

UNITED STATES BANKRUPTCY COURT

Northern District of Mississippi

In re Express Grain Terminals, LLC*
Debtor

(Complete if issued in an adversary proceeding)

Case No. 21-11832-SDM

Chapter 11

Plaintiff

v.

Adv. Proc. No. _____

Defendant

*Jointly Administered with Express Biodiesel, LLC, Case No. 21-11834-SDM
and Express Processing, LLC, Case No. 21-11835-SDM.

SUBPOENA TO TESTIFY AT A DEPOSITION
IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: John Coleman, 1107 Robert E. Lee Dr., Greenwood, MS 38930

(Name of person to whom the subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this bankruptcy case (or adversary proceeding). If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

PLACE The Hampton Inn, 1815 Hwy. 82 W., Greenwood, MS 38930

DATE AND TIME
Tues., Feb. 15, 2022 at 9:00 a.m.

The deposition will be recorded by this method:

by virtual means and may be videotaped

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

SEE ATTACHMENT - including the order (also attached) which modifies the deadlines below

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 2/4/22

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Kristina M. Johnson
Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party)
Bank of Commerce and First South Farm Credit, AC, who issues or requests this subpoena, are:

Kristina M. Johnson, Esq., Jones Walker LLP, 190 E. Capitol St., Ste. 800, Jackson, MS 39201 (601) 949-4785

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any): John Coleman
 on (date) 2/5/2022

☐ I served the subpoena by delivering a copy to the named person as follows: _____
 _____ on (date) _____; or

☒ I returned the subpoena unexecuted because: Def. is out of town/state

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true and correct.

Date: 2/7/2022

Craig Wells
 Server's signature
Craig Wells / Process Server
 Printed name and title
P.O. Box 4404 Brandon, MS
 Server's address
39047

Additional information concerning attempted service, etc.:

2/6 (Sunday) 1250 no answer (Toyota 4-Runner, garage doors open
 (movement in house as I pulled in) ring video door bell)
 2:00pm no answer (vehicle gone, garage doors closed)
 3:20pm no answer (same ↑)
 2/7 - 1235 no answer Michael
 (Note: when seeing ~~Thomas~~ Coleman, he stated his son
 (Michael Coleman) was out of town/state attempted to
 locate a buyer)

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

...

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

ATTACHMENT TO SUBPOENA

Because the Court has ordered all depositions to be conducted virtually, copies of documents you plan to produce are required to be provided in advance of your deposition so they may be reviewed and uploaded to the court reporter the day before the your scheduled deposition. **This subpoena demands that you produce copies of all documents requested below no later than 48 hours before the deposition date and time on the face of this subpoena *by email if possible* to Kristina M. Johnson, Esq. at email address kjohnson@joneswalker.com; otherwise documents may be produced by express mail to Kristina Johnson, Esq. sent in time to be received no later than 48 hours before the deposition date and time at the following street address:**

**Kristina M. Johnson, Esq.
Jones Walker LLP
190 E. Capitol St., Ste. 800
Jackson, MS 39201**

Please bring your set of the documents produced according to the instructions above to your deposition with you in the event documents you sent by email or express mail are not delivered for reasons beyond your control.

Documents Requested To Be Produced

All documents (including emails, text messages and/or other documents relating to Express Grain Terminals, LLC, Express Biodiesel, LLC, and Express Processing, LLC (collectively, "Business Debtors") in your possession and/or control from January 1, 2016 through the date of your scheduled deposition which relate to the operations of the Business Debtors as to:

- 1) delivery, storage, use, and/or sale of grain;
- 2) claims of creditors and/or others to the grain in the possession or control of the Business Debtors; and
- 3) all communications regarding the above matters with any person.

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
JOINTLY ADMINISTERED

AMENDED SECTION 557 PROCEDURES - PHASE 2 SCHEDULING ORDER

This cause came before the Court for hearing pursuant to the Court's *Order Granting Motion Establishing Procedures Under 11 U.S.C. § 557 for Determination of Rights, Ownership Interests, Liens, Security Interest and All Other Interests in and to Grain and Proceeds of Grain* (the "§ 557 Order")(Dkt. #1070)² and the *Notice of Filing of 557 Report and Grain Report* ("557 Report")(Dkt. #1156) filed by the Debtor. The § 557 Order, entered by the Court on November 8, 2021, establishes and outlines the procedures intended to facilitate the expedited determination

¹ The chapter 11 cases of the following Debtors have been administratively consolidated for joint administration pursuant to entry of the *Order Granting Motion for Joint Administration* (Dkt. #1158) dated November 18, 2021: *Express Grain Terminal, LLC*, Case No. *Express Biodiesel, LLC*, Case No. 21-11832-SDM ("EGT"); 21-11834-SDM ("EB"), and *Express Processing, LLC*, Case No. 21-11835-SDM ("EP"). EGT, EB, and EP are referred to collectively as the "**Business Debtors**." Docket references are to the EGT case unless otherwise noted herein.

² Unless otherwise stated, defined terms in this Order shall bear the meanings ascribed to them in the § 557 Order.

of interests in or disposition of grain and grain assets. Since the date of entry of the § 557 Order, this case has moved rapidly. Many of the procedures outlined in the Order, while having been completed, have posed challenges to all parties involved—including the Court. One of the challenges the Court has been tasked to resolve is how to conduct the discovery necessary for resolution of certain legal issues (“Common Legal Issues”) within the timeframe prescribed in 11 U.S.C. § 557(c)(1).³

The § 557 Order contemplates two phases of procedures. Phase 1 concerned the identification and briefing the Common Legal Issues regarding the priority of any interests asserted. Pursuant to the § 557 Order, all parties were invited to participate in briefing the Common Legal Issues, with the Court to decide on some or all of the Common Legal Issues at a Preliminary Determination Hearing. The briefing of these issues commenced on December 17, 2021, and the Court held the Preliminary Determination Hearing on January 18, 2022. At this hearing the extent of these complicated issues became clear: all issues identified would need further fact development for the Court to issue proper decisions on each. Because of this, the Court entered an *Order Outlining Ruling and Setting the Second Phase Scheduling Conference* (Dkt. #1709) on January 20, 2022. This Order set the Second Phase Scheduling Conference on January 24, 2022 and invited the parties to submit written suggestions to assist the Court in determining the discovery time schedule for Phase 2.

Two parties submitted written suggestions to the Court prior to the January 24, 2022 Second Phase Scheduling Conference: Bank of Commerce, First South Production Credit, ACA (“Bank of Commerce”)(Dkt. #1719) and Macquarie Commodities (USA) Inc.

³ Unless indicated otherwise, all statutory references will be to Title 11 of the United States Code.

(“Macquarie”)(Dkt. #1738). The Court heard argument by all parties concerning the suggestions made but, upon request by all parties to have additional time to submit more detailed, thoughtful suggestions concerning discovery, the Court continued the Second Phase Scheduling Conference to January 26, 2022. Prior to this date, both Bank of Commerce and Macquarie submitted proposed Phase 2 scheduling orders for the Court to consider after conferring and receiving comments and suggestions from other interested parties. The latest submissions to the Court, although a collaborative effort, will be referred to as “Bank of Commerce” and “Macquarie” proposals. Further argument and comment were presented by all parties on January 26, 2022. For the sake of simplicity, the following suggestions, arguments, and comments from both January 24 and January 26, 2022 are as follows:

Bank of Commerce

Discovery Suggestions. As previously mentioned, Bank of Commerce was one of two parties to submit suggestions for discovery to the Court. These suggestions concerned document production, depositions, and discovery disputes. First, regarding documents, Bank of Commerce suggested that any documents produced should be uploaded to the Interest Data Room to expedite access to all documents by all parties participating in the § 557 procedures (“Participating Parties”). Access to the Interest Data Room will also allow any Participating Parties to upload copies of any documents not already attached to their filed Interest Notices they seek to introduce into evidence in support of their Interest Notices. Bank of Commerce proposed that the production of any other documents should be by means of written document request served in conjunction with depositions. Next, Bank of Commerce suggested that all depositions of members of the farming groups—the Farm Group and Farm Groups I, II, and III—should be exclusively by means of written questions pursuant to Federal Rules of Bankruptcy Procedure 7031 (incorporating

Federal Rule of Civil Procedure 31). Alternatively, Participating Parties could serve interrogatories on members of the Farm Group and Farm Groups I, II, and III pursuant to Federal Rule of Bankruptcy Procedures 7033 (incorporating Federal Rule of Civil Procedure 33). Bank of Commerce suggested that all other depositions, however, be taken in a live format, with documents subject to request or subpoena uploaded to the Interest Data Room prior to the deposition and parties with similar interests working together on document production to limit duplication. In the event that live depositions cannot be taken, however, Bank of Commerce suggested that, by agreement of the deponent and the Participating Party, depositions may be conducted virtually. Finally, Bank of Commerce suggested that Farm Group and Farm Groups I-III as a group should serve only a single notice of deposition on a Participating Party and only one attorney should be able to question the affected deponent to avoid duplication.

Argument and Comment. Bank of Commerce began its presentation by addressing the rationale for its suggested limitation of discovery, specifically the limitation of depositions by written questions under Fed. R. Bankr. P. 7031 and Fed. R. Civ. P. 31. As the Court also recognizes, physically deposing all farmers in interest will be a very difficult task: while there are 100 to 200 farmers that are ascertainable, it is possible that the number of farmers with interests in this case exceed those that are actually known. Bank of Commerce argues that there is no need for in-person depositions, as the farmers will all have the same or substantially similar sets of questions. Additionally, the highly emotional and stressful toll that the farmers have taken on over the course of this case supports the notion that depositions should be in written format, as Bank of Commerce argues that depositions by written questions is the most economic and least intrusive method of questioning the farmers.

Several of Macquarie's suggested procedures were addressed by Bank of Commerce. Bank of Commerce first discussed the overall timeline and specifically addressed the timeline that was suggested by Macquarie. Bank of Commerce pointed out that § 557(c)(1) mandates that this process is "not to exceed 120 days," but that Macquarie's suggested timeline does just that by extending the process by 6 to 8 weeks.⁴ Though the timeline for implementation of the § 557 procedures can be extended under § 557(f),⁵ Bank of Commerce points out that the burden for doing so is very high. Bank of Commerce argued that "material injury" has already occurred in this case—the farmers are already in the 2022 crop year and to ask the farmers and Production Lenders to wait more time to determine whether or not they will receive any payment is highly prejudicial. Alternatively, Bank of Commerce argued for a level of certainty in the discovery timeline that does not exceed the 120-day deadline contemplated by § 557(c)(1).

Bank of Commerce went on to address Macquarie's suggested discovery groupings, which is addressed in more detail below. While Bank of Commerce understands the intention behind the groupings, Bank of Commerce pointed out that counsel for some Production Lenders is not the same for others, and that in some instances Production Lenders are unrepresented or uninterested completely. Essentially, requiring anyone that is similarly situated to be grouped ignores that counsel for all parties is not the same, which raises ethical and malpractice concerns. While cooperation is important to facilitate the discovery process in this case, Macquarie argued that formal groupings is inappropriate here.

⁴ The current deadline for completion of the 120-day process is March 8, 2022.

⁵ The court may extend the period for final disposition of grain or the proceeds of grain under this section beyond 120 days if the court finds that (1) the interests of justice so require in light of the complexity of the case; and (2) the interests of those claimants entitled to distribution of grain or the proceeds of grain will not be materially injured by such additional delay. 11 U.S.C. § 557(f).

Finally, Bank of Commerce addressed the issue of Excluded Claims.⁶ While Macquarie suggested and argued for the removal of certain issues raised in Phase 1 of the § 557 procedures (as discussed more thoroughly below), Bank of Commerce argued that the scope of the § 557 procedures and the upcoming Final Determination Hearing is to determine the validity and extend of the interests in grain as contemplated by 11 U.S.C. § 557 as well as the § 557 Order. These include issues of constructive trusts, equitable subordination, and marshalling, just to name a few. Bank of Commerce argued that in order for the Court to answer the question of the determination of interests in grain and grain proceeds, all of these questions will have to be answered in connection with the § 557 process and not eliminated nor moved to an adversary proceeding.

Macquarie

Discovery Suggestions. The second party to present discovery suggestions to the Court was Macquarie. First, with respect to the production of documents, Macquarie suggested that production of documents be voluntary: each entity or person holding an interest (Interest Holder) should file a supplemental Interest Notice by February 7, 2022 of all documents that the Interest Holder intends to rely upon at the Final Determination Hearing in order to establish each party's claim. As previously mentioned, Macquarie also suggested discovery groupings to jointly coordinate their discovery requests. These groupings would be (i) the Farmers, (ii) the Production Lenders, and (iii) the Warehouse Receipt Holders. Each of these three groups, Macquarie suggested, shall serve only one set of discovery requests upon any other Interest Holder in the case.

⁶ See page 7, paragraph (k), of the Notice of Procedures attached to the § 557 Order. Such provision states that the interest procedures “[] will not apply to the determination of any claims, causes of action, cross claims, or counterclaims sounding in tort, contract, or statute that are not directly related to the determination of interests in the Pre-Petition Grain and the Proceeds pursuant to 11 U.S.C. § 557[.]”

Macquarie also addressed depositions and, unsurprisingly, takes a different approach than the one presented by Bank of Commerce. Macquarie first separated depositions into two groups: farmers and non-farmers. Macquarie suggested and argued that, in light of the amount of legal issues presented and the factual allegations associated with each, actual depositions of the farmers should be taken by each party. However, because of the volume of farmers in this case, Macquarie suggested a two-step process concerning “farmer discovery.” First, initial discovery from the farmers should be conducted by interrogatories, requests for production and requests for admissions consolidated into a sworn questionnaire (“Questionnaire”) to be approved by the Court after review and comment from all Participating Parties. Following the completion and submission of the Questionnaires by the farmers, further depositions of the farmers may be taken by any Participating Party, whether those depositions be live or virtual in nature.

Non-farmers, however, will not be subject to a similar Questionnaire. Rather, Macquarie suggested that, in conjunction with the voluntary production of documents, discovery requests to any non-farmer Interest Holder should be served and uploaded to the Interest Data Room. Like the farmers, depositions of Interest Holders should be in a live format, but may be taken virtually if necessary with the protections provided by the applicable rules, including Fed. R. Civ. P. 30(b)(4). Additionally, corporate deponents should designate a corporate representative within the meaning of Fed. R. Civ. P. 30(b)(6) as incorporated by Fed. R. Bank. P. 7030 to testify as to who is most familiar with the subject matter(s) identified in the applicable deposition notice. Macquarie made further suggestions regarding depositions and discovery, including establishing a time limitation of eight (8) hours for depositions, the designation of one lawyer to lead questioning of deponents, and the designation of expert witnesses.

Argument and Comment. Like Bank of Commerce, Macquarie began its presentation on January 24 and 26 by outlining its suggestions and the rationale behind each. First, with respect to the voluntary production of documents, Macquarie stated that the original and ongoing goal of the § 557 Order was to try and get a baseline of every Participating Party's transaction documents that they intend to rely upon. As there will likely be supplemental requests for discovery, Macquarie explained that the suggested groupings is intended to cut down on the number of discovery requests and allow for the groupings of Interest Holders to coordinate their discovery. Macquarie argued that the vision for this is to allow each group to have one set of requests for each Interest Holder to cut down on duplication and repetition. Regarding depositions, Macquarie continued to maintain that all depositions should take place in a live format, whether that format be in-person or virtual. This suggestion was born out of the concern Macquarie had regarding follow-up and cross examination questions as well as the concern that, with the volume of farmers in this case, there will very likely be farmers that have different factual circumstances than others.

Macquarie went on to address the issue of Excluded Claims. While there have been several issues raised in the § 557 procedures, Macquarie argued that several of the issues raised are state law causes of action and that the parties who have raised these issues simply do not have standing to assert them. However, Macquarie acknowledged that, if the Court does determine to include the claims raised by the Participating Parties in Phase 1 of the § 557 procedures, some sort of process must be established so that the parties being accused may have a fair opportunity to understand any allegations and adequately respond to them.

Finally, Macquarie advocated for the extension of the § 557 procedures past the 120-day deadline under § 557(f) in light of the sheer number of interests and legal issues involved in this case. Macquarie acknowledged that, while no party is interested in waiting any longer than it must

for payment, there would be no further material injury in extending the timeframe as all parties are fighting over “shares of cash.” In other words, Macquarie argued that any kind of concern about grain “going bad” or being lost is mitigated by the fact that the grain is being preserved under the Orders concerning cash collateral and that the grain is essentially being converted to cash. Though waiting to receive payment works different hardships on different parties depending on their financial situations, all parties are ultimately fighting over money. Additionally, Macquarie points out that there may be issues raised that are more appropriate for an adversary proceeding and that, if certain issues are not determined as a part of the § 557 process, there will likely be lawsuits after the conclusion of the § 557 process that will take significant time to resolve. In other words, no party may be paid for an extended period of time regardless of whether the § 557 procedures are extended or not.

Other Interested Parties

As the final proposals were a collaborative effort by several interested parties, all other parties presented argument and comment for and against the suggested procedures. These arguments and comments from both the January 24 and January 26, 2022 hearings are as follows:

EGT. While EGT has remained a neutral party in the discussion regarding discovery, several points made at the hearings on January 24 and 26 are relevant to consider here. First, EGT commented that, if every party was able to go through full-fledged discovery, there would not be a way to hold the Final Determination Hearing on or before March 8, 2022. By way of example, counsel for EGT explained that one of the identified Common Legal Issues—whether a bailment relationship existed between the farmers and EGT—would require proof of EGT’s ordinary course of business. This, EGT argued, would involve finding copies of contracts going back several years to the extent that EGT still has access to copies of contracts. Additionally, if an

executive or a merchandizer of EGT had to be deposed along with the farmers, the process would take an extreme amount of time. The deposition process would similarly be cumbersome for those non-party witnesses or witnesses that are no longer employed at EGT. EGT also had significant comments to make regarding the timeframe of the case, namely that it is difficult to reconcile the concept of moving quickly in the discovery process with the fact that, no matter what happens, it is very likely that a party will appeal. While not directly taking one side or another on the issue of extension under § 557(f), EGT points out that it is possible that, in the midst of these discovery procedures, a party will ask the Court at a later date for additional time for discovery. Finally, EGT gave the Court confirmation that EGT can give Interest Data Room access to all Interest Holders by providing them the email username and password but cautioned that confidentiality and security issues are a concern with the volume of participants having access to the Interest Data Room.

UMB. UMB joined in the suggestions made by Macquarie and presented their own comments and arguments in support of Macquarie's suggested discovery procedures. UMB argued that the discovery timeframe and procedures being proposed by Bank of Commerce is not feasible considering the amount of legal issues before the Court. Any one of the legal issues being addressed would, under normal circumstances, be entitled to four to twelve months of discovery; here, there are six to eight major issues that must undergo discovery before they can be resolved. UMB thus similarly argued that the § 557 procedures should be extended past the 120-day timeline. UMB points out that the number of players in this case, both lawyers and Participating Parties alike, renders the shortened timeline a logistical nightmare. Further, UMB argues that some of the Common Legal Issues asserted will require Participating Parties to retrieve emails, text messages, written documents (i.e., contracts, written notes, etc.)—all of which must be

accumulated as well as reasonably reviewed prior to any deposition being taken. Regardless of an extension, however, UMB argued that it (as well as Macquarie and StoneX) should have the opportunity to discover and depose the parties that have the information they need to address these legal issues and that, in order to do so, live depositions should be taken as opposed to depositions by written questions. Further supporting this argument is UMB's contention that the farmers in this case are not similarly situated, as some farmers (i) have signed, executed contracts, (ii) have multiple contracts spanning years that may be signed or unsigned, or (iii) don't have written contracts at all.

StoneX Commodity Solutions. StoneX Commodity Solutions ("Stone X"), like UMB, similarly joins in with Macquarie; however, StoneX prefaced its argument and comments with its own concern for extending the 120-day timeline under § 557(f). While StoneX indicated that it was originally not in agreement with such an extension, it maintained that, if an extension is to be granted, it should be granted only once in order to keep the proceedings on a tight timeframe. StoneX additionally brought up due process concerns. Specifically, StoneX maintained that, regardless of what process is decided upon, each party should have an equal opportunity to engage in discovery and ask the fact-building questions necessary to respond to any allegations contained in the Common Legal Issues. Without this, StoneX argued, it is highly prejudicial and violative of due process for only one party to take depositions on pivotal issues in the process and disallowing the same for another.

The Farm Group. The Farm Group joined in and supported the proposed discovery procedures and timeframe proposed by Bank of Commerce. Farm Group argued against an extension under § 557(f), asserting that the farmers will continue to be harmed if the deadlines are extended as they have crop lenders waiting to be paid for the farmers' grain that EGT has

continued to use to support its own business operations. Thus, Farm Group argued, it is imperative to stay within the deadlines set forth in Bank of Commerce's proposals.

Farm Group I. Farm Group I also supported Bank of Commerce's proposals. Farm Group I maintained that every party is entitled to discovery and that, while Bank of Commerce's proposed deadlines are shorter, the shortened timeframe is exactly what is contemplated by § 557. Farm Group I indicated that, while the task will be difficult, it is more than willing to work within the parameters of § 557 and material harm will result if the parameters are extended by the Court.

Farm Groups II and III. Farm Groups II and III joined in and adopted the positions of Farm Group, Farm Group I, and Bank of Commerce. Farm Groups II and III went on to comment that, while it is true that discovery on the Common Legal Issues and/or the Excluded Claims will be voluminous and difficult, no party can argue that these issues were not before them in November 2021 when the § 557 Order was entered. Farm Groups II and III went on to point out that the § 557 Order was entered without objection and that, at this point, it seems that all parties have waived any sort of objection and argument that the process cannot be completed in the period of time outlined by § 557. Therefore, the discovery timeline suggested by Bank of Commerce is supported by Farm Groups II and III.

Discovery Procedures and Timelines

Having considered the submitted suggestions by Bank of Commerce and Macquarie, all argument and comments made by all Participating Parties, and this Court's authority to shorten discovery and other procedural deadlines under § 557(c)(3), (d) and Fed. R. Bankr. P. 9014(c) and 9016 and the positions of the parties expressed at the Second Phase Scheduling Conference, and having considered the number of interested parties, the complexity of the issues, and the 120-day time constraints imposed by § 557(c)(1), the Court finds that the following deadlines are

appropriate in the premises and shall govern Phase 2 of the *Order Granting Motion Establishing Procedures Under 11 U.S.C. § 557 for Determination of Rights, Ownership Interests, Liens, Security Interests and All Other Interests in and to Grain and Proceeds of Grain* (Dkt. #1070):

A. Extension Under § 557(f).

The Court finds that, at this time, discovery deadlines are not a basis for extension of the 120-day timetable under § 557(f). The Court similarly declines to make a ruling at this time on whether any claimants in this case have suffered “material harm” as that phrase is used in § 557(f)(2).

B. Participating Parties.

1. Participating Parties are defined in the § 557 Order and include the following: UMB Bank N.A. (“**UMB**”); Macquarie Commodities (USA) Inc. (“**Macquarie**”); StoneX Commodity Solutions LLC f/k/a FCStone Merchant Services, LLC (“**StoneX**”) (together, “**Warehouse Receipt Holders**”); Farm Group and Farm Groups I, II, and III (together, the “**Farming Groups**”) and any other farmers proceeding *pro se* who wish to participate in Phase 2 (the “**Farmers**”); Agrifund, LLC, Bank of Commerce, First South Production Credit, ACA, SouthernAg Credit, Staple Cotton Discount Corp., Planters Bank & Trust Co., Guaranty Bank & Trust Co., Holmes County Bank, and Bank Plus (together, the “**Production Lenders**”); and the Debtor, EGT.⁷

2. The Court declines to adopt the grouping recommendations by Macquarie. Any groupings designated by the Court in this case have not been substantive groupings; rather, they

⁷ While EGT is a Participating Party for the purposes of Phase 2, the Court anticipates the Debtor’s participation to be less active than other Participating Parties. In other words, rather than propound discovery, the Court expects EGT to make available, give access to, and provide any and all documents and/or potential witnesses as they are requested by any other Participating Party and submit to any deposition questions as they are presented by other Participating Parties.

have been for the purpose of simplicity in all written product and Court proceedings. All Participating Parties are expected to utilize their best and most proper litigation judgment concerning the coordination of discovery requests.

C. Written Discovery and Production of Documents.

1. Any documents produced shall be uploaded to the Interest Data Room to expedite access by all Participating Parties. This data upload shall suffice as service and/or production of documents otherwise required by mail or other method of production under the rules of discovery. Counsel for the Business Debtors will arrange within three (3) days from entry of this Order or no later than **11:00 a.m. on February 1, 2022**, a process that will enable Participating Parties (both those represented by legal counsel and those unrepresented by legal counsel) to upload documents to the Interest Data Room and file a certificate of service/notice of compliance that the notice of directions for uploading documents by a Participating Party to the Interest Data Room was served on all necessary parties.⁸ Service on all represented parties shall be made by email to the respective party's legal representative. Service on all unrepresented parties shall be made by U.S. Mail. Upon completing a data upload to the Interest Data Room, Participating Parties shall file a Notice of Data Upload with the Court, including a general description of the content uploaded, the date uploaded and a reference to the Interest Notice(s) to which the data upload relates (if applicable).

2. On or before **February 4, 2022**, each Participating Party shall upload to the Interest Data Room copies of all Interest Notices (including all attachments) filed by that respective party with the Court in each of the Business Debtors' cases and all Background Documentation required

⁸ The Participating and Non-Participating Parties that may have access to the Interest Data Room shall not disclose the access information to any party not contemplated under this Order. The Court recognizes that documents uploaded to the Interest Date Room may contain sensitive information, and the Court is, therefore, prohibiting the sharing of the access information.

to have been uploaded to the Interest Data Room but which may not have been uploaded by the Data Room Deadline as required by this Court's § 557 Order. On or before **February 4, 2022**, all Participating Parties shall upload any documents (not already attached to their filed Interest Notices) that they may seek to introduce into evidence as *prima facie* support of their Interest Notices at the Final Determination Hearing. To the extent that the Debtor has not been in compliance with the requirements of the § 557 Order regarding uploading documentation to the Interest Data Room, the Debtor shall fully comply and upload all required documentation outlined in the § 557 Order on or before **February 4, 2022**. Any Participating Party who seeks to amend their Interest Notice previously filed must file an amended Interest Notice no later than **February 4, 2022** ("Amendment Deadline"), attaching all supporting documentation as required by the § 557 Order. Parties shall have a continuing duty of disclosure and duty to supplement their supporting documentation with accompanying explanatory reference to applicable Interest Notices up to and including the Discovery Deadline set forth herein. Subject to the Federal Rules of Evidence and this Court's determination as to admissibility, Participating Parties are free to introduce into evidence any document produced by any Participating Party in discovery or attached to any filed Interest Notices at the Final Determination Hearing. Documents not either attached to an Interest Notice or produced by any Participating Party in discovery may not be introduced into evidence at the Final Determination Hearing except as allowed under the applicable rules of evidence and procedure or as otherwise ordered by this Court. This paragraph is intended to modify the Mandatory Production paragraph in the § 557 Order, at p.16, ¶ j. To the extent any other deadlines in the § 557 Order may conflict with the deadlines herein, this Order shall control.

3. If no deposition of the requested Participating Party is noticed, documents requested through all other written discovery means shall be produced by upload to the Interest

Data Room by the Participating Party within the timeframe set forth in this Order. Any document withheld shall be referenced in a privilege log as provided by Fed. R. Civ. P. 26(b)(5) as incorporated by Fed. R. Bankr. P. 7026 uploaded to the Interest Data Room at the time of production. Production of any other documents should be by means of written document requests served in conjunction with depositions (discussed below) and restricted by the stated response times as allowed under Section 557(c)(3), (d) and Fed. R. Bankr. P. 9014(c) and 9016.

4. Written discovery responses shall be due within 10 days from the date of service of any propounded written discovery. This shortened 10-day deadline also applies to any motions to quash a subpoena, which might be filed by Participating or Non-Participating Parties under Bankruptcy Rule 9016.

5. Regarding a preliminary witness list, this Order controls and modifies the § 557 Order (Dkt. #1070), in that the Participating Parties shall have until February 4, 2022 to produce via the Interest Date Room a preliminary witness list, which lists witnesses the Participating Parties intend to call and the testimony expected to be given by each. This witness list is “non-binding” and shall not limit a party’s ability to call other witnesses that may become necessary as discovery progresses.

D. Farmer Discovery

1. Because of the number of Farmers and Farming Groups who have asserted interests in the grain, initial discovery from the Farmers and Farming Groups shall be conducted by interrogatories, requests for production and requests for admissions consolidated into a simple sworn questionnaire (the “Questionnaire”) to be approved as to form by the Court after review and comment from counsel for the Warehouse Receipt Holders, the Farming Groups, the Production Lenders, and the United States Trustee. The parties shall submit either an agreed form

of the Questionnaire or, following good faith negotiations, separate proposed forms of the Questionnaire to the Court for approval by **5:00 p.m. CST on February 1, 2022**. In the event that the parties cannot reach agreement on substantial portions of the Questionnaire form, the Participating Parties shall promptly contact Chambers in order for the Court to determine if an emergency hearing is necessary to address the status of the Questionnaire. The Court shall then enter an order determining the approved form of the Questionnaire no later than February 3, 2022. Within one (1) business day after the entry of the order approving the form of the Questionnaire, counsel for the Warehouse Receipt Holders shall coordinate to serve a copy of this Order, the order approving the Questionnaire, a copy of the approved Questionnaire to all Farmers and Farming Groups who have filed Interest Notices in the case or who are listed in the Debtor's 557 Report (Dkt. #1156-1). Counsel for the Warehouse Receipt Holders shall file a certificate of service evidencing proper service of the foregoing documents.

2. The Farmers and Farming Groups shall submit their completed Questionnaires to the Interest Data Room by **February 15, 2022**. To the extent that Farmers and Farming Groups do not have access to the Interest Data Room, the Warehouse Receipt Holders shall designate on the Questionnaire which party is responsible for receipt of the Questionnaire from any Farmer or Farming Group unable to upload to the Interest Data Room and provide a physical address to which the Questionnaires may be mailed. Mailed Questionnaires should be placed in the mail so as to be post-marked no later than **February 15, 2022** and sent to counsel for the Warehouse Receipt Holders so that the Questionnaires are received by **February 18, 2022**. Counsel for the Warehouse Receipt Holders shall upload copies of all completed Questionnaires, not already uploaded by or on behalf of an answering Farmer or Farming Group, to the Interest Data Room promptly upon receipt. Any Farmer or Farming Group who fails to submit a completed Questionnaire by the

deadline set forth in this Order may be prohibited from participating in the Final Determination Hearing.

3. In the event of absolute necessity, all Participating Parties will be given the opportunity to seek Court approval for the deposition of a Farmer or Farming Group. If a Participating Party wishes to depose any Farmer or Farming Group, that party should first consult with the legal representative of that Farmer or Farming Group, or directly with the Farmer or Farming Group if they are unrepresented. If no agreement can be reached on conducting the deposition or the date and time of such a deposition, the Participating Party requesting the deposition shall file a motion with the Court containing the justification for why the Farmer or Farming Group should be deposed and the proposed date and time for the deposition. A motion to expedite must accompany the underlying motion for the Court to consider the underlying motion on an expedited basis.

E. Non-Farmer Discovery

1. Subject to other arrangements that may be agreed to by the Participating Parties, and subject to deponent availability, depositions shall be conducted according to the following schedule:

- a. February 14-15: The Business Debtors and any other witness not specifically named, including principals of the Business Debtors who have not been identified as a corporate representative under Fed. R. Civ. P. 30(b)(6) as incorporated by Fed. R. Bankr. P. 7030.
- b. February 17: StoneX.
- c. February 18: Macquarie.
- d. February 21-22: Production Lenders.

e. February 23-24: UMB.

f. The Participating Parties may have the opportunity to utilize any other days for depositions upon **mutual agreement** as provided in Paragraph 4 below.

4. Depositions shall be conducted virtually with the protections provided by applicable rules including Fed. R. Civ. P. 30(b)(4). Corporate deponents shall designate a corporate representative within the meaning of Fed. R. Civ. P. 30(b)(6) as incorporated by Fed. R. Bankr. P. 7030 to testify who is most familiar with the subject matter(s) identified in the applicable deposition notice and who will be, except for good cause shown, the corporate representative who will testify at the Final Determination Hearing. Depositions may be conducted after hours and/or on weekends as the Participating Parties and/or applicable non-party witnesses may mutually agree.

5. The Farming Group shall serve only a single notice of deposition on a Participating Party and only one Farming Group attorney or Farmer attorney may question the affected deponent to avoid unnecessary duplication. To the extent feasible, Production Lenders and EGT Creditors (to include, but is not limited to, the Warehouse Receipt Holders, Farming Groups, and Farmers) shall coordinate in serving notices of deposition and/or document requests directed at the same Participating Parties and non-party witnesses to avoid unnecessary duplication. While only one Farming Group or Farmer attorney may question the deponent, any unrepresented farmer or Participating Parties' legal representative may appear and orderly submit questions to the questioning attorney to ask the deponent. The attempt of this provision is to coordinate the questions and conduct the deposition in the most expedient manner and alleviate unnecessary duplication while allowing the parties a thorough and complete opportunity to depose the deponent.

6. Participating Parties shall file any designations of expert witness(es) expected to be called at the Final Determination Hearing no later than twenty (20) calendar days before the Final Determination Hearing, together with the applicable curriculum vitae. Expert reports must be uploaded to the Interest Data Room no later than ten (10) calendar days prior to the expert witness deposition.

F. Cooperation.

4. The Court expects the Participating Parties to act in good faith in settling discovery and scheduling disputes.

5. To the extent any disputes cannot be resolved, the affected Participating Parties shall contact Chambers by email, copying counsel for all Participating Parties, for an expedited telephonic hearing, without the necessity of formal motion.

6. All discovery shall be concluded under these procedures no later than the end of the day on **February 25, 2022**. (“**557 Discovery Deadline**”).

7. No later than five (5) calendar days before the Final Determination Hearing, the Participating Parties will file a proposed Joint Pretrial Order (“**PTO Deadline**”) that identifies the following:⁹

- a. Stipulated facts and exhibits.
- b. Proposed witnesses for each Participating Party designating each witness as either a “shall call” or “may call” (except as to rebuttal witnesses) to the extent that the Participating party, if calling a non-adverse witness, can guarantee their presence. Any adverse or hostile witness must be properly subpoenaed.

⁹ The Court is aware that five calendar days before the Final Determination Hearing is a day of the weekend (Sunday, February 27, 2022).

c. Proposed exhibits not the subject of stipulation (except as to rebuttal).

G. Final Determination Hearing.

8. The Final Determination Hearing shall be conducted beginning on **March 4, 2022.**

9. Participating Parties may, but are not required to, file trial briefs by **10:00 a.m.**

Wednesday, March 2, 2022.

H. Extensions.

10. The applicable deadlines herein may be adjusted based upon agreement of the affected Participating Parties without necessity of Court order with the exception of the Amendment Deadline, 557 Discovery Deadline, the PTO Deadline, and the Final Determination Hearing.

11. Nothing herein prohibits Participating Parties from moving the Court to alter or extend any deadline herein. However, the Court implores the Participating Parties to remain cognizant of the high burden contained in § 557(f) and to be aware that the Court, in this case and discovery procedure, is less lenient than in those cases where implementation of § 557 is not required.

##END OF ORDER##