Q.B. No. 1461 of 2009

CANADA)
PROVINCE OF SASKATCHEWAN)

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*. R.S.C. 1985, c. C-36, AS AMENDED (the "*CCAA*")

IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF BIG SKY FARMS INC., DRYCAST SYSTEMS INC. and BIG SKY MANAGEMENT CONSULTING CORP.

AND

SHAFER COMMODITIES INC.

APPLICANT

NOTICE OF MOTION

TAKE NOTICE THAT an application will be made to the Honourable Mr. Justice N.G. GABRIELSON, in chambers at the Court House, 520 Spadina Crescent East, in the City of Saskatoon, in the Province of Saskatchewan, on the 9th day of December, 2009, at 9:00 o'clock in the forenoon or so soon thereafter as counsel can be heard on behalf of the Applicant, SHAFER COMMODITIES INC., for an order:

(a) to the extent required, lifting the stay of proceedings ordered in Initial Order of the Honourable Justice N.G. Gabrielson pronounced the 10th day of November, 2009 (the "**Initial Order**"), to allow the bringing of this Application and the granting of the relief sought herein;

(b) abridging the time for service of this Notice of Motion as may be required, and deeming service hereof good and effective as against the Respondents, BIG SKY FARMS INC., DRYCAST SYSTEMS INC. and BIG SKY MANAGEMENT CONSULTING CORP. (the "**Debtor Companies**"), and all other interested parties;

(c) declaring the Applicant to be a critical supplier, within meaning of section 11.4 of the *Companies' Creditors Arrangement Act*, as amended (the "***CCAA***");

(d) granting for the benefit of the Applicant a post application trade creditor charge (the **"Shafer Charge"**) over all the property, undertaking and assets of the Debtor Companies, in the aggregate amount of $750,000.00, for feed components delivered by the Applicant to the Debtor Companies subsequent to the granting of the Initial Order, which charge shall rank in priority to the Directors' Charge (as defined in the Initial Order), but subordinate to the Administration Charge and the DIP Lenders' Charge (as these terms are defined in the Initial Order;

(e) permitting the Debtor Companies to pay the Applicant the amount of $1,060,880.71 representing the value of feed components supplied during the thirty (30) day period prior to the Initial Order; and

(f) in the alternative to (e) above, an order permitting the Debtor Companies to pay the Applicant forthwith the amount of $383,212.30 for feed components supplied during the period of October 29, 2009 – November 9, 2009.

(g) in combination with the orders sought in subparagraphs (d), (e) and (f) above, an order amending the Initial Order by inserting provisions into the Initial Order on terms and conditions set out in Schedule "A" to this Notice of Motion, or on such other terms and conditions as this Honourable Court deems appropriate:

(h) amending the Initial Order to the extent necessary to grant the relief sought herein, on terms and conditions as this Honourable Court deems appropriate;

(i) such further and other relief as counsel may advise and this Honourable Court deems appropriate; and

(j) The costs of this application.

UPON THE FOLLOWING GROUNDS:

(a) The Applicant relies on the inherent jurisdiction of this Honourable Court;

(b) The Applicant is engaged in the sale and transportation of feed commodities, and is the sole supplier of Distillers Dried Grain ("**DDG**") and Soybean Meal ("**SBM**") to the Debtor Companies;

(c) The DDG and SBM (collectively the "**Critical Feed Components**") sold and delivered by the Applicant to the Debtor Companies is critical to the ongoing operation of the Debtor Companies and vital to the proper nutrition and health of the livestock;

(d) The Applicant is owed approximately $1,060,880.71 by the Debtor Companies for the supply of Critical Feed Components, inclusive of trucking, for the thirty (30) day period prior to the Initial Order;

(e) The Initial Order, by compelling the Applicant to continue to supply Critical Feed Components after November 10, 2009, but not directing the Debtor Companies to pay for the feed, or granting a charge on the property, undertaking, and assets of the Debtor Companies to ensure the Applicant gets paid, unfairly prejudices the Applicant and enriches the Debtor Companies and its secured lenders when such enrichment was not necessary;

(f) In the Initial Order, this Honourable Court could have directed the Debtor Companies to pay the Applicant for the Critical Feed Components and trucking of same, and granted a charge on the property, assets, and undertaking of the Debtor Companies in favour of the Applicant as a critical feed supplier, as this Honourable Court has done previously in similar *CCAA* cases.

(g) Should the Applicant be forced to make the difficult decision to cease supplying the Critical Feed Components to the Debtor Companies there is no other viable source of supply available to step in and provide the said components of the feed to the Debtor Companies within a reasonable period of time;

(h) The interim payment arrangements are such that the Applicant is providing several hundred thousand dollars worth of credit to the Debtor Companies from time to time depending upon the date that the Orders are placed and the date that the payment is received such that it is at risk of not receiving full payment for post Initial order goods supplied, which is contrary to the spirit and intent of the *CCAA*;

(i) Given the number of deliveries of shipments to a large number of locations of the Debtor Companies, a cash on delivery arrangement is not viable;

(j) By not paying for the feed supplied by the Applicant for the period October 12 to November 9, 2009, the Debtor Companies have generated a fund which is akin to forcing the Applicant to provide a Debtor-in-Possession ("**DIP**") loan;

(k) It would be inequitable to permit the Debtor Companies to enjoy the benefit of goods ordered prior to the granting of the Initial Order at a time when they were aware that no payment would be forthcoming because the application for the Initial Order was imminent;

(l) The Order sought is just, equitable, and convenient; and

(m) Such further and other grounds as counsel for the Applicant may advise and this Honourable Court may allow.

AND FURTHER TAKE NOTICE THAT in support of the within application will be read the following:

(a) This Notice of Motion with proof of service;

(b) Affidavit of Janice Lynne Leishman;

(c) Draft Order; and

(d) Such further and other material as counsel for the Applicant may advise and this Honourable Court may allow.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of December, 2009.

McDougall Gauley LLP

Per: ______________________
Solicitors for the Applicant,
Shafer Commodities Inc.

TO: The Registrar
Judicial Centre of Saskatoon

AND TO: MacPherson Leslie & Tyerman
Attention: Jeff Lee

This document was prepared by:

McDougall Gauley LLP

Barristers and Solicitors,
701 Broadway Avenue,
Saskatoon, SK S7K 3L7

Whose address for service is: same as above.
Lawyer in charge of file: Ian Sutherland
Telephone 653-1212,
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<u>Schedule "A"</u>

<u>SHAFER CHARGE</u>

41A. Obligations incurred by the Applicant to Shafer Commodities Inc. ("**Shafer**") for feed delivered to the Debtor Companies subsequent to the date of this Order shall be paid in accordance with the terms of credit of Shafer.

41B. As security for the obligations of the Applicant to Shafer, Shafer is granted a mortgage, charge, lien and security interest in and against any and all of the Property, to a maximum aggregate amount of $750,000.00 (the "**Shafer Charge**"). The Shafer Charge shall have the priority set out in paragraphs 42 - 47 herein.

41C. Notwithstanding any other provision contained herein, the Applicants shall pay and honour payment to Shafer in regards to feed components supplied or provided to the Applicant by Shafer within 30 days prior to the date of this Initial Order.

<u>VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER</u>

42. The priorities of Directors Charge, the Administration Charge<u>, the Shafer Charge,</u> and the DIP Lenders' Charge (collectively the "**Charges**"), as among them, shall be as follows:

First - Administration Charge (to the maximum of $500,000.00);

Second - DIP Lenders' Charge (to the maximum of $6,300,000.00); and

<u>Third – The Shafer PATC (to the maximum of $750,000.00); and</u>

<u>Fourth - Directors' Charge (to the maximum of $2,000,000.00).</u>