
SO ORDERED,



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.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: EXPRESS GRAIN TERMINALS, LLC¹

CASE NO.: 21-11832-SDM

DEBTOR

CHAPTER 11

**ORDER GRANTING SECOND 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 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**

This cause came before the Court on the *Second 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 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 "Second Amended Request for Certification") (Dkt. #1947) filed by Bank of Commerce and First South Farm Credit, ACA ("First South") (collectively, the "Production

¹ 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”).² 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).³

The Court entered its *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) on January 25, 2022. The Production Lenders disagree with the Court’s findings on the implementation of 11 U.S.C. § 557(i), and therefore, in their Statement of Issues on Appeal (Dkt. #2075) and Second Amended Request for Certification, the Production Lenders assert the following issues:

I. In all cases where the quantity of a specific type of grain held by a debtor operating a grain storage facility exceeds ten thousand bushels, do the provisions of 11 U.S.C. § 557(i) require the trustee to *sell* the grain in the debtor’s possession to a third party and *then* determine the disposition of the *proceeds* in accordance with the expedited procedures of 11 U.S.C. § 557(i)?

II. Whether the Bankruptcy Court erred as a matter of law and/or abused its discretion in holding that the disposition procedure of 11 U.S.C. § 557(i) shall go into effect at any time deemed appropriate by the Court by way of 11

² On February 8, 2022, the Production Lenders filed their Notice of Appeal (Dkt. #1938) and Request for Certification (Dkt. #1940). On the same day, they filed an Amended Request for Certification (Dkt. #1942). A day later, on February 9, 2022, the Production Lenders filed a Second Amended Request for Certification (Dkt. #1947), which is the most recent and relevant pleading for the Court’s consideration as to whether it should certify the direct appeal.

³ In their Reply, the Production Lenders explained that multiple amended requests 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 original request for certification and the amended requests for certification. For the sake of procedural clarity, the Court is only considering the Second Amended Request for Certification (Dkt. #1947) 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”).

U.S.C. § 557(c)(2), so long as such a procedure is completed before the expiration of the 120-day timeframe contemplated by 11 U.S.C. § 557(c)(1), even where the Court has allowed the entirety of the grain to be used by the debtor in its operations such that the decision to sell the grain as contemplated under 11 U.S.C. § 557(i) is rendered meaningless?

Statement of Issues on Appeal (Dkt. #2075); *Second Amended Request for Certification* (Dkt. #1947). In their Second Amended Request for Certification, the Production Lenders argue that there is no controlling authority within the Fifth Circuit that addresses the above issues as they relate to the expedited procedures under 11 U.S.C. § 557, or the Court's discretion to expedite certain procedures (e.g., 11 U.S.C. § 557(i)) under that section of the Bankruptcy Code. The Production Lenders also assert that the expedited procedures related to grain storage facilities are important for federal bankruptcy law, and because those facilities are regulated under state law, state regulators need certainty for enforcement purposes. Last, the Production Lenders cite the Court's own Opinion and Order that the implementation of 11 U.S.C. § 557(i) would adversely affect the economy of the Mississippi Delta region in support of its argument that the issues on appeal are matters of public importance.

The Warehouse Receipt Holders, not surprisingly, take a different approach. They argue that the statement of issues in the Production Lenders' Second Amended Request for Certification are moot because the raw, prepetition grain has mostly been utilized by the Business Debtors in its manufacturing operation. In other words, even if an appellate court were to determine that 11 U.S.C. § 557(i) should have been implemented at an earlier point in the expedited procedures, the potential relief to be afforded, i.e., the forced sale of the grain, would not be possible. The Warehouse Receipt Holders also argue that circumventing the district court is not appropriate due to the fact intensive determination this Court undertook in delaying the implementation of 11 U.S.C. § 557(i). Finally, the Warehouse Receipt Holders aver that allowing the issues to go through

the “usual levels of review” by the district court could further narrow and clarify the issues for the Fifth Circuit.

In their Reply, the Production Lenders argue that this Court does not have jurisdiction to entertain mootness arguments because the appropriate appellate court should consider those arguments in connection with the appeals under Bankruptcy Rule 8013(a)(1). Finally, the Production Lenders assert that this Court does not have discretion under 28 U.S.C. § 158(d)(2) to deny certification if the appealing party meets the established criteria.

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 in this case to retain jurisdiction on direct appeal, 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).⁴

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;

⁴ 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 Opinion and Order.

(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 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 Second Amended Request for Certification has been filed. Substantively, the Court agrees with the Production Lenders that the Opinion and Order involves questions of law concerning the implementation of 11 U.S.C. § 557(i) that have not been addressed by the Fifth Circuit or the Supreme Court of the United States. The Court only wishes that there existed some controlling decision by higher courts in which it could have utilized in

making its decision. Specifically, there is no controlling decision as to (1) whether the Court must first determine the disposition of grain (i.e., ownership of the grain) under 11 U.S.C. § 557 generally before ordering sale of grain under 11 U.S.C. § 557(i)⁵ or (2) whether the Court has discretion as to *when* it may implement 11 U.S.C. § 557(i) by way of 11 U.S.C. § 557(c)(2) if it can be implemented before the expiration of the 120-day timeframe under 11 U.S.C. § 557(c)(1). Further, the Court agrees that the legal determination it made does involve a matter of public importance, but not how the Production Lenders frame their argument. To the contrary, the forced sale of millions of bushels of grain would have resulted in the immediate shutdown of the Business Debtors' operation, thereby resulting in hundreds of lost jobs and diminished bankruptcy estate assets, which directly affect all Creditors of the bankruptcy estate, including the farmers.

As to the Warehouse Receipt Holders' arguments, the Court does not believe that the legal issues surrounding 11 U.S.C. § 557(i) are now moot. The Business Debtors are still storing almost 100,000 bushels of grain, and it is very likely that those bushels of grain will be sold soon, possibly before the expiration deadlines of the 11 U.S.C. § 557 procedures and likely in accordance with

⁵ The Court wants to make clear that, in interpreting § 557(i), its intention was to give effect to the purpose of 11 U.S.C. § 557 as a whole. While the legislative history connected to 11 U.S.C. § 557 is scant—and in some ways nonexistent—the legislative history connected to the enactment of the Omnibus Bankruptcy Improvements Act of 1983 and, specifically, §§ 235, 236, and 237, are instructive: Congress clearly placed ownership and/or producer interests at the heart of 11 U.S.C. § 557. See also, *In re Esbon Grain Co., Inc.*, 55 B.R. 308, 313 (Bankr. D. Kan. 1985) (outlining relevant legislative history of the Omnibus Bankruptcy Improvements Act of 1983). Specifically, 11 U.S.C. § 557 is concerned with distributing grain or grain proceeds to the producers/depositors/owners of the grain before distribution to the debtor's other creditors. Considering the underlying purpose and the fact-intensive nature of this bankruptcy case, the Court utilized its discretion under 11 U.S.C. § 557(c) to delay the sale of grain until such ownership interests and/or producers were identified. And, considering the facts presented here, there may be instances, depending on the outcome, where those producers of the grain may have *no* ownership interests in said grain because of their inability to prove title. Similarly, those same producers may not have a claim superior to those creditors holding additional claims to the same grain.

11 U.S.C. § 557(i).⁶ Regardless of the mootness argument, or any other arguments made by the Warehouse Receipt Holders, the Court finds that the Production Lenders have satisfied the legal standard for direct appeal by showing that that the circumstance enumerated in 28 U.S.C. § 158(d)(2)(A)(i) is present.⁷

Based on the above, the *Second 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 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* (Dkt. #1947) is **GRANTED**.

##END OF ORDER##

⁶ The Court acknowledges, however, that it does not have the information as to whether these bushels of grain are prepetition or postpetition grain.

⁷ The Court does not believe any other circumstance is present under 28 U.S.C. § 158(d)(2)(A). As to the second circumstance, there are no decisions that directly address the legal issues presented, and so it is only logical there would not be conflicting decisions by higher courts over the legal issues. As to the third circumstance, the Court does not agree that an immediate appeal of these issues would “materially advance” the progress of the bankruptcy case. While 11 U.S.C. § 557(i) may still be implemented and “in play”, the amount of bushels of grain still being stored is minimal compared to the amounts being stored at the beginning of the bankruptcy case. Further, even though the Court extended the 120-day procedure deadline under 11 U.S.C. § 557 in its most recent *Order Extending the Period for Final Disposition of Grain or the Proceeds of Grain Under § 557(f), Rescheduling the Final Determination Hearing on Common Legal Issues, and Outlining Procedures* (Dkt. #2206), the Court believes that it is near the end of the expedited procedures. All discovery is complete and the briefing deadlines for legal issues will soon expire. At this point, the Court need only conduct the trial now scheduled to begin on March 31, 2022, and give its ruling on the legal issues, which will in turn determine the interest in the prepetition grain and grain proceeds and specific distributions thereof.