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SO ORDERED,



A handwritten signature in black ink, reading "Selene D. Maddox".

Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI**

**IN RE: EXPRESS GRAIN TERMINALS, LLC<sup>1</sup>**

**CASE NO.: 21-11832-SDM**

**DEBTOR**

**CHAPTER 11**

**ORDER GRANTING AMENDED REQUEST FOR CERTIFICATION PURSUANT TO  
28 U.S.C. § 158(d)(2)(A) OF A DIRECT APPEAL TO THE COURT OF  
APPEALS FOR THE FIFTH CIRCUIT OF THIS COURT'S FINAL ORDER (I)  
AUTHORIZING USE OF CASH COLLATERAL, (II) AUTHORIZING CONTINUED  
USE OF EXISTING BANK ACCOUNTS AND CASH MANAGEMENT SYSTEM, (III)  
GRANTING ADEQUATE PROTECTION, AND (IV) FOR OTHER RELIEF**

This case came before the Court on the *Amended Request for Certification Pursuant to 28 U.S.C. § 158(d)(2)(A) of a Direct Appeal to the Court of Appeals for the Fifth Circuit of this Court's Final Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, (III) Granting Adequate Protection, and (IV) for Other Relief* (the "Amended Request for Certification") (Dkt. #1948) filed by Bank of Commerce and First South Farm Credit, ACA ("First South") (collectively, the "Production

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<sup>1</sup> The above styled case is being jointly administered with *In re Express Biodiesel, LLC*, Case No. 21-11834-SDM and *In re Express Processing, LLC*, Case No. 21-11835-SDM. For ease of reference, the Court will refer to these Debtors collectively as the "Business Debtors".

Lenders”).<sup>2</sup> UMB Bank, N.A. (“UMB”), StoneX Commodity Solutions, LLC (“StoneX”) and Macquarie Commodities (USA) Inc. (“Macquarie”) (collectively, the “Warehouse Receipt Holders”) filed an *Opposition to Request for Certification of Direct Appeal* (the “Response”) (Dkt. #2126), which was later joined (Dkt. #2128) by the Business Debtors. The Production Lenders also filed a *Reply* (Dkt. #2143).<sup>3</sup>

On January 28, 2022, the Court entered the *Final Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, (III) Granting Adequate Protection, and (IV) for Other Relief* (the “Final Cash Collateral Order”) (Dkt. #1787). Aggrieved by the Court’s decision to allow the continued use of cash collateral, the Production Lenders filed their Notice of Appeal, and later their Statement of Issues on Appeal (Dkt. #2076) and Amended Request for Certification, asserting the following issues:

I. Whether the Bankruptcy Court erred as a matter of law and/or abused its discretion in holding that the Court may allow a chapter 11 debtor to utilize grain in its manufacturing operation under 11 U.S.C. § 363 instead of mandating that the grain be sold to a third party as required by 11 U.S.C. § 557(i)?

II. Is the Bankruptcy Court’s authorization for EGT to use in its continued manufacturing operation the grain it held under the terms of the Final Cash Collateral Order, instead of mandating that the grain be sold to a third party as required by 11 U.S.C. § 557(i), an appropriate form of adequate protection of the Production Lenders’ interests in the grain within the meaning of 11 U.S.C. § 363?

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<sup>2</sup> On February 8, 2022, the Production Lenders filed their Notice of Appeal (Dkt. #1939) and Request for Certification (Dkt. #1941). A day later, on February 9, 2022, the Production Lenders filed an Amended Request for Certification (Dkt. #1948), which is the most recent and relevant pleading for the Court’s consideration as to whether it should certify the direct appeal.

<sup>3</sup> In their Reply, the Production Lenders explained that the Amended Request for Certification needed to be filed to “attach copies of the orders appealed and to correct a typographical error in one of the questions requested for certification”. The Court points this out because the Warehouse Receipt Holders filed their Responses (Dkt. #s 2125 and 2126) and the Business Debtors filed their Joinder (Dkt. #2128) to both the Request for Certification and the Amended Request for Certification. For the sake of procedural clarity, the Court is only considering the Amended Request for Certification (Dkt. #1948) in this Order, but the Court will consider all substantive arguments made for and against certification of a direct appeal to the Fifth Circuit Court of Appeals (the “Fifth Circuit”).

Statement of Issues on Appeal (Dkt. #2076); Amended Request for Certification (Dkt. #1948). In their Amended Request for Certification, the Production Lenders argue that there are no controlling decisions by the Fifth Circuit or the United States Supreme Court that address the sufficiency of adequate protection related to a grain storage facility and its continued use of cash collateral under 11 U.S.C. § 363 in light of the mandate for a grain storage facility to sell bushels of grain under 11 U.S.C. § 557(i). Like their arguments in their Second Amended Request for Certification (Dkt. #1947), which concerns the appeal of the Court’s *Memorandum Opinion and Order Approving Amended Application for Final Employment of CR3 Partners, LLC in Part and Denying Motion for Appointment of a Chapter 11 Trustee* (the “Opinion and Order”) (Dkt. #1767), the Production Lenders assert that the legal outcome involves a matter of public importance. Specifically, this Court’s decision to allow the use of grain being held by the Business Debtors for its manufacturing operation and whether sufficient adequate protection was afforded is of the “utmost importance” in resolving future grain storage facility bankruptcy cases in the state of Mississippi.

The Production Lenders also argue that in the Final Cash Collateral Order, the Court did not sufficiently address or provide legal authority justifying the use of collateral (i.e., grain) and whether the adequate protection was sufficient in light of the sale mandate in 11 U.S.C. § 557(i). According to the Production Lenders, the Court’s decision to delay implementation of 11 U.S.C. § 557(i) and allow the continued use of cash collateral delayed distribution of funds to potential interest holders in the grain and allowed the Business Debtors to spend millions of dollars in continuing its manufacturing operation—all without sufficient adequate protection to the potential interest holders in the grain.

Because the Warehouse Receipt Holders' Response was a "joint response" to both this Amended Request for Certification and the Second Amended Request for Certification, which concerns the appeal of the Court's Opinion and Order, many of their objections are the same: (1) the objections to continued use of cash collateral (grain) in the Business Debtors' manufacturing operation are moot because the collateral authorized to be used has not been spent and the grain is mostly depleted; and (2) the Court conducted a fact intensive determination in its Final Cash Collateral Order, and the issues should pass through the usual levels of review. In the Production Lenders Reply, they argue that the Court's decision to allow continued use of cash collateral is not "moot" simply because the Business Debtors are willing to sell whatever amount of grain is left due to the revocation of their grain warehouse licenses by the State of Mississippi. Further, the Production Lenders argue that because the Court retained jurisdiction and extended time in which the Business Debtors may use cash collateral (even from its Final Cash Collateral Order in a bench ruling given on February 24, 2022), 11 U.S.C. § 363 is still relevant.

Under 28 U.S.C. § 158(d), courts of appeals retain jurisdiction over appeals from all final decisions, judgments, orders, and decrees entered by the district courts or bankruptcy appellate panels under 28 U.S.C. § 158(a) and (b). 28 U.S.C. § 158(d)(1). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") created the direct appeal procedure and confers jurisdiction to the court of appeals over appeals from bankruptcy court judgments, orders or decrees, both final and interlocutory, that would otherwise be within the jurisdiction of the district court under 28 U.S.C. § 158(a). 28 U.S.C. § 158(d)(2)(A). For the Fifth Circuit to retain jurisdiction on direct appeal in this case, two prerequisites must be satisfied: (1) the Production

Lenders must certify that one of the three circumstances in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) is present and (2) the Fifth Circuit must authorize the direct appeal. 28 U.S.C. § 158(d)(2)(A).<sup>4</sup>

As to the first prerequisite, 28 U.S.C. § 158(d)(2)(A) provides the court of appeals shall have jurisdiction of appeals if the appellant(s) certify that:

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A)(i)-(iii). If any one of the circumstances are present, the appropriate court of appeals “shall” have jurisdiction, i.e., the bankruptcy court must make the certification. *In re Franchise Services of North America, Inc.*, 2018 WL 485959, at \*3 (Bankr. S.D. Miss. Jan. 17, 2018), *aff’d*, 891 F.3d 189 (5th Cir. 2018) (citing *In re Adkins*, 517 B.R. 698, 699 (Bankr. N.D. Tex. 2014), and discussing the applicable standard prior to amendments made in 2014 to part VIII of the Federal Rules of Bankruptcy Procedure and predecessor Bankruptcy Rule 8001(f) to now Bankruptcy Rule 8006).

Procedurally, the party requesting certification for direct appeal must make the request no later than 60 days after entry of the order. 28 U.S.C. § 158(d)(2)(E). The request must also be filed in the court where the matter is pending and served as required under Bankruptcy Rule 8003(c)(1). Fed. R. Bank. P. 8006(f)(1)-(2). The request for certification must contain a statement of facts necessary to understand the question(s) presented, the relief sought, the reasons why the appeal

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<sup>4</sup> This Court is only concerned with the first prerequisite, as the Fifth Circuit, in its discretion, may or may not authorize the direct appeal of the Court’s Final Cash Collateral Order.

should be allowed, which circumstance is present in 28 U.S.C. § 158(d)(2)(A)(i)-(iii), and a copy of the order and any related opinion. Fed. R. Bank. P. 8006(f)(2).

To begin, the Court finds that the Production Lenders have satisfied the procedural requirements described above, at least now that the Amended Request for Certification has been filed. Substantively, the Court agrees with the Production Lenders that there are legal issues in its Final Cash Collateral Order that have not been addressed by the Fifth Circuit or the Supreme Court of the United States, and therefore, the Production Lenders have met the requisite legal standard under 28 U.S.C. § 158(d)(2)(A)(i) for the Court to certify the direct appeal. To be clear, there is ample case law and controlling decisions which discuss the sufficiency of adequate protection in relation to the use or continued use of cash collateral generally. The Court, however, found no case law or guidance as to whether the ordered adequate protection in this case (the segregation of substantial proceeds from the sale of byproducts post manufacturing)<sup>5</sup> is sufficient adequate protection when considering the sale mandate under 11 U.S.C. § 557(i).

The Court notes that the first issue as framed by the Production Lenders in this appeal of the Final Cash Collateral Order is just a different way of phrasing the two issues on appeal of the Court's Opinion and Order: the Production Lenders just "threw in" 11 U.S.C. § 363 for color. Nevertheless, the Court finds that the second issue involves a question of law in which there is

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<sup>5</sup> The Court finds it odd that there is no mention of the adequate protection afforded to parties asserting interests in the prepetition grain or the grain proceeds, which is the subject of this appeal. For clarity, the Court ordered the segregation of proceeds from the sale of all byproducts produced from the Business Debtors' manufacturing operation at the varying spot market soybean bushel prices plus an added 30 cent bonus. The Court also ordered the segregation of all proceeds from the sale of any prepetition corn. Further, the Court ultimately ordered the segregation of all additional revenue from the Business Debtors' operations, except a threshold amount in the Business Debtors' operating account. In total, based on testimony this Court has received, there should be around 60 million dollars in at least four segregated accounts that continues to serve as adequate protection to allow the Business Debtors' continued use of cash collateral.

neither a controlling decision (circumstance (i)) nor conflicting decision(s). Further, an immediate appeal to the Fifth Circuit could advance the progress of the case as the Court is continuing to allow the use of cash collateral, which the Court acknowledges is the proceeds from the sale of byproducts produced from the now ceased manufacturing operation (circumstance (iii)).<sup>6</sup>

The Court need not spend any time addressing the arguments raised by the Warehouse Receipt Holders in this Order, because as mentioned above, the Production Lenders have shown that at least one circumstance in 28 U.S.C. § 158(d)(2)(A) is present. Based on the above, the *Amended Request for Certification Pursuant to 28 U.S.C. § 158(d)(2)(A) of a Direct Appeal to the Court of Appeals for the Fifth Circuit of this Court's Final Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, (III) Granting Adequate Protection, and (IV) for Other Relief* (Dkt. #1948) is **GRANTED**.

##END OF ORDER##

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<sup>6</sup> The Court notes, however, that there is a major distinction between previous orders allowing the use of cash collateral, including the Final Cash Collateral Order, and the Court's recent bench ruling extending the time in which the Business Debtors may use cash collateral. Specifically, the Business Debtors' manufacturing operation ceased on or about February 15, 2022. The continued use of cash collateral is not based on the manufacturing operation. Just the opposite: the Court is allowing the Business Debtors to use cash collateral to implement "Scenario 2" of its winddown plan and implement the Court-approved sale of the Business Debtors' assets.