including:

fraudulent conduct on the part of defendant; the imminent danger of the property being lost, concealed, injured, diminished in value, or squandered, the inadequacy of the available legal remedies, the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment; and, in more general terms, plaintiff’s probable success in the action and the possibility of irreparable injury to his interests in the property.

12 FEDERAL PRACTICE AND PROCEDURE § 2983, at 18-22 (2014) (internal footnotes omitted); *see also Steinberg v. Young*, 641 F. Supp. 2d 637, 641 (E.D. Mich. 2009) (listing many of the above factors).

ANALYSIS

1. CHS’s Justifications Do Not Support the Broad Relief Requested

The available record fails to demonstrate the type of grave and unanticipated emergency that is a necessary predicate for the appointment of a receiver. CHS’s basis for appointing a receiver can be distilled into two main arguments: misrepresentations regarding and fraudulent transfers of funds by Boersen, and the insufficient funds that Boersen has to harvest the 2017 crop. Neither consideration warrants the requested relief as proposed.

The funds or other assets that CHS claims Boersen fraudulently transferred or misrepresented pale in comparison to the total amount at stake here. The conversion count seeks

only about \$200,000. As to the 2016 crop inventory, even assuming that Boersen has zero remaining value, the amount at issue is still only a fraction of the over \$145 million that CHS states it is owed. Moreover, CHS had time and opportunity to make its own assessment of a harvest already completed, and judge the risk of future lending. At least as recently as the 2017 planting, CHS advanced funds to put crops in the ground. It obviously knew harvest would soon be coming. CHS now has the ability to judge whether it is worth advancing another \$862,000 a week long enough to harvest about \$50 million of crops in the field. The claimed misrepresentations may well be grounds for default under the lending and security agreements and for normal remedies that go with it. They may also inform CHS's judgment about funding this harvest. But they do not support a sweeping receivership, even assuming CHS establishes its case on these points and disproves Defendants' denials.

The need to protect the 2017 harvest is also an inadequate justification. Much of the proposed sixty-page order is unnecessary and unrelated to protecting CHS's interest in the collateral crop presently in the ground. Moreover, CHS admits that when it entered the May 3, 2017, forbearance agreement Boersen was already in the midst of its spring planting. (ECF No. 62, PageID.459.) It is also plain that CHS was aware of Boersen's financial distress. CHS clearly had knowledge of Boersen's defaults under the security agreements, and Mr. Briden also has declared that before CHS executed the forbearance agreement, CHS's counsel entered into an agreement with an accounting firm to monitor Boersen's operations. (ECF No. 3, PageID.221.) CHS's decision to proceed with the forbearance agreement and let Boersen continue with additional planting necessarily included an informed risk that further funding, or a loss of crops, would be required a few months later. The record does not provide details on the value of CHS's collateral other than

the 2017 harvest. But even granting that the total collateral is less than \$145 million owed, the Court is not persuaded that a sweeping receivership is presently warranted.

2. Limited Relief is Warranted to Permit a Receiver to Initiate Bankruptcy Proceedings.

While CHS has failed to persuade the Court that its proposed sixty-page order is justified on this record, the Court is satisfied that CHS is entitled to a form of limited relief: namely, the appointment of a receiver for the sole purpose of initiating voluntary bankruptcy proceedings, on a non-exclusive basis, on behalf of the Defendants. Bankruptcy provides for an immediate and automatic stay that serves the interest of both CHS and Defendants. It also provides a forum in which CHS can seek and propose options for financing that would better protect any new cash advances, and permit harvest. And the bankruptcy would allow this to happen without jeopardizing the interests of other creditors, including the creditors who financed farm equipment on a purchase money basis. All interested parties, including the growing number seeking intervention here, would have a common forum to protect their interests. Accordingly, the only possible waste identified by CHS could be averted, and Defendants would be under Court supervision, if a receiver decides to put Defendants in bankruptcy.

There are several additional considerations for concluding that bankruptcy, rather than a broad receivership, is more appropriate. For one thing, while the Court presently has subject matter jurisdiction over this case, that may not last. Subject matter jurisdiction in this case is based on diversity under 28 U.S.C. § 1332. A federal district court has diversity jurisdiction only if there is complete diversity of the parties. *See Bateman v. E.I. DuPont De Nemours & Co.*, 7 F. Supp. 2d 910, 911 (E.D. Mich. 1998). As the Court has surmised, and as some of the Boersen defendants have

confirmed, there are numerous Michigan parties who have a pecuniary interest in this case, including:

- 300 Michigan landlords whom Boersen admits clearly have claims.
- 15 Michigan municipalities with claims for unpaid property taxes.
- 80 Michigan employees with various claims.
- Over 12 Michigan creditors to whom Boersen owes over \$100,000.
- At least 3 Michigan Parties to whom Boersen owes approximately \$9 million for land contracts.

(ECF No. 60, PageID.449.)

Should any of those Michigan parties seek to intervene, and be aligned against the Michigan Defendants, diversity would disappear. The Court would then be required to consider whether the case could continue absent those parties, or whether it must be dismissed because the parties are indispensable:

A person who should have been joined in the first instance because that person is so related to the action to be regarded as “indispensable” could not intervene if joinder would deprive the court of jurisdiction over the subject matter of the action. The action had to be dismissed, as Rule 19(b) requires, if the court concluded that the absentee is so related to the action to be deemed indispensable.

7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1917 (3d ed. 2007). Certainly as to the independent contract, claim and delivery, and conversion aspects of Plaintiff’s allegations, the other parties may not be indispensable. But Plaintiff’s request for a receivership goes far beyond that. Plaintiff seeks power over all of Defendants’ property, including that which may be subject to other priority liens. Rule 19(b)

provides four non-exhaustive factors for a court to consider in determining whether a party is indispensable:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

If one of the 400 Michigan parties identified by Boersen seek to intervene, there would be a strong argument for indispensability. A Michigan lender whose equipment is involuntarily used under the receivership estate, for example, would certainly be prejudiced. Or one of the over 300 landlords with unpaid rent or other defaults would certainly be prejudiced if the receiver tries to operate on the property over the landlord's objection. And if the receiver chooses to exercise the requested power of selling other people's property free and clear of liens, naturally the lien holder needs a place to complain. What about wage earners who are not properly paid? How could the Court empower the receiver to do the things it seeks in its sixty-page order without having the affected parties here? And if these parties include Michigan parties aligned against the Michigan

Defendants because they have their own claims against Defendants, how does the Court retain diversity jurisdiction?³

Another jurisdictional consideration is the provision in the proposed order that would stay “[a]ll civil legal proceedings of any nature.” (ECF No. 6-1, PageID.254.) The Court is aware of at least one federal case outside this district involving some of the proposed receivership property. *See TFG-Michigan, L.P., v. Boersen Farms Grain*, No. 2:17-cv-231 (D. Utah). And there appears to be ongoing state litigation as well. (*See* ECF No.11, PageID.352-353.) The Court knows of no authority allowing it to enjoin litigation in another federal court under circumstances similar to these, where the same defendants are already subject to an unfavorable order. Furthermore, federal courts are typically prohibited from enjoining state court proceedings under the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”). Courts construe the exceptions to the Anti-Injunction Act narrowly and resolve all doubts in favor of letting the state court actions proceed. *See Kansas Public Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1068 (8th Cir. 1996) (citing *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 297 (1970)). The Supreme Court has “acknowledged the existence of an historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over the res, prior to the state-court action” because “the ‘necessary in aid of’ exception to § 2283 may be fairly read as incorporating this historical in rem exception.” *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S.

³ The Court notes that the vast majority of interstate federal receiverships with sweeping powers rest subject matter jurisdiction in a federal statute so that these diversity issues never arise.

623, 641–42 (1977). The proposed receivership powers here, however, threaten to go well beyond this exception. Accordingly, this provision of the proposed order poses an additional jurisdictional barrier against the appointment of a receiver.

Bankruptcy proceedings avoid these jurisdictional tangles. Indeed, bankruptcy appears to be the preferred jurisdictional vehicle that Congress expressly created for situations such as this. Bankruptcy also includes an automatic stay that avoids the thorny questions of jurisdiction under the Anti-Injunction Act. Finally, bankruptcy also builds in protections for anyone with any claim or potential claim, including lessors, secured creditors, general creditors, laborers, and taxing authorities. In sum, it is far more favorable, for all involved, to proceed in bankruptcy than with a receiver. However, Defendants’ status as “farmers” under the Code may prevent what would otherwise be an involuntary filing. Accordingly, the Court will grant CHS’s motion only to the limited extent it allows the Receiver to seek authorization to initiate bankruptcy proceedings.

ACCORDINGLY, IT IS ORDERED THAT CHS’s Proposed Order (ECF No. 4) is **REJECTED** and Plaintiff’s Motion for Expedited Hearing (ECF No. 5) is **DENIED**. The Court **GRANTS in part** and **DENIES in part** CHS’s Motion to Appoint Receiver (ECF No. 6). The Court appoints O’Keefe & Associates Consulting, LLC, as Receiver in this case over Defendants for the following limited purpose:

To seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United States Code (the “Bankruptcy Code”) for the Defendants. If any Defendant is placed in bankruptcy proceedings, the Bankruptcy Court will address and resolve whether the Receiver may operate as a debtor-in-possession.

The authority described immediately above is non-exclusive, and should not be construed as restraining any of the Defendants from exercising their rights under the Bankruptcy Code. This

Order will automatically expire on October 31, 2017, unless before that time CHS shows cause satisfactory to the Court as to why the Order should remain in place.

IT IS SO ORDERED.

Dated: September 13, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE HUNTINGTON NATIONAL
BANK,

Case No. 2:19-cv-10890

HONORABLE STEPHEN J. MURPHY, III

Plaintiff,

v.

SAKTHI AUTOMOTIVE GROUP
USA, INC., et al.,

Defendants.

**ORDER DENYING PLAINTIFF'S
EMERGENCY MOTION FOR APPOINTMENT
OF RECEIVER AND TEMPORARY RESTRAINING ORDER [6]**

On March 27, 2019, Plaintiff Huntington National Bank ("Huntington") filed its complaint and an emergency motion for appointment of receiver and temporary restraining order. ECF 1, 6. Defendants Sakthi Automotive Group, Sakthi America Corporation, and Sakthi Real Estate Holdings, Inc. ("Sakthi Defendants") filed their answer the same day and filed a response in opposition to Huntington's emergency motion on March 28, 2019. ECF 14, 16. Also on March 28, 2019, the Court held a hearing on Huntington's emergency motion. For the reasons below, the Court will deny the motion.

BACKGROUND

Huntington is the successor by merger to FirstMerit Bank, N.A. Its two-count complaint alleges: (1) breach of contract of loan documents, and (2) entitlement to

appointment of receiver. ECF 1. Huntington claims that on October 30, 2015, Sakthi Defendants borrowed funds from Huntington through a credit and security agreement and executed a secured revolving note in favor of Huntington. *Id.* at 3. To secure their obligations under the credit agreement, note, and other loan documents, Sakthi Defendants granted Huntington security interests and liens on collateral. Huntington claims that it "holds a properly perfected security interest in substantially all of the personal property interests of the Defendants, except for certain Excluded Collateral." *Id.* at 4. Sakthi Automotive Group and Sakthi America Corp. also granted Huntington mortgages on their real property. *Id.* at 4–5.

Huntington claims that Sakthi Defendants have defaulted under the terms of the credit agreement and other loan documents and that they owe Huntington the aggregate amount of \$19,083,295.62. *Id.* at 5–6, 9. Huntington sent Sakthi Defendants a notice of default on March 13, 2019. *Id.* at 5. Huntington relies on the affidavit of its senior vice president, Barry O'Neill to support its contention that Sakthi Defendants are in breach of the parties' loan agreement and that a receiver should be appointed to protect Huntington's interests in the collateral. *See* ECF 6-1. Huntington contends that Sakthi Defendants are without the resources to preserve collateral and that the collateral is in danger of deterioration. ECF 1, PgID 10. Huntington further asserts that Sakthi Defendants consented to the appointment of a receiver based on the following clause in the parties' loan documents:

11.5 **Appointment of Receiver.** Upon the occurrence of an Event of Default and at all times thereafter, the Lender shall be entitled to the immediate appointment of a receiver for all or any part of the Collateral, whether such receivership is incidental to a proposed sale of the Collateral, pursuant to the Uniform Commercial Code or otherwise. Each Loan Party hereby consents to the appointment of such a receiver without notice or bond, to the full extent permitted by applicable statute or law; and waives any and all notices of and defenses to such appointment and agrees not to oppose any application therefor by the Lender, but nothing herein is to be construed to deprive the Lender of any other right, remedy or privilege the Lender may have under law to have a receiver appointed, provided, however, that, the appointment of such receiver shall not impair or in any manner prejudice the rights of the Lender to receive any payments provided for herein. Such receivership shall, at the option of the Lender, continue until full payment of all of the Obligations.

ECF 1-1, PgID 76.

Sakthi Defendants respond that they are not in default and that a receiver is not warranted and would cause them substantial harm. *See generally* ECF 16.

STANDARD OF REVIEW

A federal district court "may issue a temporary restraining order without written or oral notice to the adverse party" only if two conditions are met: (1) specific facts in a verified complaint "show that immediate and irreparable injury, loss, or damage will result to the movant" before a hearing can be held; and (2) "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). A federal district court "may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1).

The Court balances four factors when deciding whether to issue a temporary restraining order or grant a preliminary injunction:

- (1) whether the movant has a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunctive relief is not ordered; (3) whether the requested injunction will cause substantial harm to third parties; and (4) whether the interests of the public are served by the issuance of the injunction.

Meyer Jewelry Co. v. Meyer Holdings, Inc., 906 F. Supp. 428, 431–32 (E.D. Mich. 1995) (citations omitted); *see also Ne. Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). The moving party carries the burden of persuasion. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Huntington relies on *Meyer Jewelry Co.* and *Steinberg v. Young*, 641 F. Supp.2d 637 (E.D. Mich. 2009) to justify appointment of a receiver. Relevant factors affecting whether to appoint a receiver include:

[1]the existence of a valid claim by the moving party; [2] the probability that fraudulent conduct has occurred or will occur to frustrate the claim; [3] imminent danger that property will be lost, concealed, or diminished in value; [4] inadequacy of legal remedies; [5] lack of a less drastic equitable remedy; and [6] the likelihood that appointment of a receiver will do more harm than good.

Meyer Jewelry Co., 906 F. Supp. at 432 (citing *Aviation Supply Corp. v. R.S.B.I Aerospace Inc.*, 999 F.2d. 314, 316–17 (8th Cir. 1993)). Notably, "the appointment of a receiver is an extraordinary equitable remedy that is justified in only extreme situations." *Id.* (citations omitted).

ANALYSIS

Huntington has failed to carry its burden at this juncture to demonstrate that the extraordinary remedies of a temporary restraining order and appointment of receiver are warranted. More evidence is required. Critically, Huntington has failed to demonstrate that it will suffer irreparable harm if a receiver is not immediately appointed. At the hearing, counsel for Huntington expressed the concern that payroll, which is due March 29, 2019, would not be funded. Defense counsel countered that it would be. The Court instructed that should payroll fail to issue, the parties must

contact the court right away for a status call. Thus, Huntington did not demonstrate irreparable and immediate harm. Although Huntington may have a valid claim, it has not demonstrated that the remaining factors for appointing a receiver weigh in its favor.

Although Huntington points to language in the parties' loan contract that would allow for the appointment of a receiver in the event of default of Sakthi Defendants' obligations, the Defendants deny they are in default. The only evidence that has been submitted on this issue is the affidavit of Huntington's senior vice president. Further, Huntington's proposed order grants extensive powers to the receiver, far beyond simply maintaining the status quo and protecting Huntington's interests. The proposed order includes paragraphs that have no connection to the content of Huntington's motion, and Huntington fails to cite any provision in the 220 pages of loan documents it filed with its complaint that would support the sweeping powers it seeks. For example, it asserts that the receiver is authorized to employ a consultant to assist in "the marketing process . . . pursuant to an engagement agreement on terms and conditions agreed upon by the Plaintiff and the Receiver without further order of the Court." ECF 6-4, PgID 453. It provides the receiver with the power "to retain or terminate any existing professionals of the Defendants including consultants, accountants, and attorneys, in his sole reasonable discretion." *Id.* at 460. Huntington does not cite any provision in its contract that provides for this relief.

Based on the information and evidence currently before it, the Court will deny Huntington's emergency motion for a temporary restraining order. And consistent with instructions given during the hearing, the Court will order the parties to submit briefing and to prepare for an evidentiary hearing on a motion for preliminary injunction.

ORDER

WHEREFORE, it is hereby **ORDERED** that Huntington's Emergency Motion for Appointment of Receiver and Temporary Restraining Order [6] is **DENIED**.

IT IS FURTHER ORDERED that the Court will conduct an evidentiary hearing on a motion for preliminary injunction on **Wednesday, April 3, 2019, at 2:00 p.m.** Plaintiff shall **FILE** a motion for preliminary injunction by **Sunday, March 31, 2019 at 12:00 p.m. (noon)**. Defendants shall **FILE** a response brief by **Monday, April 1, 2019 at 5:00 p.m.** If the parties would like additional time to prepare, they are welcome to file a proposed, stipulated order to extend the dates or to otherwise move the Court.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: March 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on March 29, 2019, by electronic and/or ordinary mail.

s/ David P. Parker
Case Manager