

**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

**NOTICE OF FILING PLAN SUPPLEMENT DOCUMENT  
(NEW TRADE AGREEMENT) AS RELATED TO THE SECOND AMENDED PLAN**

The Debtor, by and through its attorneys, Foley & Lardner LLP, hereby submits the attached: a Plan Supplement Document (the New Trade Agreement) as related to the Second Amended Plan of Reorganization filed on November 8, 2013 [Dkt No. 213].

Dated: November 20, 2013  
Detroit, Michigan

FOLEY & LARDNER LLP

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Possession*



## NEW TRADE AGREEMENT

Groeb Farms, Inc. (the “**Debtor**”), on the one hand, and [VENDOR (“**Vendor**”), on behalf of itself, its affiliates, and its subsidiaries (collectively, “**Supplier**”), on the other hand, hereby enter into the following trade agreement (this “**New Trade Agreement**”), dated as of this [DATE].

### Recitals

WHEREAS on October 1, 2013 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), in the United States Bankruptcy Court for the Eastern District of Michigan (the “**Bankruptcy Court**,” together with any other court with jurisdiction over the Debtor’s bankruptcy case, the “**Court**”).

WHEREAS on the Petition Date the Debtor filed the *Plan of Reorganization of Groeb Farms, Inc., Pursuant to Chapter 11 of the Bankruptcy Code*, as amended and supplemented from time to time, (the “**Plan**”), as **Exhibit A** to the *Disclosure Statement for the Plan of Reorganization of Groeb Farms, Inc. Pursuant to Chapter 11 of the Bankruptcy Code, Dated October 1, 2013* [Docket No. 23], as amended (the “**Disclosure Statement**”).<sup>1</sup>

WHEREAS prior to the Petition Date, Supplier sold and delivered goods to the Debtor.

[WHEREAS Supplier is scheduled as a general unsecured creditor in the Debtor’s bankruptcy case with a prepetition claim against the Debtor in the amount of [###] (the “**Scheduled Claim**”).]

[WHEREAS on [DATE], Supplier filed a proof of claim numbered [###] on account of prepetition claims asserted by Supplier against the Debtor (the “**Proof of Claim**”).]

WHEREAS, the [Scheduled Claim / Proof of Claim] constitutes a “**Trade Claim**” as that term is defined in the Plan.

WHEREAS, the Supplier received payments from the Debtor during the 90 days prior to the Petition Date in the amount of [\_\_\_\_], and payments greater than the MFN Price (as defined below) for goods or services delivered during the period between October 29, 2013 and the date of this Agreement (the “**Measurement Period**”), in the amount of \_\_\_\_\_ (the “**Post-Petition Preference Amount**”), both of which amounts may be subject to clawback under applicable bankruptcy and non-bankruptcy laws, and which the Debtor shall waive the right to clawback, subject to the terms of this New Trade Agreement. For purposes of this Agreement, the “**MFN Price**” means the total amount the Debtor would have paid for such goods or services if Supplier had provided the Debtor with the lowest price offered by Supplier for services or for similar product (with respect to food, determined by color, grade, floral source, and country of origin), which product is legally in the United States, to any customer of size similar to or greater than the Debtor, using the same fob point of entry (where applicable).

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings set forth in the Plan.

WHEREAS, the Supplier is entitled to an administrative claim in the amount of [\$\_\_\_\_\_] arising under 11 U.S.C. § 503(b)(9) (the “**503(b)(9) Claim**”), and will be paid the 503(b)(9) Claim no later than twenty (20) days after the Effective Date of the Plan;

WHEREAS, pursuant to the Plan, if Supplier enters into this New Trade Agreement, Supplier shall receive the following “**Trade Claim Treatment**” on account of its Agreed Trade Claim (as defined below):

- (a) a cash recovery, with the cash distribution reduced by the Post-Petition Preference Amount in either case, equal to the greater of (i) 40% of the Agreed Trade Claim amount and (ii) each such holder’s pro rata share of \$4.8 million (up to 60% of such holder’s Agreed Trade Claim amount) (the “**Trade Claim Distribution Amount**”), which the reorganized Debtor shall satisfy by paying (x) for goods shipped or services delivered to the Debtor after the execution of this New Trade Agreement, but before the Effective Date (A) where the invoice has been paid prior to the Effective Date, within 30 days after the Effective Date, 10% of each previously paid invoice, or (B) where the invoice has not been paid prior to the Effective Date, 110% of each invoice when such invoice is otherwise paid, and (y) an extra 10% on the amount of each invoice for products ordered post-Effective Date until the Trade Claim Distribution Amount has been paid in full; provided that the Reorganized Debtor shall satisfy the Trade Claim Distribution Amount by no later than 18 months after the Effective Date; and
- (b) its pro rata share of the proceeds from the General Unsecured Claims Litigation Trust (as defined in the Plan), based on the amount of the Agreed Trade Claim less the Trade Claim Distribution Amount (the “**Trade Deficiency Claim Amount**”); provided, however, that the Trade Deficiency Claim Amount shall be payable only after creditors of the Debtors other than those creditors that sign an agreement similar to this New Trade Agreement (including, for the avoidance of doubt, Supplier and this New Trade Agreement) have each recovered an amount equal to 10% of such creditor’s allowed general unsecured claim.

WHEREAS the Debtor and Supplier (each a “**Party**,” and collectively, the “**Parties**”) each agree to the following terms as a condition of payment on account of the Trade Claim held by Supplier against the Debtor.

### **Agreement**

1. **Recitals.** The foregoing recitals are incorporated herein by reference as if fully set forth herein.

2. **Agreed Claims and Credits.**

a. The Parties hereby agree that Supplier delivered to the Debtor, and the Debtor received, goods and related services in an aggregate amount equal to \$[###] prior to the Petition Date, for which Supplier did not receive payment, and that such amount, less the 503(b)(9) Claim constitutes the “**Agreed Trade Claim.**” For the avoidance of doubt, the Parties hereby agree that the amount of the Agreed Trade Claim is

\$[###], and that the Agreed Trade Claim is the total balance of Supplier's general unsecured claims against the Debtor.

b. The Parties hereby agree that the Agreed Trade Claim shall constitute Supplier's Allowed Trade Claim for purposes of voting, treatment and distribution in accordance with the Plan.

3. Agreement to Supply.

a. Supplier shall supply goods or services to the Debtor on trade terms at least as favorable to the Debtor as those practices and programs (including unsecured trade credit, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, commissions, brokerage payments, coupon reconciliation, product mix, availability, delivery timing and charges and other programs) in place at the time of sale (the "**Customary Trade Terms**"). The Customary Trade Terms include, without limitation, the following:

- i. Pricing: [Insert specific pricing term] Supplier shall supply goods or services to the Debtor at the MFN Pricing for such goods or services in place at the time of signing the purchase order (or such other document memorializing the sale).
- ii. Payment Terms: [Insert payment terms]. Supplier agrees to offer payment terms of not less than 30 days for all orders made after the execution of this Agreement.
- iii. [Remaining terms to be specifically set forth with respect to credit limits, cash discounts, timing, etc.]

b. Supplier shall sell goods and/or provide services in volumes reasonably consistent with current market conditions and Supplier's capacity, pursuant to the Customary Trade Terms.

c. The Customary Trade Terms may not be modified, adjusted, or reduced in a manner adverse to the Debtor except as agreed-to in writing by the Parties, which writing may be by purchase order or some other standard commercial document customarily used in the honey industry; provided, however, for each new order placed by Debtor from Supplier there shall be a purchase order (or other standard commercial document customarily used in the honey industry) that shall be signed by Debtor and Supplier and that shall be deemed to be a material supplement to this New Trade Agreement and shall be legally binding on the Parties.

d. Supplier represents and warrants that the Agreed Trade Claim is owned solely by Supplier and that no broker or buyer has any rights in or to the Agreed Trade Claim.

e. Supplier represents and warrants that as of October 29, 2013, Supplier has supplied goods or services to the Debtor at the prevailing market price for such goods or services, or that the Trade Claim Distribution Amount will be reduced accordingly.

4. Payments on Agreed Trade Claim. The Agreed Trade Claim shall be satisfied in full, pursuant to Article III of the Plan, by payment of the Trade Claim Treatment. No later than

twenty (20) days after the Effective Date of the Plan, the Debtor shall pay Supplier's 503(b)(9) Claim.

5. Confirmation and Plan Matters.

a. Supplier agrees that it shall not require a lump-sum payment upon the Effective Date of the Plan on account of any outstanding administrative claims Supplier may assert arising from the delivery of postpetition goods or services, to the extent that payment of such claims is not yet due under the terms the goods and/or services were sold. Supplier agrees that such claims will be paid in the ordinary course of business after the Effective Date of the Plan pursuant to the Customary Trade Terms then in effect.

b. Supplier will not separately seek payment from the Debtor on account of any prepetition claim outside the terms of this New Trade Agreement or the Plan to the extent the Effective Date of the Plan occurs by January 19, 2014.

6. Debtor Obligations Subject to Court Approval; Result of Failure to Confirm Plan.

a. All obligations of the Debtor and Supplier hereunder shall be considered effective on the date hereof.

b. This New Trade Agreement and the obligations of the Debtor and Supplier hereunder shall terminate and become null and of no effect in the event that the Effective Date of the Plan has not occurred by January 19, 2014.

7. Supplier Breach.

a. In the event that Supplier breaches any of its obligations arising under this New Trade Agreement (each, a "**Supplier Breach**"), the Debtor shall have the option, in its sole and absolute discretion, to terminate this New Trade Agreement (the "**Debtor Termination Option**"); provided, however, the Supplier shall have the right to cure any default within thirty (30) days from receipt of written notice provided as directed and in the manner set forth herein.

b. If a Supplier Breach occurs, and is not timely cured, before the Effective Date of the Plan and the Debtor exercises the Debtor Termination Option, Supplier shall be treated in accordance with Article III.C(5)(b)(ii) of the Plan.

c. If a Supplier Breach occurs after the Effective Date of the Plan, and is not timely cured, and the Debtor exercises the Debtor Termination Option: (i) Supplier shall forfeit, and the Debtor shall have no obligation to pay, any remaining amount of the Trade Claim Distribution due to Supplier and Supplier shall waive its right to any distribution on account of its Trade Deficiency Claim Amount; (ii) any payments previously made in satisfaction of Supplier's Agreed Trade Claim shall be promptly returned to the Debtor by no later than thirty (30) days; (iii) the Avoidance Waiver (as defined herein) shall be, and shall be deemed to be, null and void *ab initio*, and (iv) so long as (ii) has been satisfied, Supplier shall be entitled to its pro rata share of the litigation trust proceeds in accordance with Article III.(C)(5)(b)(ii) of the Plan

d. In the event Supplier signs this New Trade Agreement prior to the voting deadline of the Plan, a Supplier Breach shall be deemed to occur in the event the Supplier does not vote in favor of the Plan.

e. Late deliveries due to circumstances and/or conditions beyond the control of the Supplier shall not be deemed a breach of the Supplier's obligations hereunder so long as Supplier makes reasonable best efforts to provide for timely delivery under the circumstances.

8. Debtor Breach.

a. In the event that the Debtor breaches any of its obligations arising under this New Trade Agreement (each, a "**Debtor Breach**"), after expiration of the cure period set forth in 8(b) below, the Supplier shall have the option, in its sole discretion, to terminate this New Trade Agreement (the "**Supplier Termination Option**"). In the event the Supplier exercises the Supplier Termination Option, the Supplier (i) shall continue to be treated in accordance with Article III.C(5)(a) of the Plan; (ii) shall be entitled to keep any monies paid on account of the Agreed Trade Claim; (iii) shall continue to be released from its Avoidance Waiver (as defined herein); and (iv) the Debtor shall still be obligated to pay the remaining amount of the Trade Claim Distribution due to Supplier.

b. In the event a Debtor Breach occurs, the Debtor shall have thirty (30) days to cure such Debtor Breach after written notice by Supplier provided as directed and in the manner set forth herein.

9. Proofs of Claim.

a. Supplier represents and warrants that the Agreed Trade Claim and the 503(b)(9) Claim that remains unpaid, shall be its only claim(s) against the Debtor and shall supersede each and every Proof of Claim or applicable motion filed by Supplier on account of prepetition claims Supplier may hold against the Debtor. All other or different unsecured claims of Supplier, whether evidenced by (i) each and every Proof of Claim that has been filed by Supplier against the Debtor; and/or (ii) the Debtor's schedules of assets and liabilities filed in the chapter 11 case, shall be Disallowed.

10. Avoidance Waiver. Upon the Effective Date of the Plan and subject to a Supplier Breach (in which event of a Supplier Breach any such Avoidance Action (as defined in the Plan) shall be transferred to the unsecured creditor trust created under the Plan), the Debtor shall forever release and waive its right to assert Avoidance Actions (as defined in the Plan) against Supplier on behalf of the Debtor, its estate, and its successors, including without limitation any subsequently appointed trustee (the "**Avoidance Waiver**").

11. Notice.

If to Supplier:

[NAME]

[ADDRESS]

Attn: [NAME]

E-mail: [EMAIL]  
Facsimile: [FAX]

[and]

[OTHER FOR SUPPLIER]

If to Debtor:

Groeb Farms, Inc.  
10464 Bryan Hwy  
Onsted, MI 49265  
Attn: [NAME]  
Facsimile: [FAX]  
E-mail: [EMAIL]

and

Foley & Lardner LLP  
One Detroit Center  
500 Woodward Ave., Suite 2700  
Detroit, MI 48226-3489  
Attn: Judy A. O'Neill, Esq.  
E-mail: JONeill@foley.com  
Attn: John A. Simon, Esq.  
E-mail: JSimon@foley.com  
Facsimile: (313) 234-2800

12. Compliance. At any time during the term of this Agreement, if using good faith the Debtor has a reasonable belief that the Supplier is not providing Customary Trade Terms, including its MFN Price, the Debtor may request an audit of Supplier to confirm that Supplier has provided the Debtor the Customary Trade Terms (a “**Compliance Audit**”) in accordance with this New Trade Agreement. Within five (5) business days of a request for a Compliance Audit, the party from whom information is being sought shall provide proof of such compliance with this New Trade Agreement, including, the Customary Trade Terms set forth herein; provided, however, that Supplier shall not be required to provide any competitive, proprietary, commercially sensitive or confidential information (all of which information may be redacted by Supplier); provided, further, that notwithstanding the foregoing Supplier shall use good faith to produce such information as is reasonably necessary to establish its compliance with this New Trade Agreement (as may be modified by a subsequent purchaser order or other commercial writing signed by the Parties in accordance with the terms of this New Trade Agreement). In the event it is determined that any Party has breached this New Trade Agreement, the other Party shall have all rights and remedies under the New Trade Agreement, the Bankruptcy Code, and applicable law. In the event a Party disputes that the other party has complied with the terms of this New Trade Agreement, such dispute shall be resolved by the Bankruptcy Court.

13. Representations and Acknowledgements. The Parties agree, acknowledge, and represent that:

a. The Parties have reviewed the terms and provisions of the Plan and this New Trade Agreement and (i) consent to be bound by such terms, and (ii) acknowledge that this New Trade Agreement is expressly subject to the Effective Date of the Plan, except as provided above; and

b. In the event of a disagreement between the Parties regarding whether a breach has occurred, either Party may apply to the Court for a determination of their relative rights, in which event, no action may be taken by either Party, including, but not limited to, the discontinuing of shipment of goods from Supplier to the Debtor, until a ruling of the Court is obtained.

14. Confidentiality. Each party agrees to hold in confidence and not disclose to any other person or entity: (i) the specific terms as to a Supplier of this New Trade Agreement; (ii) the terms of payment set forth herein (except those terms that are specifically set forth in the Plan); and (iii) the Customary Trade Terms (collectively, the “**Confidential Information**”); provided that (a) if any person or entity seeks to compel a Party’s disclosure of any or all of the Confidential Information through judicial action or otherwise, or the Party subject to disclosure intends to disclose any or all of the Confidential Information, such party shall immediately provide the other Party with prompt written notice so that the non-disclosing Party may seek an injunction, protective order, or any other available remedy to prevent such disclosure; provided further that if such remedy is not obtained, the Party subject to disclosure shall furnish only such information as such Party is legally required to provide; or (b) this New Trade Agreement may be used by a Party hereunder to enforce the terms of this New Trade Agreement.

15. Miscellaneous.

a. The Parties hereby represent and warrant that: (i) they each have full authority to execute this New Trade Agreement on behalf of the respective Parties; (ii) the respective Parties have full knowledge of, and have consented to, this New Trade Agreement; and (iii) they are fully authorized to bind that Party to all of the terms and conditions of this New Trade Agreement, subject to Court approval in the case of the Debtor.

b. This New Trade Agreement and the Plan set forth the entire understanding of the Parties regarding the subject matter hereof and supersede all prior oral or written agreements between them. This New Trade Agreement may not be changed, modified, amended, or supplemented, except in a writing signed by both Parties. To the extent of any inconsistency between the Plan and this New Trade Agreement, the Plan shall control.

c. Signatures by facsimile or electronic signatures shall count as original signatures for all purposes.



d. This New Trade Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

e. The Parties hereby submit to the exclusive jurisdiction of the Bankruptcy Court to resolve any dispute with respect to or arising from this New Trade Agreement.

[SIGNATURE PAGE FOLLOWS]

AGREED AND ACCEPTED AS OF THE DATE SET FORTH ABOVE:

**GROEB FARMS, INC.**

**[SUPPLIER], for itself, its affiliates and its and subsidiaries**

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By:  
Title:

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By:  
Title: