

**THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:)	
)	Chapter 11
GROEB FARMS, INC.)	
)	Case No. 13-58200
Debtor.)	
)	Honorable Walter Shapero

DEBTOR’S FIRST DAY MOTION FOR ORDER PURSUANT TO SECTIONS 105(a), 363(b), AND 507(a) OF THE BANKRUPTCY CODE AUTHORIZING (I) PAYMENT OF WAGES, COMPENSATION, AND EMPLOYEE BENEFITS; (II) CONTINUATION OF EMPLOYEE BENEFIT PROGRAMS; AND (III) FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED THERETO

The Debtor, by and through its proposed counsel, Foley & Lardner LLP, hereby submits this Motion For Entry of an Order Pursuant To Sections 105(a), 363(b), and 507(a) of the Bankruptcy Code Authorizing: (i) Payment of Wages, Compensation, And Employee Benefits; (ii) Continuation of Employee Benefit Programs; and (iii) Financial Institutions To Honor and Process Checks and Transfers Related Thereto (the “Motion”). In support of this Motion, the Debtor relies on the Declaration of Jack Irvin, Jr. the Chief Financial Officer of the Debtor in Support of Chapter 11 Petitions and First Day Orders filed contemporaneously herewith (the “Irvin Declaration”)¹. In further support of this Motion, the Debtor represents as follows:

Jurisdiction

1. This Court has jurisdiction to hear the Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court pursuant

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them as set forth in the Irvin Declaration.



to 28 U.S.C. §§ 1408 and 1409. Sections 105(a), 363(b), and 507(a) of title 11 of the United States Code (the “Bankruptcy Code”) authorize the relief requested in this Motion.

Background

2. On the date hereof (the “Petition Date”), the Debtor filed a petition for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Eastern District of Michigan. The Debtor intends to continue in possession of its property and to manage its business as debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed and no committees have been appointed or designated in the Debtor’s chapter 11 case.

3. The Debtor was formed in 1981 and is the country’s leading processor and packager of honey for food manufacturers, food service companies, and retail customers.

4. The Debtor is headquartered in Onsted, Michigan. The Debtor also operates a honey processing facility in San Bernardino, California, and maintains a testing lab in Belleview, Florida.

5. The Debtor has approximately 76 full time employees, 8 contractors hired through staffing services, and 4 part time employees. Approximately 47 of the employees are in Michigan, 25 are in California, 2 are in Georgia, and 2 are in Florida. For the fiscal year ended December 31, 2012 the Debtor had net sales from continuing operations of approximately \$137.8 million.

6. In 2001, the Government imposed anti-dumping duties on honey imported from China. After the institution of these duties, the honey industry increasingly imported honey whose country of origin was identified to the buyers as Asian nations such as Vietnam, Malaysia,

and Indonesia. When imports identified with a Chinese country of origin fell, the Government began to investigate the honey industry and the possibility that honey was being transshipped (i.e. shipped through a second country to conceal its origins) and/or mislabeled to avoid the anti-dumping duties. Beginning in 2007, the U.S. Department of Justice (“DOJ”) brought the first of several cases in different districts alleging that U.S. honey packers had imported transshipped honey. In 2008, the Debtor received a grand jury subpoena seeking information relating to the investigation of its industry.

7. Following an extensive DOJ investigation, in February 2013, the Debtor entered into a deferred prosecution agreement (the “DPA”) with the DOJ as a global resolution for the Debtor. The agreement required the Debtor to: (1) accept and acknowledge responsibility for historical purchases of transshipped honey; (2) continue cooperating with the government’s ongoing investigation for two years; (3) pay a \$2 million fine; (4) dispose of any and all Chinese-origin honey in its possession which entered the country in contradiction to the duty requirements and (5) cease selling any of its finished goods containing such Chinese honey. The agreement further required the Debtor to continue ongoing compliance programs and remediation measures. The DPA acknowledged that two former, unnamed executives had misled the Debtor’s board, the Debtor’s customers and the public.

8. Both before and after execution of the DPA, the Debtor took a number of steps to remediate issues regarding potentially transshipped honey. In January 2012, the Debtor retained Foley & Lardner LLP to conduct an internal investigation. In January 2012, the Debtor also began revising its policies and procedures relating to the procurement of honey overseas. In February 2012, the Debtor named a new interim president and relieved its then-current CEO from his operating responsibilities. In June 2012, the Debtor agreed to a separation agreement

with such CEO and stripped the then-current vice president of operations of all purchasing responsibility and subsequently terminated him. The Debtor hired a new full time president and CEO, Rolf Richter, effective June 27, 2012. The Debtor also licensed software to facilitate verification of container numbers and countries of origin for the honey that the Debtor purchases. The Debtor continues to carry BRC certification at each of its plants, which is a globally recognized food safety, quality and audit program subject to stringent audit testing by third parties. The Debtor also has strengthened its supplier audit program and reinvigorated lab testing procedures at its state-of-the-art lab testing facility in Florida. In October 2012, the Debtor hired John Wolf as its Vice President of Supply Chain and Management, to further enhance supply management and compliance. Mr. Wolf has a long history of experience in the food industry, including 24 years with Kellogg's.

9. As a result of the foregoing measures, the Debtor has robust policies and procedures in place relating to the purchase of honey to avoid international duty issues in the future. The Debtor also provides compliance training to all of its employees.

10. The Debtor had hoped that the DPA would enable the Debtor to have a fresh start with new executives and a new compliance program. However, in April 2013, just two months after the DPA was finalized, two civil putative class action lawsuits were filed against the Debtor in the United States District Court for the Northern District of Illinois by producers, packers and/or distributors of honey. In *Adee Honey Farms, et al v. Groeb Farms, et al.*, Case No. 1:13-cv-02922 (the "Adee Lawsuit"), the putative class alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and Lanham Act. In *Moore's Honey Farm, et al. v. Groeb Farms, Inc., et al.*, Case No. 1:13-cv-02905 (the "Moore Lawsuit"), and collectively with the Adee Lawsuit, the "Putative Class Actions"), the putative class alleges violations of RICO

and common law fraud, negligent misrepresentations, conspiracy, and clandestine wrongful importation without paying the anti-dumping duties. On June 24, 2013, the Putative Class Actions were consolidated (hereinafter, the “Putative Class Action”) by Order of the Court handling the Moore Lawsuit (the “Consolidation Order”). An Amended Complaint must be filed pursuant to the Consolidation Order on or before October 21, 2013. The Putative Class Action is based on the factual statements contained in the DPA and claims the class members were harmed by the Debtor and other defendants’ purchases of transshipped honey. While none of the claims make a specific damage demand, RICO and Lanham Act cases carry a potential for treble damages and attorneys’ fees.

11. As a result of the DPA, and the costs associated with it, including: (1) the \$2,000,000 fine; (2) the legal fees; (3) the costs of the compliance programs; and (4) the costs incurred in recruiting and hiring new, experienced executives, the Debtor has incurred significant unanticipated expenses.

12. Although the Debtor has significant defenses to the allegations in the Putative Class Action, the fine, the attorneys’ fees and litigation and other expenses have severely strained, and would continue to severely strain, the Debtor’s liquidity. In addition, despite the fact that the putative classes have not been certified, the mere existence of these lawsuits negatively affects the value of the Debtor outside of a bankruptcy proceeding and impedes potential buyers from purchasing the company at a maximized value to resolve the Debtor’s financial issues.

13. In addition, increased prices in the honey market and supply shortages have had a negative impact on the Debtor. In late 2010, the Debtor had contracts with certain suppliers to purchase substantial amounts of honey at agreed-upon prices, while the honey market was

experiencing significant price increases. However, these suppliers failed to deliver the product to the Debtor. As a result, the Debtor was forced to re-enter the honey market to buy replacement product at a time when, on a global basis, prices were increasing and the supply of honey was decreasing. The Debtor has initiated legal action against certain suppliers in order to receive the contracted honey. These issues have put further pressure on the Debtor's financial condition.

14. As a result of the foregoing and various other factors, the Debtor defaulted under its Credit Agreement with Wells Fargo Bank, N.A. ("Wells"). As a result, Wells began to exercise its rights and remedies, including without limitation: (a) imposing a \$750,000 reserve in borrowing on July 23, 2013; and (b) reducing or limiting the Debtor's available credit. These actions significantly reduced the Debtor's available cash, rendering it unable to buy necessary raw honey needed in the operation of its business.

15. On or about July 24, 2013, the Debtor hired Houlihan Lokey Capital, Inc. ("Houlihan") to assist with the assessment and implementation of strategic alternatives. Thereafter, Houlihan undertook an extensive marketing effort, including reaching out to 165 potentially interested parties, including strategic and financial buyers and capital providers. Houlihan secured Confidentiality Agreements from 75 parties and submitted a Confidential Information Memorandum to those parties. As part of the marketing process, Houlihan requested the submission of Indications of Interest ("IOIs") on or before September 18, 2013.

16. The Debtor received eight written IOIs, including a proposal from Honey Financing Company, LLC ("Honey Financing"), an affiliate of Peak Rock Capital, to restructure the obligations of the Debtor and acquire the equity of the reorganized Debtor pursuant to the chapter 11 Plan of Reorganization (the "Plan") filed contemporaneously herewith. After reviewing the IOIs, the Debtor determined that the proposal from Honey Financing was the best

overall offer based on the following factors, among others: (1) the Debtor's financing needs and lending arrangements; (2) the speed and certainty of closing the transaction; and (3) the total overall value to be provided to all stakeholders as a result of the transaction. Therefore, the Debtor elected to pursue the transaction with Honey Financing. The Debtor entered into the Restructuring Support Agreement in connection with the offer (the "Honey Financing RSA").

17. Also on September 18, 2013, HC Capital Holdings 0909A ("HC"), an affiliate of Honey Financing, purchased the Wells debt, and became the Debtor's senior secured lender.

18. In order to further bolster its restructuring efforts, the Debtor executed a Restructuring Support Agreement with its senior subordinated debt holders, Argosy Investment Partners II, L.P., and Marquette Capital Fund I, LP (the "Senior Subordinated Debt RSA").

19. The Debtor has also entered into a Restructuring Support Agreement with the interim class action co-lead counsel in the Putative Class Action (the "Putative Class Action RSA") and collectively with the Honey Financing RSA and the Senior Subordinated Debt RSA, the "RSAs").

20. The Debtor filed this chapter 11 case in order to affect the restructuring transaction as defined in the RSAs.

21. Additional factual background relating to the Debtor, including its corporate structure, business operations, the circumstances leading to the filing of the chapter 11 case, the Restructuring Agreement and the Debtor's existing indebtedness, is set forth in detail in the Irvin Declaration, filed concurrently herewith and fully incorporated herein by reference.

Relief Requested

22. Based upon the authority described herein, the Debtor seeks entry of an order, pursuant to sections 105(a), 363(b), and 507(a) of the Bankruptcy Code, granting Debtor authority to (i) pay, in its sole discretion, all prepetition obligations incurred under or related to

Wage Obligations, Payroll Taxes, Expense Reimbursements, and other Employee Benefits (each as defined below, and collectively, the “Employee Amounts”) and all costs incident to such obligations; (ii) pay, in its sole discretion, all service fees related to the foregoing (collectively, the “Administrative Fees” and hereafter with the Employee Amounts, the “Employee Obligations”); and (iii) maintain and continue to honor the Employee Benefits (as defined below), including practices, plans (including vacation and holiday plans), programs, and policies, available for employees as, as they were in effect as of the Petition Date or as they may be modified, amended, or supplemented from time to time in the ordinary course of the Debtor’s business. The Debtor also requests that the Court authorize the Debtor’s banks and other financial institutions (collectively, the “Banks”) to receive, honor, process, and pay any and all checks drawn on the Debtor’s payroll and general disbursement accounts (collectively, the “Disbursement Accounts”) and automatic payroll transfers, to the extent that the checks or transfers relate to Employee Obligations.

The Debtor’s Prepetition Employee Obligations

23. In the ordinary course of its business, the Debtor incurs payroll obligations to its employees as compensation for the performance of services. As of the Petition Date, the Debtor employed approximately 76 full-time employees (the “Full-Time Employees”), approximately 4 part-time employees (the “Part-Time Employees”) and approximately 8 individuals who are employed by staffing agencies (the “Contractors”, and together with the Full-Time Employees and the Part-Time Employees, the “Employees”). The work of the Employees is critical to the Debtor’s business. Out of the Full-Time Employees and the Part Time Employees, approximately 55 are hourly employees (the “Hourly Employees”) and approximately 25 are salaried employees (the “Salaried Employees”).

24. The Debtor has costs and obligations in respect of the Employees relating to the period prior to the Petition Date, as set forth specifically below. Certain of these costs and obligations are outstanding and due and payable, while others will become due and payable in the ordinary course of the Debtor's businesses after the Petition Date.

Wages, Salaries, and Compensation

25. Prior to the Petition Date and in the ordinary course of business, the Debtor typically paid obligations relating to wages, salary, and compensation for the Employees as follows: (a) employees receive compensation on a weekly basis, one week in arrears (the "Employee Wage Obligations"); and (b) Contractors are paid through staffing companies hired by the Debtor (the "Contractor Payment Obligations"); and together with the Employee Wage Obligations, the "Wage Obligations"). The Debtor pays the Wage Obligations through direct deposits into the account directed by the Employee or by check made out the Employee, or by check to the staffing companies who provide the Contractors on a net 45 day basis. To facilitate payment of the Employee Wage Obligations, the Debtor engages a payroll service, Paycor, Inc. ("Paycor"). Paycor draws the money for the relevant payroll every Thursday, and then distributes the payroll to its Employees every Friday.

26. The Debtor's current estimated weekly gross payroll for all employees is approximately \$90,000 and the Contractor Payment Obligations are approximately \$14,000 per month. Prior to filing chapter 11, on September 26, 2013, in the ordinary course of its business, the Debtor paid payroll of approximately \$88,000.

27. As of the Petition Date, the Debtor has accrued approximately \$94,000 in unpaid prepetition Wage Obligations.

28. By this Motion, the Debtor seeks the authority to pay all its accrued and outstanding prepetition Wage Obligations including the monthly fees paid to Paycor (the “Payroll Service Fees”).

Payroll Taxes

29. The Debtor is required by law to withhold from its Employees’ wages amounts related to federal, state, and local income taxes, as well as social security and Medicare taxes (collectively, the “Withholding Taxes”) and to remit the same to the appropriate taxing authorities (collectively, the “Taxing Authorities”). In addition, the Debtor is required to make matching payments from its own funds on account of social security and Medicare taxes, and to pay, based on a percentage of gross payroll and subject to state-imposed limits, additional amounts to the Taxing Authorities for, among other things, state and federal unemployment insurance (collectively, the “Employer Payroll Taxes” and, together with the Withholding Taxes, the “Payroll Taxes”). The Payroll Taxes are approximately \$5,200 on a weekly basis. As of the Petition Date, the Debtor has accrued approximately \$4,500 in Payroll Taxes that relate to the Employees for the period prior to the Petition Date. The Debtor requests authority to pay such amounts to the extent they have not already been paid.

Expense Reimbursements

30. The Employees incur various expenses in the discharge of their ordinary duties, such as travel and meal expenses, including amounts charged on personal or business-issued credit cards. Because these expenses are incurred as part of their official duties and in furtherance of the Debtor’s businesses, the Debtor directly pays or reimburses the Employees in full for these expenses (the “Expense Reimbursements”), subject to the submission of proper documentation to the appropriate accounting department. A majority of Expense Reimbursements are travel-related expenses related to sales or client development. The Debtor

reimburses expenses on a rolling basis, with a time lag of up to two weeks between submission or the request for reimbursement and payment. It is difficult to determine what Expense Reimbursements that accrued prepetition are outstanding on the Petition Date because of the lag time in the submission of such requests. However, based upon historical figures, the Debtor estimates that it has approximately \$10,000 in prepetition Expense Reimbursements outstanding as of the Petition Date. The Debtor requests authority to pay all Expense Reimbursements.

Employee Benefits

31. In the ordinary course of business, the Debtor has established various benefit plans and policies for its Employees that fall into the following categories: (i) paid time off plans, including vacation days, paid holidays, bereavement leave, and jury duty (collectively, the “PTO Plans”); (ii) medical insurance, dental insurance, prescription coverage, life insurance, and disability insurance plans and programs (collectively, the “Health and Welfare Plans”); (iii) workers’ compensation plans and programs (the “Workers’ Compensation Plans”); (iv) a 401(k) plan (the “401(k) Plan”) and (v) severance benefit packages offered to severed employees in the Debtor’s discretion prior to the Petition Date (the “Severance Benefits”), and together with the PTO Plans, Health and Welfare Plans, and the Workers’ Compensation Plans, the “Employee Benefits”). In connection with certain of the Employee Benefits, such as medical insurance and 401(k) Plan contributions, the Debtor directly deducts specified amounts from eligible Employees’ wages. The Employee Benefits are described below. The Debtor requests authority to continue and honor all of their obligations in respect of the Employee Benefits as they come due.

(i) PTO Plans

32. Under the PTO Plans, Employees are eligible, in certain circumstances, to receive full wages for, among other things, vacation and holidays. Generally, Employees are eligible for paid vacation time after their first ninety days on the following schedule:

- 90 days through two years of service: 40 hours
- Three to ten years of service: 80 hours
- 11 years of more of service: 120 hours

33. Employees earn their vacation on a quarterly basis throughout the year. Employees may take vacation time before it is earned, but if an Employee leaves the company or is terminated, the “advanced” vacation must be repaid to the Debtor.

34. The Debtor cashes out in full the accrued, but unused, vacation of Employees who depart from the Debtor’s employment, and pays each employee for earned but unused vacation in the last month each year.

35. The Debtor provides its Employees with certain paid holidays during the calendar year after they have been employed for 30 days. The Debtor reserves the right to change the holiday schedule in its discretion. Generally, paid holidays include: New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

36. The Debtor provides Employees who have been employed for 90 days and are not on probation with one day paid bereavement leave for a death in their immediate family. Employees may use vacation time if they are required to attend jury duty.

(ii) Health and Welfare Plans

37. The Debtor sponsors several Health and Welfare Plans to provide benefits to Employees, including, without limitation, (i) medical, dental, vision or other health plans, (ii) life insurance, and (iii) disability benefits as described below.

(a) Medical and Dental Plans.

38. The Debtor offers various health benefits, including, among others, medical, dental, prescription drug, and vision coverage (the “Medical Plans”). Employees are eligible for coverage after their 90th day of employment. The Medical Plans are provided through Blue Cross Blue Shield.

39. Generally, the Debtor pays approximately 76% of the cost of the Medical Plan coverage for Employees and their enrolled family members depending on the size of the enrollment (individual Employee v. Employee and family) with the balance contributed by the Employees through payroll withholding. Specifically, the Debtor withholds approximately \$11,900 per month in the aggregate from Employees’ wage compensation for the Medical Plan and remit such amounts to the medical health care plan providers (the “Medical Plan Withholdings”). The Debtor pays approximately \$53,000 per month for the Medical Plan. As of the Petition Date, the Debtor estimates that it has approximately \$53,000 in accrued and unpaid prepetition obligations with respect to the Medical Plans.

(b) Life Insurance.

40. The Debtor maintains basic life insurance coverage (the “Life Insurance Plans”) for all active full-time Employees. UNUM provides the Debtor’s Life Insurance Plans. Under the Life Insurance Plans, an Employee’s beneficiary is entitled to receive either \$10,000, \$25,000

or \$50,000 based on the Employee's selection. The Debtor spends an average of \$372.12 per month on Life Insurance.

(c) Disability Benefits.

41. The Debtor allows Employees to purchase both Long Term Disability and Short Term Disability insurance through AFLAC (the "Disability Plans"). The Debtor does not subsidize or contribute to the cost of the Disability Plans. However, Employees pay for the Disability Plans through a payroll deduction.

(iii) Workers' Compensation Plans

42. The laws of the states in which the Debtor operates require it to maintain workers' compensation policies and programs to provide the relevant Employees with coverage for claims arising from or related to their employment with the Debtor. The Debtor uses Hanover Insurance Company for the Workers' Compensation Plans. The monthly premium for the Debtor's workers' compensation policy is \$13,658.83. As of the Petition Date, the Debtor estimates that it has approximately \$2,600 in accrued and unpaid premiums and administrative fees relating to the Workers' Compensation Plans.

(iv) 401(k) Plan

43. The Debtor sponsors a retirement investment plan and withholds from the wages of participating Employees contributions towards the 401(k) Plan. All full-time Employees are eligible to participate in the 401(k) Plan after their 90th day of employment. The Debtor withholds approximately \$11,000 per month for the 401(k) Plan.

44. Wells administers the 401(k) Plan for all of the Employees, and holds the 401(k) Plan res in trust as the trustee. The withholding contributions are withheld from payroll payments and wired to Wells, at the same time as payroll is paid. As of the Petition Date, the

Debtor holds \$2,500 of unpaid accrued obligations related to withholding contributions. In addition, the Debtor pays approximately \$14,000 to Wells per year to administer and audit the 401(k) Plan (the “401(k) Administrative Fees”), and approximately \$2,000 of 401(k) Administrative Fees are outstanding as of the Petition Date. The Debtor seeks authority, but not the obligation, to continue the 401(k) Plan and honor its obligations for the 401(k) Administrative Fees.

(v) Severance Benefits

45. Prior to the Petition Date, the Debtor paid severance to terminated personnel, in its discretion. The amount of severance pay was three weeks for every year of service for officers, two weeks for every year of service for managers and one week of severance pay for every year of service for other employees, capped at 6 months of severance pay. The Debtor also included in severance packages payment for any unused vacation pay for the year of termination and paid COBRA premiums for the duration of the severance payment period. The Debtor would receive, in exchange for such severance payment, an agreement from the severed employee to waive any other claims against or obligations of the Debtor.

**Cause Exists to Authorize the
Payment of the Debtor’s Employee Obligations**

46. Pursuant to section 507(a)(4)(A) of the Bankruptcy Code, claims of employees for “wages, salaries, or commissions, including vacation, severance, and sick leave pay” earned within 180 days before the Petition Date are afforded priority unsecured status to the extent of \$12,475 per employee. Similarly, section 507(a)(5) of the Bankruptcy Code provides that employees’ claims for contributions to certain employee benefit plans are also afforded priority unsecured status to the extent of \$12,475 per employee covered by such plan, less any amount paid pursuant to section 507(a)(4).

47. Furthermore, section 363(b)(1) of the Bankruptcy Code provides, “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code further provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title. No provision of this Title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

48. The Debtor believes that most of the Employee Obligations owed by the Debtor and relating to the period prior to the Petition Date constitute priority claims under sections 507(a)(4) and (a)(5) of the Bankruptcy Code. As priority claims, the estate must pay the Employee Obligations in full before satisfying any of the Debtor’s general unsecured obligations. As the Debtor anticipates confirming the Plan of Reorganization, the relief requested may affect only the timing of the payment of these priority obligations, and it will not prejudice the rights of general unsecured creditors or other parties in interest.

49. In addition, under Michigan law, officers and directors of the Debtor can be personally liable for all unpaid compensation claims, including vacation pay.

50. As of the Petition Date, the Debtor believes that no Employees have claims for Wage Obligations (excluding obligations under the PTO Plan, which are not current cash pay obligations of the Debtor as of the Petition Date) in excess of \$12,475.

51. The Debtor submits that, to the extent Employees are owed in excess of \$12,475, payment of such amounts is necessary and appropriate and may be authorized under sections 105(a) and 363(b) of the Bankruptcy Code pursuant to the “necessity of payment” doctrine.

52. Payment of prepetition obligations is rooted in the common law “necessity of payment” doctrine, which courts have consistently applied when the failure to pay prepetition obligations posed a real, significant threat to a debtor's estate. *See e.g., In re Penn Central Transp. Co.*, 467 F.2d 100 (3d Cir. 1972); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (“courts have used their equitable power under Section 105(a) . . . to authorize payment of prepetition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization”); *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (reasoning that because the debtor-in-possession has fiduciary duties it must meet, it is logical that the bankruptcy court may “authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate” under Section 105(a)); *In re Eagle-Picher Industries, Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (holding that a per se ban on any prepetition payments is too inflexible to serve the rehabilitative purposes of the Bankruptcy Code).

53. In a line of well-established cases, the doctrine was first applied beginning with railroad reorganizations dating back to the turn of the century. *See, e.g., Gregg v. Metropolitan Trust Co.*, 197 U.S. 183 (1905) (“the payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts”); *Miltenberger v. Lognsport Ry.*, 106 U.S. 286, 312 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent “stoppage of... [crucial] business relations”).

54. Moreover, the Bankruptcy Court for the Eastern District of Michigan has granted relief similar to that requested in this Motion with respect to Employee Obligations in the following matters: *In re Energy Conversion Devices, et. al.*, Case No. 12-43166; *In re Blue Water Automotive Systems, Inc.*, case No. 08-43196; *In re Greektown Holdings, LLC*, Case No. 08-53104.

55. In the case of *In re Ionosphere Clubs*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989), the bankruptcy court recognized that an order authorizing the debtor to pay certain prepetition wage, salary, medical benefit and business expense claims was justified by the “necessity of payment” doctrine because such payments were necessary to preserve and protect the debtor's business. *Id.* at 175-76. Similarly, in *In re Gulf Air, Inc.*, 112 B.R. 152 (Bankr. W.D. La. 1989), the court found that payment of prepetition employee wage claims was essential to the debtor’s reorganization efforts because, without payment, many skilled employees would abandon the debtor’s operations. See also, *In re Marine Optical, Inc.*, 10 B.R. 893 (B.A.P. 1st Cir. 1981) (court authorized postpetition payments of prepetition employee claims including wages and other benefits that would be entitled to priority under 11 U.S.C. § 507(a)(3)); *In re N. Pipeline Constr. Co.*, 2 C.B.C.2d 475, 477 (Bankr. D. Minn. 1980) (debtor obtained authority to pay, on a postpetition basis, prepetition employee-related claims, as such payments were in the best interest of the estate and would not significantly affect unsecured creditors); *In re Chateaugay Corp.*, 80 B.R. 279 (S.D.N.Y. 1987) (court authorized debtor to make “selective” prepetition payments, and finding that such payments were not in violation of Section 507 of the Bankruptcy Code).

56. The bankruptcy court’s exercise of its authority under the “doctrine of necessity” is appropriate to carry out specific statutory provisions of chapter 11, specifically, Sections 1107(a), 1108 and 363(b)(1), which authorize a debtor-in-possession to maintain and operate the debtor’s business and use estate property out of the ordinary course of business. Indeed, a debtor-in-possession operating a business under Section 1108 of the Bankruptcy Code has a fiduciary duty to protect and preserve the estate, including the going concern value of an operating business. See *In re CoServ, L.L.C.*, 273 B.R. at 497 (“There are occasions when this

[fiduciary] duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”). A bankruptcy court’s exercise of its authority under Section 105(a) is also necessary to carry out two central policies underlying chapter 11: (a) permitting the successful rehabilitation of the debtor, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984), and (b) preserving going concern value and maximizing the property available for distribution to creditors. *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. La Salle St. P’ship*, 526 U.S. 434, 453 (1999). Granting the relief requested in the Motion will enhance the likelihood of the Debtor’s successful rehabilitation and will help maximize the value of the estate’s assets and, ultimately, the return to creditors.

57. Any delay or failure to pay wages, salaries, benefits, and other similar items could irreparably impair the Employees’ morale, dedication, confidence, and cooperation at a time when the Employees’ support is critical to the success of the Debtor’s chapter 11 case. At this early stage, the Debtor simply cannot risk the substantial damage to its business that would inevitably attend any decline in its Employees’ morale.

58. The Employees are very experienced in the Debtor’s business and are able to perform their jobs efficiently. Furthermore, many of the them have been employed by Debtor for long periods of time, and have developed strong working relationships with the Debtor’s vendors and customers. If a significant number of Employees left the Debtor due to this proceeding, the Debtor would need to expend scarce time and resources to find and train suitable replacement employees. These replacement employees, if available, would not have the same knowledge of the Debtor’s business, its customers, and its vendors as the current Employees. The time and resources the Debtor would need to replace Employees would be better spent focusing on the pending sale transaction and reorganization of the Debtor, which will inure to the benefit of all stakeholders.

59. Bankruptcy Rule 6003 provides that to the extent “relief is necessary to avoid immediate and irreparable harm,” a Bankruptcy Court may approve a motion to “pay all or part of a claim that arose before the filing of the petition” prior to 21 days after the Petition Date. Absent an order granting the relief requested in this Motion, the Employees will suffer undue hardship and, in many instances, serious financial difficulties, as the amounts in question are needed to enable certain of the Employees to meet their own personal financial obligations. Without the requested relief, the stability of the Debtor will be irreparably undermined because otherwise loyal Employees will seek employment alternatives. Furthermore, Onsted, Michigan, where one of the Debtor’s facilities is located, is a small town and finding replacement employees would be very difficult, causing further harm to the Debtor. The Debtor’s inability to honor its obligations would risk the immediate loss of employees and customer relationships and severely impair the Debtor’s ability to reorganize. Therefore, the relief requested herein is necessary to avoid immediate and irreparable harm and the requirements of Bankruptcy Rule 6003 for expedited relief are satisfied.

60. In respect of Expense Reimbursements, the Employees and the Debtor’s directors and officers incurred business expenses prepetition for the benefit of the Debtor, with the understanding that they would be reimbursed. It would therefore be inequitable to require them to bear those expenses personally, in addition to causing significant and irreparable harm.

61. With respect to Payroll Taxes in particular, the payment of such taxes will not prejudice other creditors of the Debtor’s estates, as the relevant Taxing Authorities generally would hold priority claims under section 507(a)(8) of the Bankruptcy Code in respect of such obligations. Moreover, the portion of the Payroll Taxes withheld from an Employee’s wages on behalf of the applicable Taxing Authority is held in trust by the Debtor. As such, these Payroll

Taxes are not property of the Debtor's estate under section 541 of the Bankruptcy Code. See, e.g., Begier v. IRS, 496 U.S. 53, 67 (1990) (withholding taxes are property held by a debtor in trust for another and, as such, are not property of the debtor's estates).

62. In addition, the Debtor believes it is necessary to continue payment of the Administrative Fees to the administrators of the Employee Obligations and the administrators of programs related to Employee Benefits. Without the continued services of these administrators, the Debtor would be unable to continue to honor its Wage Obligations and Employee Benefits obligations in an efficient and cost-effective manner.

63. The Debtor does not seek to alter its compensation, vacation, or other benefit policies at this time. This Motion is intended to permit the Debtor, in its discretion, to make payments consistent with the Debtor's existing policies to the extent that, without the benefit of an order approving this Motion, such payments may be inconsistent with the relevant provisions of the Bankruptcy Code. The Motion is also intended to permit the Debtor, in its discretion, to continue to honor its practices, programs, and policies with respect to its Employees, as such practices, programs, and policies were in effect as of the Petition Date as described in this Motion. Payment of all Employment Obligations in accordance with the Debtor's prepetition business practices is in the best interests of the estate, its creditors, and all parties in interest and will enable the Debtor to continue to operate its businesses in an economic and efficient manner without disruption. The Employees are central to the Debtor's operations and vital to this chapter 11 case because without them, the Debtor's business could not function. A significant deterioration in employee morale at this critical time undoubtedly would have a devastating impact on the Debtor, its customers and vendors, the value of the Debtor's assets and businesses, and the Debtor's ability to continue operations. The total amount sought to be paid in this

Motion is relatively modest compared with the value of the Debtor's businesses and the importance of the Employees to the Debtor's chapter 11 case.

64. Accordingly, by this Motion, the Debtor seeks authority pursuant to sections 507(a), 363(b), and 105(a) of the Bankruptcy Code to pay, subject to the Debtor's sole discretion, the Employee Obligations as they become due and owing during the pendency of this case and to continue, uninterrupted, its practices, programs and policies with respect to its Employees, as such practices, programs, and policies were in effect as of the Petition Date as described in this Motion.

65. Any delay in paying the obligations relating to the Employee Obligations or Administrative Fees would be detrimental to the Debtor, its creditors, and the estate. Accordingly, and to successfully implement the foregoing, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of the order granting this motion, whether imposed by Bankruptcy Rule 6004(h) or otherwise.

**Applicable Banks Should be Authorized
to Honor and Pay Checks Issued and Make
Other Transfers to Pay the Employee Obligations**

66. The Debtor further requests that the Court authorize the Debtor's Banks to receive, process, honor, and pay all prepetition and post-petition checks issued or to be issued, and electronic fund transfers requested or to be requested, by the Debtor in respect of the Employee Obligations. The Debtor also seeks authority to issue new post-petition checks or effect new electronic fund transfers on account of such obligations to replace any prepetition checks or electronic fund transfer requests that may be dishonored or rejected.

67. As a result of the commencement of this chapter 11 case, and in the absence of an order of the Court providing otherwise, the Banks may dishonor or reject the Debtor's checks, wire transfers, and direct deposit transfers in respect of the Employee Obligations.

68. The Debtor represents that each of these checks or transfers is or will be drawn on the Debtor's payroll and general disbursement accounts and can be readily identified as relating directly to payment of the Employee Obligations. Accordingly, the Debtor believes that the Banks will not inadvertently honor prepetition checks and transfers other than those for the Employee Obligations.

69. Authorization to pay all amounts on account of Employee Obligations shall not be deemed to constitute post-petition assumption or adoption of any contract, program, or policy pursuant to section 365 of the Bankruptcy Code. The Debtor is in the process of reviewing these matters and reserves all of its rights under the Bankruptcy Code with respect thereto. Moreover, authorization to pay all amounts on account of Employee Obligations shall not affect the Debtor's right to contest the amount or validity of any such obligations, including, without limitation, the Payroll Taxes that may be due to any Taxing Authority.

Notice

70. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the Eastern District of Michigan; (b) the secured creditors of the Debtor and their counsel; and (c) the twenty (20) largest unsecured creditors of the Debtor. The Debtor submits that in light of the nature of the relief requested, no further notice is required. This Motion has been submitted on an expedited basis because of the numerous matters to be considered by the Court during the initial period of this case regarding the administration and the post-petition operations of the Debtor.

WHEREFORE, the Debtor respectfully requests entry of an order, the form of which is attached to this Motion as **Exhibit 1**, granting the relief requested herein and granting the Debtor such other and further relief as may be just and appropriate under the circumstances.

Dated: October 1, 2013
Detroit, Michigan

FOLEY & LARDNER LLP

/s/ Judy A. O'Neill

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*Proposed Counsel for the Debtor and Debtor in
Possession*

EXHIBIT 1

Proposed Form of Order

**THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:)	
)	Chapter 11
GROEB FARMS, INC.)	
)	Case No. 13-58200
Debtor.)	
)	Honorable Walter Shapero

**FIRST DAY ORDER PURSUANT TO SECTIONS 105(a), 363(b), AND 507(a) OF THE
BANKRUPTCY CODE AUTHORIZING (I) PAYMENT OF WAGES, COMPENSATION,
AND EMPLOYEE BENEFITS; (II) CONTINUATION OF EMPLOYEE BENEFIT
PROGRAMS; AND (III) FINANCIAL INSTITUTIONS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED THERETO**

Upon the Debtor's Motion for Order Pursuant to Sections 507(a), 363(b), and 105(a) of the Bankruptcy Code Authorizing (i) Payment of Wages, Compensation, and Employee Benefits, (ii) continuation of Employee Benefit Programs, and (iii) Financial Institutions to Honor and Process Checks and Transfers Related Thereto (the "Motion"), filed by the Debtor, seeking entry of an order authorizing the Debtor to (a) continue certain employee compensation and benefits programs, and (b) pay certain prepetition compensation and benefit claims, all as more fully described in the Motion; and the Court having jurisdiction pursuant to sections 157 and 1334 of title 28 of the United States Code to consider the Motion and the relief requested therein; and venue being proper in this Court pursuant to sections 1408 and 1409 of title 28 of the United States Code; and it appearing that no other or further notice need be provided; and the Court having found and determined that the relief sought in the Motion is necessary to avoid immediate and irreparable harm to the Debtor and its estate, as contemplated by Bankruptcy Rule 6003; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtor, its creditors, and all parties in interest; and the Court having

heard the evidence and statements of counsel regarding the Motion and having determined that the legal and factual bases set forth in the Motion and establish just cause for the relief granted herein, it is therefore

ORDERED that the Motion is GRANTED; and it is further

ORDERED that, pursuant to sections 507(a), 363(b), and 105(a) of the Bankruptcy Code, the Debtor is authorized, but not required, to satisfy, in its sole discretion, all prepetition obligations without further Order of the court, with respect to Employee Obligations¹, including without limitation, the Wage Obligations, the Payroll Taxes, the Expense Reimbursements, and other Employee Benefits; and it is further

ORDERED that the Debtor is authorized, but not required, to continue to honor, in its sole discretion, its practices, programs, and policies with respect to the Employees as such practices, programs, and policies were in effect as of the date of the commencement of the Debtor's chapter 11 case, including, but not limited to the Employee Benefits; and it is further

ORDERED that the Debtor is authorized, but not required, to pay, in its sole discretion, costs and expenses incidental to the payment of the Employee Obligations, including the Administrative Fees, Payroll Service Fees and all other administration and processing costs and payments to outside professionals and companies, in the ordinary course of business, in order to facilitate the administration and maintenance of the Debtor's programs and policies related to the Employee Obligations; and it is further

ORDERED that all applicable banks and other financial institutions (the "Banks") are authorized, when requested by the Debtor, in its sole discretion, to receive, process, honor, and pay any and all checks drawn on the Debtor's payroll or disbursement accounts and any

¹ All capitalized terms used, but no otherwise defined herein, shall have the meanings ascribed to such terms in the Motion.

other transfers that are related to Employee Obligations and the costs and expenses incident thereof, whether those checks were presented prior to or after the date of the commencement of the Debtor's chapter 11 case, provided that sufficient funds are available in the accounts to make such payments; and it is further

ORDERED that any Bank may rely on the representations of the Debtor with respect to whether the Bank should honor any check or other transfer drawn or issued by the Debtor prior to the Petition Date pursuant to this Order, and such Bank shall not have any liability to any party for relying on such representations by the Debtor as provided for in this Order; and it is further

ORDERED that the Debtor is authorized (consistent with this Order), but not required, in its sole discretion, to issue postpetition checks or to effect postpetition fund transfer requests in replacement of any checks or fund transfer requests related to Employee Obligations dishonored or rejected as a consequence of the commencement of the Debtor's chapter 11 case; and it is further

ORDERED that nothing in the Motion or this Order shall be construed as impairing the Debtor's right to contest the validity or amount of any Employee Obligations, including, without limitation, Payroll Taxes that may be due to any taxing authority; and it is further

ORDERED that nothing in the Motion shall be deemed a request by the Debtor for authority to assume, and nothing in this Order shall be deemed authorization to assume, any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; and it is further

ORDERED that notwithstanding the relief granted in this Order, any payment made by the Debtor pursuant to the authority granted herein shall be subject to the orders approving entry into the Debtor-in-Possession Financing and Authorizing Continued Use of Cash Collateral; and it is further

ORDERED that notwithstanding any applicability of Bankruptcy Rules 6004(h), 7062, or 9014, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED that entry of this Order is necessary to avoid immediate and irreparable harm and the requirements under Bankruptcy Rule 6003 have been satisfied; and it is further

ORDERED that notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rules 4001(d) and 6004(a) are waived.

EXHIBIT 2

Notice of Motion and Opportunity to Object

Not Applicable

EXHIBIT 3

Brief

Not Applicable

EXHIBIT 4

Certificate of Service

**THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

_____)	
In re:)	Chapter 11
)	
GROEB FARMS, INC.)	Case No. 13-58200
)	
Debtor.)	Honorable Walter Shapero
_____)	

CERTIFICATE OF SERVICE

The Debtor has engaged a Noticing Agent, which will serve this Motion and file a subsequent Proof of Service after it has performed the serve.

Dated: October 1, 2013
Detroit, Michigan

FOLEY & LARDNER LLP

/s/ Judy A. O'Neill
Judy A. O'Neill (P32142)
John A. Simon (P61866)
Tamar N. Dolcourt (P73425)
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Proposed Counsel for the Debtor and Debtor in Possession

EXHIBIT 5

Affidavit

Not Applicable

EXHIBIT 6

Documentary Exhibits

Not Applicable