

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
ABERDEEN**

\_\_\_\_\_) )  
**In re:** ) )  
 ) )  
**Express Grain Terminals, LLC,<sup>1</sup>** ) **Case No. 21-11832-SDM** )  
 ) **Chapter 11** )  
**Debtor(s)** ) )  
 ) )  
\_\_\_\_\_ )

**JOINT MOTION FOR APPROVAL OF SETTLEMENT AND COMPROMISE**

**COME NOW** StoneX Commodity Solutions LLC, formerly known as FCStone Merchant Services, LLC (“StoneX”), UMB Bank, N.A. (“UMB”), Macquarie Commodities (USA) Inc. (“Macquarie”), Agrifund, LLC, Ag Resource Holdings, LLC, Ag Resource Management (collectively, “Agrifund”), BankPlus, Guaranty Bank and Trust Company (“Guaranty”), Southern AgCredit, ACA (“SAC”), Bank of Commerce (“Bank of Commerce”), First South Farm Credit, ACA (“First South”), Planters Bank & Trust Company (“Planters”), Staple Cotton Discount Corporation (“Staple Cotton”), and Express Grain Terminals, LLC, Express Processing, LLC, and Express Biodiesel, LLC (collectively, the “Debtors”, and together with StoneX, UMB, Macquarie, Agrifund, BankPlus, Guaranty, SAC, Bank of Commerce, and First South, Planters, and Staple Cotton, the “Movants”), by and through their respective undersigned counsel, pursuant to Sections 105 and 557 of Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedures (the “Bankruptcy Rules”), and jointly move for entry of an order substantially in the form attached hereto as **Exhibit A** (the

<sup>1</sup> Jointly administered with *In re Express Biodiesel, LLC*, Case No. 21-11834-SDM, and *In re Express Processing*, Case No. 21-11835-SDM. *See* (Dkt. # 1158).

“Proposed Order”), approving the compromise and settlement reached by and among the Movants along with various members of the farm group as set forth and memorialized in that certain Settlement Agreement Related to Disputed Grain Assets (the “Settlement Agreement”), which is attached hereto as **Exhibit B**. In further support of this Joint Motion, the Movants state as follows:

### **JURISDICTION & VENUE**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested herein are Sections 105 and 557 of the Bankruptcy Code and Bankruptcy Rule 9019.

### **FACTUAL & PROCEDURAL BACKGROUND**

4. On September 29, 2021 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Mississippi (the “Court” or “Bankruptcy Court”).
5. On October 4, 2021, the Debtors filed the Emergency Motion for Use of Cash Collateral, to Authorize Continued Use of Existing Bank Accounts and Cash Management System and Granting Adequate Protection (Dkt. # 16).
6. On October 5, 2021, the Court entered the *Agreed Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 32).
7. On October 13, 2021, the Court entered the *Agreed Second Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 120).
8. On October 29, 2021, the Court entered the *Amended Agreed Second Interim Order*

*(I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 603).

9. Also on October 29, 2021, the Court entered the *Agreed Third Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 643).

10. On November 5, 2021, the Court entered the *Fourth Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 976).

11. On November 8, 2021, the Court entered the Order Establishing Procedures for Determination of Rights, Ownership Interests, Liens, Security Interests and All Other Interests in and to Grain and Proceeds of Grain (Dkt. # 1070) (the “557 Procedures Order”). Also, on November 8, 2021, three parties<sup>2</sup> (the “District Court Plaintiffs”) filed a lawsuit in the United States District Court for the Southern District of Mississippi in the case styled *Island Farms, LLC v. UMB Bank N.A.*, Case No. 3:21-cv-00721-HTW-LGI (the “District Court Lawsuit”). The District Court Plaintiffs are represented by John W. (“Don”) Barrett with Don Barrett PA, E. Carolos Tanner, III with Tanner & Associates, LLC, Gerald Moses Abdalla, Jr. with Abdalla Law, PLLC, and Richard Runft Barrett with the Law Offices of Richard R. Barrett, PLLC.

12. On November 17, 2021, Express Grain filed the *Notice of Filing of 557 Report and Grain Report* (Dkt. # 1156) (the “557 Report Notice”). Attached as Exhibit “A” to the 557 Report Notice is the 557 Report (as defined in the 557 Procedures Order). Attached as Exhibit “B” to the 557 Report Notice is the Grain Report (as defined in the 557 Procedures Order).

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<sup>2</sup> The plaintiffs in the District Court Action were Island Farms, LLC, Porter Planting Company Partnership, and Wyatt Farm Partnership.

13. On November 29, 2021, Express Grain filed the *Notice of Filing of 557 Report Supplement* (Dkt. # 1204), which attached a *557 Report Supplement* as Exhibit “A.”

14. On December 2, 2021, the Court entered the *Fifth Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 1309).

15. On December 17, 2021, the Court entered the *Order Extending the Debtor’s Use of Cash Collateral Until January 7, 2021 Under the Terms of the Fifth Interim Cash Collateral Order (Dkt. #1309) and for Other Requirements* (Dkt. # 1509).

16. On December 31, 2021, the Court entered the *Amended Fifth Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 1605).

17. On January 11, 2022, the Court entered the *Sixth Interim Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Continued Use of Existing Bank Accounts and Cash Management System, and (III) Granting Adequate Protection* (Dkt. # 1648).

18. On January 17, 2022, Express Grain filed the *Amended Grain Report* (Dkt. # 1693).

19. On January 18, 2022, the Court conducted the Preliminary Determination Hearing (as defined in the 557 Procedures Order).

20. 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* (Dkt. # 1787) (the “Final Cash Collateral Order”). The Final Cash Collateral Order was appealed by Bank of Commerce and First South together with the 557(i) Order (defined infra). The Court has certified a direct appeal

to the Fifth Circuit.<sup>3</sup> The Court has certified a direct appeal to the Fifth Circuit. Also, on January 28, 2022, the Court entered the *Section 557 Procedures – Phase 2 Scheduling Order* (Dkt. # 1789), which procedures were further amended on January 31, 2022 (Dkt. # 1800).

21. On March 3, 2022, the Court entered the *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).

22. On March 9, 2022, the Court entered the *Order Clarifying Proof of Claim Objections and Establishing Objection Procedures* (Dkt. # 2242).

23. Various parties in interest assert interests in certain pre-petition soybeans and corn stored by one or more of the Debtors (the “Pre-Petition Grain”) and proceeds of the Pre-Petition Grain (the “Proceeds”) by virtue of holding warehouse receipts, security interests, production money security interests, and for other asserted reasons under applicable law. The following claims and notices of interest in the Pre-Petition Grain and Proceeds have been filed:<sup>4</sup>

- a. UMB filed its *Official Form for Assertion of Interest in Grain*, filed December 3, 2021

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<sup>3</sup> Bank of Commerce and First South (collectively, “Appellants”) filed the *Notice of Appeal (Docket No. 1787)* [Dkt. # 1939] and the *Notice of Appeal (Docket No. 1767)* [Dkt # 1938] appealing the Cash Collateral Order and the *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 # 1767] (the “557(i) Order”) that are pending in the case styled *Bank of Commerce et al v. Express Grain Terminals, LLC*, Case Nos. 4:22 cv-00029DMB and 4:22cv-00030DMB, United District Court for the Northern District of Mississippi (Greenville Division). Appellants asked the Bankruptcy Court to certify the questions presented directly to the Fifth Circuit Court of Appeals, and the Bankruptcy Court entered the *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 the 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 #. 2215] (the “Cash Collateral Certification”); *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* [Dkt # 2216] (the “557(i) Certification” collectively with the Cash Collateral Request for Certification, the “Certifications”). Appellants’ petitions for direct appeal with the Fifth Circuit Court of Appeals are now pending based on those Certifications at Case No. 22-90014 (557(i) Order) and 22-90015 (Cash Collateral Order).

<sup>4</sup> Various parties have also filed objections to certain interest notices and claims as noted on the docket.

(Dkt. # 1417).

- b. StoneX filed its Official Forms for Assertion of Interest in Grain (Dkt. ## 1435, 1437, 1880) filed on December 3, 2021 and February 4, 2022.
- c. Macquarie filed its Official Form Assertion of Interest in Grain, filed December 3, 2021 (Dkt. # 1429).
- d. The farmers in Farm Group I filed certain *Assertions of Interest* setting forth claims based on theories of reclamation and constructive trust.
- e. The farmers in Farm Group II filed their Original, Amended and Second Amended *Assertions of Interest* setting forth claims based upon theories of constructive trust, reclamation and/or invalid contracts.
- f. The farmers in Farm Group III filed their Original, Amended and Second Amended *Assertions of Interest* setting forth claims based upon theories of bailment, reclamation and/or constructive trust.
- g. Guaranty filed its Official Form for Assertion of Interest in Grain (Guaranty Bank & Trust Company) on December 3, 2021 (Dkt. # 1436), as amended by Amended Assertion of Interest in Grain (Guaranty Bank & Trust Company) filed on February 21, 2022 (Dkt. # 2081).
- h. SAC filed SAC's Second Amended Official Forms for Assertions of Interest in Grain, filed February 4, 2022 (Dkt. ## 1861, 1862, 1866, 1863, 1864, 1865, 1867).
- i. Bank of Commerce and First South have asserted their respective claims and interests in grain and proceeds of grain as set forth in their summary chart, separately filed by Bank of Commerce and First South ("BOC/FS Interest Exhibit"),<sup>5</sup> as production money lien holders of certain farmers who delivered grain to EGT.
- j. The Debtor filed its *Amended Official Form for Assertion of Interest in Grain* (Dkt. # 1873) on February 4, 2022.
- k. Planters filed its Official Forms for Assertions of Interest in Grain on December 3, 2021 (Dkt. ## 1414, 1415) and uploaded its Amended Official Forms for Assertion of Interest in Grain as to its farmer borrowers to the EGT Interest Data Room on February 4, 2022. Planters originally asserted an interest in the crops of Spencer Alderman Farms but subsequently withdrew same (Dkt. # 2249).
- l. Staple Cotton filed its Official Forms for Assertions of Interest in Grain on December 3, 2021 (Dkt. ## 1341-1348)

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<sup>5</sup> Bank of Commerce and First South reserved the right to make changes in their discretion to the BOS/FS Interest Exhibit prior to the commencement of trial. And, all other parties reserve their right to object to these changes.

24. The Final Cash Collateral Order required that certain Proceeds be segregated pending resolution by the Court as to proper disposition. As of April 1, 2022, the CRO reported that the disputed asset pool totals \$58,942,674.30 (the “Disputed Grain Asset Pool”), detailed as follows:

- a. Train Segregated Account: \$4,614,292.74
- b. Main Soybean Segregated Account: \$39,535,507.26
- c. Corn Segregated Account: \$5,610,213.68
- d. Excess Segregated Account: \$1,810,699.93
- e. General Operating Account: \$2,622,892.48
- f. Hedge Account Proceeds: \$1,067,001.16
- g. Accounts Receivable (Soybean): \$3,325,449.91
- h. Accounts Receivable (Corn): \$17,617.14
- i. Remaining Soybean Inventory: \$150,000.00
- j. Remaining Finished Product Inventory: \$189,000.00

25. On February 23, 2022, the Court in a bench ruling approved the Debtors’ sale (the “Sale”) of substantially all of its fixed assets to UMB (or its designee) that were subject to UMB’s security interests and liens (the “Purchased Assets”) pursuant to that certain Asset Purchase Agreement (the “Purchase Agreement”) dated February 24, 2022. The *Order Granting Motion to Sell Substantially All of the Assets Owned by Express Grain Terminals, LLC, Free and Clear of Liens, Claims and Interests, with Liens Attaching to Proceeds of Sale, Outside the Ordinary Course of Business* (Dkt. # 2708) (the “Sale Order”) was entered on April 11, 2022.

26. On March 24, 2022, the Court in a bench ruling approved the Transition Services Agreement (“TSA”) between the Debtors and UMB. The *Order Approving Transition Services*

*Agreement and Purchase Asset Surcharge Procedures* (Dkt.# 2709) (the “TSA Order”) was entered on April 11, 2022. Pursuant to the TSA Order, UMB has agreed to pay \$400,000 as an agreed upon surcharge regarding the Purchased Assets.

### **COMPROMISE OF CONTROVERSY**

27. On March 15, 2022, the Court entered its *Order Referring 11 U.S.C. § 557 Procedures to Mediation, Appointing Mediator, and Establishing Mediation Procedures* [Dkt. # 2543] (the “Mediation Order”). Pursuant to the Mediation Order, the Honorable William Brown (ret.) was appointed mediator (the “Mediator”) and the mediation began on March 17, 2022 (the “Mediation”). The Mediator has continued to facilitate negotiations between the various Movants and other parties including counsel for the various Farm Groups.

28. The Movants, along with the Consenting Farmers<sup>6</sup> (collectively, the “Settling Parties”) have reached a compromise and settlement that resolves the disputes among them and with respect to the priority of interests in the Disputed Grain Asset Pool. Additionally, the proposed resolution allows for those farmers who want to take their chance either in non-bankruptcy court proceedings or continue with the 557 proceedings the opportunity to do so. This compromise is the product of extensive negotiations by and among the various Movants and counsel for the Farm Groups following the Mediation.

29. The compromise and settlement is set forth in the Settlement Agreement. The material terms of the Settlement Agreement<sup>7</sup> are as follows:

a. Disposition of Disputed Grain Asset Pool.

- i. The Settlement Agreement provides for a \$1,125,000 carveout to the Bankruptcy

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<sup>6</sup> Capitalized terms shall have the same meaning as set forth in the Settlement Agreement.

<sup>7</sup> The following is only a summary and parties are encouraged to read the entire Settlement Agreement. To the extent any portion of the summary contradicts a provision in the Settlement Agreement, the Settlement Agreement shall control.



Estate (the “Carveout”).<sup>8</sup>

- ii. The Disputed Grain Asset Pool, net of Estate Carveout, will be divided up between the Consenting Farmers (and their respective Production Lenders) on one hand<sup>9</sup> and the WHR Group (StoneX, UMB, and Macquarie), on the other hand. The split is roughly 16%/84% in favor of the WHR Group.
  - iii. With respect to the Consenting Farmer Share, a Farmer Distribution Fund will be established and administered by a fund administrator.
- b. Releases and Waivers.
- i. The Settling Parties are granting and receiving releases as it relates to the other Settling Parties subject to certain identified limitations and clarifications set forth in this Motion and the Proposed Order.
  - ii. Additionally, the Settlement Agreement provides that the WHR Group will waive or assign any rights to certain grain storage bonds in the face amount of \$1,100,000.00 issued to the State of Mississippi, which may ultimately benefit the Consenting Farmers (“Bonds”). Both prior to and subsequent to the execution of the Settlement Agreement, the Production Lenders have agreed to waive or otherwise forego any claims they might have against the Bonds.
  - iii. The Settling Parties are waiving certain administrative claims to the bankruptcy estate.
- c. Farmer Categories. The settlement identifies four categories of farmers:
- i. Consenting Farmers. These farmers will share in distributions from the Consenting Farmer Share, be granted releases by all Settling Parties (subject to the specified limitations in the Agreement), and grant releases to the other Settling Parties.
  - ii. Disclaiming Farmers. These farmers, with the exception of the reimbursement of certain attorneys’ fees from the Consenting Farmer Share, are (1) withdrawing any Assertion of Interest filed with the Court and (2) disclaiming and waiving any interest that they have in the Disputed Grain Asset Pool. Disclaiming Farmers, however, are getting a release from the Debtors’ bankruptcy estates. Disclaiming Farmers are not getting releases from Non-Debtor parties and are not granting any releases of claims and can pursue third-parties outside the bankruptcy court subject to all valid defenses of the target parties. Importantly, the only condition on the disclaimer by these parties is that that the Settlement Agreement is

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<sup>8</sup> In addition to the Carveout, the Debtors will retain certain additional funds on hand including the fixed asset surcharge (\$400,000), proceeds from the sale of certain golf-carts (approx. \$80,000), and previously escrowed funds for professional fees (approx. \$1,000,0000). These funds are separate and apart from the Disputed Grain Asset Pool.

<sup>9</sup> Those farmers disclaiming an interest in the Disputed Grain Asset Pool, as set forth more fully below, still will be allowed to have certain attorney fees and expenses reimbursed out of the Consenting Farmer Share.

approved by the Bankruptcy Court.

- iii. Non-Consenting Farmers. These farmers wish to proceed with the 557 Proceedings and also pursue their rights against various parties outside of bankruptcy court and are not granting or receiving releases.
  - iv. Non-Participating Farmers. These farmers are those who have not filed an assertion of interest or elected to be a Consenting Farmer or Disclaiming Farmer. The Settlement Agreement contemplates a streamlined process that will determine whether such parties wish to proceed in the Final Determination Hearing.
- d. Non-Consenting Farmer Reserve. The Settlement Agreement contemplates establishing a holdback reserve with respect to Non-Consenting Farmers. A condition of the settlement is that the reserve does not exceed \$5,000,000, unless the WHR Group agrees to the same. The holdback reserve will be funded in a proportionate manner from both the Consenting Farmer Share and the WHR Group Share. For example, if the reserve is funded at \$5,000,000, then \$800,000 shall be deducted from the Consenting Farmer Share and \$4,200,000 will be deducted from the WHR Group Share.
  - e. Thresholds. The Settlement requires certain consent threshold benchmarks to be satisfied by the various farmers in order for the settlement to be effective.
    - i. Initial Threshold. The deadline for the initial threshold was April 7, 2022, which can be extended by the WHR Group. The initial thresholds were met except for the threshold related to the number of corn farmers consenting or disclaiming.<sup>10</sup> The deadline may be extended upon the agreement by the WHR Group members. The WHR Group members have agreed to extend this deadline and understand that it has been met.
    - ii. Final Threshold. In order to determine the final threshold and the reserve, the Settlement Agreement contemplates a hearing related to the Non-Participating Farmers (“Initial Claims Hearing”). The failure of a Non-Participating Farmer to appear at the Initial Claims Hearing shall result in any objection to the claim of the Non-Participating Farmer being sustained and such Non-Participating Farmer shall only have a general unsecured claim in the non-objected to amount. If a Non-Participating Farmer appears, their claim shall be taken up as part of the 557 Final Determination Hearing. No party shall put forth its substantive case at the Initial Claims Hearing.
  - f. Pending Claim Objections. Upon the occurrence of the Distribution Date (as defined in the Settlement Agreement), all pending claim objections will be deemed withdrawn or moot except for claim objections to claims of Non-Consenting Farmers and Non-

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<sup>10</sup> See Settlement Agreement §14.1.12.

Participating Farmers.

- g. Pending Appeal. The pending appeals to the Fifth Circuit and to the District Court of the 557(i) Order and Cash Collateral Order will be sought by Appellants to be stayed pending approval of the Settlement and ultimately withdrawn upon entry of a final order approving the Settlement Agreement and consummation of the Settlement Agreement. Further, the parties agree to mutually toll any appeal deadlines pending approval of the Settlement Agreement. If the Settlement Agreement is approved, then within 14 days after consummation of the Settlement Agreement, the Appellants will file a motion to voluntarily dismiss the appeals. If the Settlement Agreement is not ultimately approved or is withdrawn, the Appellants will move to lift the stay and the parties agree that they shall have 14 days after the denial or withdrawal of the Settlement Agreement, to effectuate any appeal right that has been tolled.

30. With respect to certain release provisions under the Settlement Agreement, various parties in interest have requested certain clarifications with respect to the scope of such provisions and that such clarification be contained in this Motion and the Proposed Order. The following is a list of clarifications with respect to the scope of the release provisions in the Settlement Agreement:

- a. Sale Order and TSA Order. Except as specifically provided in Section 11.7 of the Settlement Agreement, nothing in the Settlement Agreement alters, cancels, extinguishes, impacts, supersedes, or supplants, the relief granted in the Sale Order and the TSA Order.
- b. Sale Documents. Except as stated in Section 11.7 of the Settlement Agreement, nothing in the Settlement Agreement alters, releases, or waives, any claims, rights, responsibilities, or obligations of the (i) Debtors, (ii) UMB, (iii) each of the forgoing entities' respective affiliates and assigns, and (iv) each of the forgoing entities', affiliates' and assigns' agents, attorneys, directors, employees, law firms, managers, members, officers, shareholders, and staff working on their behalf including, without limitation, the CRO and CR3 Partners, LLC, that such parties may have under the Purchase Agreement, Sale Order, TSA, or TSA Order (the "Sale Documents") including, without limitation, any and all rights or claims with respect to insurance coverage related to the Purchased Assets.
- c. Cash Collateral Orders. The various cash collateral orders shall remain in effect except as specifically modified by the Settlement Agreement or Proposed Order.
- d. Scope of Debtors' Releases. Except as otherwise provided for in the Settlement Agreement and/or clarified in this Motion, the Debtors are releasing the Non-Debtor Settling Parties, the Disclaiming Farmers, and their respective "released parties" of all the various claims they have against such parties. The types of claims being released by the Debtors would include, without limitation, breach of contract claims (except as it relates to the Sale Documents), Chapter 5 causes of action and any and all clawback

claims/causes of action the Debtors may have under state or federal law (e.g., preferences, fraudulent transfers, etc.), claims for equitable subordination and re-characterization.

- e. Assignment of Claims. Except for any assignments under the Purchase Agreement related to certain fixed assets (e.g., warranty and insurance claims related to the fixed assets), the Debtors have not assigned any claims to third parties. Additionally, no party has sought derivative standing to pursue such claims. The Settling Parties acknowledge that once any claim owned by the Debtors has been released, it cannot be subsequently assigned or revived by another party.
- f. Secured Claims/Classification of Claims. Section 11.1 of the Settlement Agreement provides that Settling Parties may maintain general unsecured claims. Section 11.5 provides that parties will maintain secured rights in non-Disputed Grain Asset Pool assets. For the avoidance of doubt, a Settling Party may maintain a partially secured claim, which can then be separately classified for plan purposes to the extent allowed under applicable law.
- g. Production Lender Loans to Farmers. Section 11.3 of the Settlement Agreement provides that the Settlement Agreement does not release any Consenting Farmer from any debts or obligations to a Production Lender or release or otherwise affect the enforceability or validity of any security interest in non-Disputed Grain Asset Pool assets granted by a Consenting Farmer to a Production Lender.
- h. Pending Appeals. The time to take action with respect to the Settlement Agreement speaks in terms of consummation of the Settlement Agreement. For clarity purposes, “consummation” for purposes of the Settlement Agreement means the Distribution Date and any Settling Party appealing from the Bankruptcy Court to the District Court or the Fifth Circuit will immediately seek a stay or abatement of those appeals, and within 14 days of the Distribution Date, withdraw the appeals.

31. The initial thresholds for Consenting Farmers and Disclaiming Farmers, as set forth in the agreement were as follows:

- a. Corn Bushel Base: 1,544,343
- b. Corn Farmer Count: 39
- c. Soybean Bushel Base: 1,498,999
- d. Soybean Farmer Count: 66

The deadline to meet initial thresholds was set for April 7, 2022, but such deadline could be extended by the WHR Group.

32. On April 8, 2022 at 9:00 a.m., counsel for the farmers reported the following for

consenting and disclaiming farmers:

- a. Corn Bushel Base: 2,091,003.73
- b. Corn Farmer Count: 37
- c. Soybean Bushel Base: 1,512,932.48
- d. Soybean Farmer Count: 68

The WHR Group agreed to extend the initial farmer count threshold deadline and it has been met.

33. As of April 11, 2022, there were approximately 10 farmers indicating that they wish to proceed with the 557 proceedings. For purposes of the Final Determination hearing that may proceed with any Non-Consenting Farmers, the represented Non-Consenting Farmers' agreed that their legal claims would be limited to assertions of Constructive Trust and Reclamation. At such Final Determination hearing, the WHR Group requests that the Court require that the Non-Consenting Farmers put on their cases in chief limited to their assertions of Reclamation and Constructive Trust first and the Court will determine whether they have met their burden to establish either a Reclamation Claim or a Constructive Trust prior to the WHR Group being required to present their claims. Further details of any such Final Determination hearing will be set forth in a joint pre-trial order to be submitted at a future date set by the Court.

34. The proposed settlement furthers the goals of the 557 Procedures Order, namely to determine the priority of interests of the parties that filed Assertions of Interest as set forth above. Faced with the complexity of the issues and uncertainties of outcomes associated with litigating the parties' myriad of claims, the settlement offers a concrete and efficient alternative to litigation.

35. Based upon reports that the initial thresholds had been met, the Movants notified the Court on April 8, 2022 and requested a status conference to apprise the Court of the Settlement Agreement. At that hearing, an *ore tenus* motion was made by counsel for UMB to stay the various pretrial deadlines in light of the settlement and also to discuss dates in which the 9019 Motion

could be heard. Upon information and belief, additional Farmers Elections were received after April 8, 2022 and believe many of the Election Forms are made up of Disclaiming Farmers. The Settlement Agreement provides that once submitted, a Farmer Election cannot be retracted or modified unless a Disclaiming Farmer is electing to be a Consenting Farmer. Settlement Agreement § 14.1.

36. On April 11, 2022, as the parties were finalizing this Motion, counsel for UMB received communications from Chris Winter and Don Barrett purportedly on behalf of certain undisclosed farmers. In the communication, Mr. Barrett attempts to withdraw the Farmer Elections on behalf of their undisclosed clients and advised counsel not to file this 9019 Motion based upon the purportedly withdrawn elections. The apparent basis for the withdrawal was the failure by Mr. Barrett and other plaintiff's counsel to understand that other than the Debtors, all other Non-Debtor parties maintained all their claims and defenses vis-à-vis a Disclaiming Farmer. As will be set forth herein, the Settlement Agreement in multiple instances clearly and unequivocally retained such rights. Further, once disclaimed, it is the position of the Movants that a disclaimer cannot be revoked but only modified to a consent. *See* Settlement Agreement § 14.1. In other words, a disclaiming farmer can elect to become a consenting farmer and take their share of the settlement fund, or take their chances in non-bankruptcy court.

### **RELIEF REQUESTED**

37. For the reasons set forth herein, the Settling Parties respectfully request that this Court enter the Proposed Order, providing the following relief (the "Requested Relief"):

- a. Approving the Settlement Agreement, as modified and clarified herein and in the Proposed Order;
- b. A determination that on the Distribution Date (as defined in the Settlement Agreement) (i) any claim objection that a Settling Party has against another Settling Party shall be deemed withdrawn; (ii) any claim objection raised against or by a Disclaiming Farmer, will be deemed moot; and (iii) all other claim objections, whether

individually or the balance of a remaining omnibus claim objection, shall be initially taken up at the Initial Claims Hearing (with respect to the Non-Participating Farmers) and will be substantively taken up at the Final Determination hearing;

- c. A finding and determination that except as specifically provided in Section 11.7 of the Settlement Agreement, nothing in the Settlement Agreement alters, cancels, extinguishes, impacts, supersedes, or supplants, the relief granted in the Sale Order and the TSA Order;
- d. A finding that except as specifically provided in Section 11.7 of the Settlement Agreement, nothing in the Settlement Agreement alters, releases, or waives, any claims, rights, responsibilities, or obligations of the (i) Debtors, (ii) UMB, (iii) each of the forgoing entities' respective affiliates and assigns, and (iv) each of the forgoing entities', affiliates' and assigns' agents, attorneys, directors, employees, law firms, managers, members, officers, shareholders, and staff working on their behalf including, without limitation, the CRO and CR3 Partners, LLC, that such parties may have under the Purchase Agreement, Sale Order, TSA, or TSA Order including, without limitation, any and all rights or claims with respect to insurance coverage related the Purchased Assets;
- e. A finding that once a bankruptcy estate cause of action or claim has been released by the Debtors, it cannot be revived and pursued by any other party derivatively or otherwise;
- f. A finding that a Settling Party may maintain a secured claim against the bankruptcy estates to the extent the assets or proceeds securing such claim are not part of the Disputed Grain Asset Pool and that such secured claims can be separately classified for plan purposes to the extent allowed under applicable law;
- g. A finding that except as specifically modified by the Proposed Order or by the Settlement Agreement, the previous cash collateral orders issued by the Court shall stay in effect;
- h. Confirming the extension of the initial threshold deadline set forth in Settlement Agreement §14.1.12 and that such threshold has been satisfied;
- i. A direction that any Settling Party appealing from the Bankruptcy Court to the District Court or the Fifth Circuit will immediately seek a stay or abatement of those appeals, and within 14 days of the Distribution Date, withdraw the appeals.
- j. Directing that the mailing and copying costs of noticing the Motion be evenly split between the WHR Group;
- k. A finding that notice of the Motion was accurate, appropriate, reasonable and legally sufficient under the circumstances and in accordance with applicable Bankruptcy Code provisions and Bankruptcy Rules;
- l. A finding that any provisions in the Proposed Order supplement the Settlement

Agreement and to the extent there is an inconsistency between the terms and provisions of the Order and the Settlement Agreement, the terms and provisions of the Order shall control unless explicitly provided otherwise therein; provided, however, all Settling Parties consent to the final Settlement Order;<sup>11</sup>

- m. Confirming that for purposes of the Final Determination hearing that may proceed with any Non-Consenting Farmers, the represented Non-Consenting Farmers have agreed that their legal claims will be limited to assertions of Constructive Trust and Reclamation. At such Final Determination hearing, the WHR Group Members request that the Court require that the Non-Consenting Farmers put on their cases in chief limited to their assertions of Reclamation and Constructive Trust first, and the Court will determine whether they have met their burden to establish either a Reclamation Claim or a Constructive Trust prior to the WHR Group being required to present their claims. Further details of any such Final Determination hearing will be set forth in a joint pre-trial order to be submitted at a future date set by the Court;
- n. Finding that the Order approving the Motion be effective immediately and that the stay period of Federal Rule of Bankruptcy Procedure 6004(h) not apply (to the extent applicable);
- o. Finding that the Settlement Agreement, as clarified herein, is fair and reasonable, falls within the range of possible litigation outcomes, is in the best interest of the estate because full settlement mitigates various risks associated with litigation in this matter, and that releases contemplated by the Settlement Agreement are consensual;
- p. A finding that once a disclaiming election has been made, it cannot be revoked, but only modified to a consenting election;
- q. Enforcing the election of the Consenting Farmers and Disclaiming Farmers; and
- r. Granting such other and further relief as the Court deems just and appropriate.

#### **BASIS FOR RELIEF**

38. Bankruptcy Rule 9019(a), which governs the approval of compromises and settlements, provides, in part, that: “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” “[A]pproval or denial of a compromise involving a bankruptcy estate is committed to the discretion of the bankruptcy judge. . . .” *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). “Settlements are approved when fair and equitable and in the

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<sup>11</sup> A failure to object to the proposed Order by a Settling Party will be considered consent to the Proposed Order.



best interests of the estate. This leaves the court with *considerable* discretion when considering approval of a proposed settlement. . . .” 1 *Collier Handbook for Creditors’ Committees* P 17.01 (2021) (discussing Rule 9019) (emphasis added). Bankruptcy Rule 9019(a) further provides that “[n]otice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.”

39. There is a general bankruptcy policy encouraging settlements and compromises. *See, e.g., In re Osborn*, No. 1602016EE, 2018 Bankr. LEXIS 1698, at \*10 (Bankr. S.D. Miss. June 6, 2018); *In re Mirant Corp.*, 334 B.R. 800, 811 (Bankr. N.D. Tex. 2005) (“One of the goals of Congress in fashioning the Bankruptcy Code was to encourage parties in a distress situation to work out a deal among themselves.”); *In re Myers*, 546 B.R. 363, 376 (Bankr. S.D. Miss. 2016) (citing 9 *Collier on Bankruptcy* ¶ 9019.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016)); *Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). “[C]ompromises are a normal part of the process of reorganization, oftentimes desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly.” *In re LMCHH PCP LLC*, Nos. 17-10353, 17-10354, 2017 Bankr. LEXIS 3361, at \*14 (Bankr. E.D. La. Oct. 2, 2017).

40. The Fifth Circuit employs the *Jackson Brewing* factors when evaluating a settlement under Bankruptcy Rule 9019. *See Matter of Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). “A decision to accept or to reject a compromise or settlement is within the sound discretion of the Court [and] [e]ssential to the process of evaluating proposed settlements. . . ‘is the need to compare the terms of the compromise with the likely rewards of litigation.’” *In re Osborn*, at \* 5 (Bankr. S.D. Miss. June 6, 2018) (citing *In re Idearc Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009)).

41. As an initial matter, a court must determine that a settlement is fair and equitable and in the best interests of the bankruptcy estate. *See generally Matter of AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984); *see also In re Highland Cap. Mgmt. L.P.*, No. 19-34054-SGJ-11, 2022 WL 780991, at \*8 (Bankr. N.D. Tex. Mar. 11, 2022) (citing *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 356 (5th Cir. 1997) (noting that a bankruptcy court is “required to ‘appraise [itself] of the relevant facts and law [in order to] make an informed and intelligent decision’”). Then, “[the Court] must evaluate and set forth in a comprehensible fashion: (1) [t]he probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) [t]he complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) [a]ll other factors bearing on the wisdom of the compromise.” *In re Jackson Brewing*, at 602 (citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (“*TMT Trailer*”), 390 U.S. 414, 425 (1968)) (emphasis added). The third factor, focused on “all other factors bearing on the wisdom of the compromise,” includes: (i) “the best interests of the creditors, ‘with proper deference to their reasonable views;’” and (ii) “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *In re Age Ref., Inc.*, 801 F.3d 530, 540 (5th Cir. 2015) (citing *Matter of Foster Mortg. Corp.*, 68 F.3d 914, 917 (5th Cir. 1995)). *See also In re Heritage Real Est. Inv., Inc.*, No. 14-03603-NPO, 2020 WL 8551776, at \*8 (Bankr. S.D. Miss. Sept. 9, 2020) (Judge Olack elaborating on the *Jackson Brewing* factors and *In re Age Ref., Inc.*); *In re Osborn, supra* at ¶ 10 (Judge Ellington doing the same).

42. Additional factors that this Court may consider are: (i) the difficulties in collecting a judgment concerning the underlying litigation; (ii) the creditors’ interests and reasonable views; (iii) whether the proposed settlement is with or among insiders; and (iv) whether the proposed settlement promotes the integrity of the judicial system. *See In re DeRosa-Grund*, 567 B.R. 773,

784 (Bankr. S.D. Tex. 2017) (collecting cases).

43. This Court is not required to consider every factor, and it “can give more weight to one or more of the above-referenced factors than to the other factors,” including giving a factor “no weight.” *In re LMCHH PCP LLC*, at \*13 (citing *In re Adelpia Commc’ns. Corp.*, 327 B.R. 143, 160-65 (Bankr. S.D.N.Y. 2005)). In determining whether to approve a compromise, a bankruptcy court is not obligated to actually rule on the merits of the various claims, the probability of succeeding on those claims or conduct a “mini trial” on the merits of the underlying cause of action. *In re Van Diepen, P.A.*, 236 F. Appx. 498, 503 (11th Cir. 2007); *U.S. v Alaska National Bank of the North (In the Matter of Walsh Construction, Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). Rather, courts consider certain factors to determine the fairness of a proposed settlement agreement. *See generally Chira v. Saal et al. (In re Chira)*, 567 F.3d 1307, 1312-1313 (11th Cir. 2009). In ruling on a proposed compromise, the Court should “canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness.” *Id.* at 608; *see also In re Bell & Beckwith*, 87 B.R. 472, 474 (N.D. Ohio 1987).

44. The Settling Parties have analyzed the *Jackson Brewing* factors described above and believe that the compromise exceeds the minimal standards and requirements established by the United States Supreme Court, the Fifth Circuit, and this Court.

45. In particular, even though each of the Settling Parties strongly believes in the merits of its respective position regarding the priority of its interests in the Disputed Grain Asset Pool each also acknowledges that the ultimate likelihood of success is uncertain as case law interpreting § 557 is scarce, as this Court is well aware.<sup>12</sup> The Settling Parties also acknowledge that continued

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<sup>12</sup> *See 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* (Dkt. # 2216, pp. 5 –6).

litigation will be costly and taxing on the various parties, the Court and its staff. The Settling Parties, many of them the largest creditors of the Debtor, support the Settlement as in their best interest. The Settlement Agreement is the result of weeks of good-faith, arms-length negotiations by and among the Settling Parties.

46. The Settling Parties understand and acknowledge the complexity of this case. And this Court has repeatedly acknowledged the same when setting the § 557 Procedures (Dkt. # 1789, p. 2) (describing the issues as “complicated”), and extending the time periods under § 557 (Dkt. # 2206, p. 2) (describing the case as “complex”).

47. This settlement is a fair and equitable distribution of grain pursuant to § 557(d)(2)(C), *et al.* and approval of it will bring an orderly end to the 557 process and the array of issues that the 557 Procedures Order seeks to address. For instance:

- a. The settlement allows for those parties that simply want to stop the legal cost and resolve their claims a means to do so.
- b. The settlement allows for an exit of those parties that no longer wish to participate in the 557 process and forgo their share of Disputed Grain Asset Pool (except for reimbursement of certain legal fees), in order to pursue rights and remedies outside of the bankruptcy process to the extent allowed under applicable law.
- c. The settlement establishes a reserve for those parties that still want to assert their rights in the 557 process and allows for further proceedings with respect to the same. However, the multiple legal and factual issues that will ultimately need to be heard and determined by the Court will be dramatically scaled back. Indeed, because all of the Production Lenders asserting an interest in the Pre-Petition Grain and Proceeds, are a party to the Settlement Agreement, a significant number of complex disputes between the Production Lenders and the Debtors and/or WHR Group will be resolved without further consideration by the Court, and the Production Lenders will not be participating at any continued trial. Additionally, with respect to the Non-Consenting Farmers, their issues will largely relate to constructive trust and reclamation arguments.

48. It is anticipated that certain Disclaiming Farmers will seek to claim that their disclaimers are invalid or should not otherwise be enforced. While certain of the Disclaiming Farmers’ non-bankruptcy lawyers may be having second thoughts about the advice they provided

to their clients, the Court should deny any attempt to invalidate the disclaimers.

49. The Settlement Agreement has been clear on the ramifications of electing to be a Disclaiming Farmer. The Settlement Agreement contains the following provisions:

District Court Action. Nothing in this Agreement shall release UMB's causes of action, suits, proceedings, debts, dues, judgments, damages, claims, property damages, expenses, liabilities, defenses, rights to payments, acts and/or omissions, demands, and all other claims of every kind, nature, and description, whatsoever, liquidated and unliquidated, fixed and/or contingent, matured and unmatured, priority or non-priority, disputed and/or undisputed, legal or equitable, secured and unsecured, accrued and unaccrued, known and unknown, choate and inchoate, whether based on statutory law, common law, federal law, state law, local law, or otherwise, which UMB now has or may have against (i) any named plaintiff in the District Court Action who is not a Consenting Farmer, or (ii) the attorneys representing the plaintiffs in the District Court Action. [Settlement Agreement § 11.6].

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No Release of Disclaiming Farmers by WHR Group. Nothing in this Agreement shall release a WHR Group member's causes of action, suits, proceedings, debts, dues, judgments, damages, claims, property damages, expenses, liabilities, defenses, rights to payments, acts and/or omissions, demands, and all other claims of every kind, nature, and description, whatsoever, liquidated and unliquidated, fixed and/or contingent, matured and unmatured, priority or non-priority, disputed and/or undisputed, legal or equitable, secured and unsecured, accrued and unaccrued, known and unknown, choate and inchoate, whether based on statutory law, common law, federal law, state law, local law, or otherwise, which such WHR Group member now has or may have against a Disclaiming Farmer. [Settlement Agreement § 11.8].

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Farmer Thresholds. Once submitted, a Farmer Election cannot be retracted or modified unless a Disclaiming Farmer is electing to be a Consenting Farmer. The final deadline for submission of Farmer Election is 5:00 p.m. (cst) the tenth (10th) day after the entry of the Settlement Order ("**Election Deadline**"); provided, however, this Agreement is subject to and conditioned upon the following threshold benchmarks being satisfied: [Settlement Agreement § 14.1]

\*\*\*\*

No Third Party Beneficiaries. Except as expressly provided herein, this Agreement is solely for the benefit of the Parties and nothing contained herein expressed or implied is intended to confer on any person other than the Parties hereto or their successors and permitted assigns, any rights, remedies, obligations, claims, or causes of action under or by reason of this Agreement. For the avoidance of doubt, the Disclaiming Farmers shall receive a release from the Debtors, but shall (a) not receive any other consideration provided to the Consenting Farmers under this Agreement and (b) not have any further claim to the Disputed Asset Grain Pool and the distributions made pursuant to this Agreement unless such Disclaiming Farmer timely elects to become a Consenting Farmer in which case such party may only participate in the Consenting Farmer share and will be bound by all applicable releases. [Settlement Agreement § 22].

50. The language quoted in paragraph 49 (other than some added minor clarifications) was included in the initial draft of the settlement agreement circulated to counsel for Debtors, Farm Groups, Production Lenders, and other WHR Group members on April 5, 2022. That language remained in the agreement throughout the negotiation process, and was still in the agreement at the time Disclaiming Farmers submitted their election forms.

51. Further, once an election to disclaim has been made, it is effective subject only to the Settlement Agreement being approved by this Court. The Election Form itself contains the following language:

The undersigned does hereby (1) withdraw any Assertion of Interest filed with the Court and (2) disclaim and waive any interest that the undersigned has or may claim to have to any and all grain delivered to the Debtors and the products and proceeds thereof which are the subject of the 557 Proceedings currently pending before the Bankruptcy Court (the “**Disputed Grain Asset Pool**”) including, without limitation, all funds in any segregated accounts, accounts receivable, and remaining grain finished product inventory.

The undersigned acknowledges that he/she/it has had an opportunity to receive funds from the Disputed Grain Asset Pool pursuant to this Settlement Agreement and/or to pursue remedies available pursuant to the Section 557 Proceedings in the Bankruptcy Court; however, the undersigned is knowingly and voluntarily disclaiming and waiving any right and interest to the Disputed Grain Asset Pool and any right to pursue remedies under Section 557 of the Bankruptcy Code.

**This Disclaimer is conditional upon Bankruptcy Court approval of the Settlement Agreement. If such agreement is not approved, this disclaimer is null and void. This option contains a limited release from the Debtors’ bankruptcy estates including claims related to “Chapter 5” causes of action and other “claw back” claims. [Highlighting added].**

and

The undersigned further covenants and agrees that before signing this Election, he/she/it has read, or had the opportunity to read, the Settlement Agreement in addition to the Additional Acknowledgements on Page 2 of this Election and has had the opportunity to consult with counsel regarding the Settlement Agreement and the Additional Acknowledgments.

52. Finally, the Movants relied on the reported initial threshold numbers in seeking to stay certain deadlines, proceed forward with drafting the necessary pleadings to have the settlement approved, and also with respect to the 557 Final Determination Hearing. The primary

purpose of staying the deadlines was so parties could cease incurring the substantial litigation expense of preparing for the imminent 557 proceeding set to begin on April 18, 2022. *See Hyperion Found. Inc. v. Acad Health Ctr., Inc. (In re Hyperion Found., Inc.)*, 2009 WL 3633878 at \*4 (Bankr. S.D. Miss. Oct. 27, 2009)(finding that cessation of litigation activity as evidence of a meeting of the minds). Allowing such parties to change their minds now because they failed to appreciate the possible implications of the election in subsequent non-bankruptcy litigation will be prejudicial to the Movants.

53. For these reasons included herein, as well as other arguments to be heard at a hearing thereon, the Movants believe the Settlement Agreement is in the best interest of the Debtors' estates and its creditors, and is a fair, reasonable, and adequate resolution of this dispute.

**WHEREFORE, PREMISES CONSIDERED**, the Movants respectfully request that the Court enter the Proposed Order, approve the Settlement Agreement, as modified and clarified herein, granting the Request Relief, and granting such other and further relief as the Court deems just and proper.

Respectfully submitted, this 12th day of April, 2022.

Law Offices of Craig M. Geno, PLLC

/s/ Craig M. Geno

Craig M. Geno (MSB #: 4793)

587 Highland Colony Parkway

Ridgeland, MS 39157

601-427-0048

Email: [cmgeno@cmgenolaw.com](mailto:cmgeno@cmgenolaw.com)

**Attorney for Debtors**

BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, P.C.

/s/ R. Spencer Clift, III

R. Spencer Clift, III (MSB #100208)

E. Franklin Childress, Jr. (TN #7040) (Pro Hac Vice)

165 Madison Avenue, Suite 2000

Memphis, Tennessee 38103

Tel: (901) 577-2216

Fax: (901) 577-0834

[sclift@bakerdonelson.com](mailto:sclift@bakerdonelson.com)

[fchildress@bakerdonelson.com](mailto:fchildress@bakerdonelson.com)

-and-

SPENCER FANE LLP

/s/ Eric L. Johnson

Eric L. Johnson (MOB # 53131)

James A. Lodoen (KS # 12931; MN # 0173605)

Peter R. Riggs (MOB # 57268)

Andrea M. Chase (MOB # 66019)

1000 Walnut St., Suite 1400

Kanas City, Missouri 64106

Tel: (816) 474-8100

Fax: (816) 474-3216

[ejohnson@spencerfane.com](mailto:ejohnson@spencerfane.com)

[jlodoen@spencerfane.com](mailto:jlodoen@spencerfane.com)

[priggs@spencerfane.com](mailto:priggs@spencerfane.com)

[achase@spencerfane.com](mailto:achase@spencerfane.com)

**Attorneys for UMB Bank, N.A.**



BURR & FORMAN LLP

/s/ David W. Houston, IV

David W. Houston, IV (MS Bar No. 100233)  
J. Patrick Warfield (*pro hac vice*)  
222 2nd Avenue S., Suite 2000  
Nashville, Tennessee 37201  
Telephone: (615) 724-3200  
dhouston@burr.com; pwarfield@burr.com

/s/ John M. Lassiter

John Lassiter (MS Bar No. 102235)  
The Pinnacle at Jackson Place  
190 E. Capitol Street, Suite M-100  
Jackson, Mississippi 39201  
Telephone: (601) 355-3434  
jlassiter@burr.com

/s/ D. Christopher Carson

D. Christopher Carson (*pro hac vice*)  
Andrew P. Cicero, III (Mississippi Bar No. 106223)  
420 North 20th Street, Suite 3400  
Birmingham, Alabama 35203  
Telephone: (205) 251-3000  
ccarson@burr.com; acicero@burr.com  
**Attorneys for StoneX Commodity Solutions, LLC**

BRUNINI, GRANTHAM GROWER & HEWES, PLLC

/s/ James A. McCullough II

James A. McCullough II (MS Bar No. 10175)  
190 East Capitol Street, Suite 100  
Jackson, Mississippi 39201  
(t) (601) 960-6898  
(f) (601) 960-6902  
jmccullough@brunini.com

-and-

HAYNES & BOONE, LLP

/s/ Charles M. Jones, II

Charles M. Jones, II (admitted *pro hac vice*)

Texas State Bar No. 24054941

2323 Victory Avenue, Suite 700

Dallas, TX 75219

Telephone: 214.651.5000

Facsimile: 214.651.5940

[charlie.jones@haynesboone.com](mailto:charlie.jones@haynesboone.com)

-and-

Kelli S. Norfleet (admitted *pro hac vice*) Texas Bar No. 24070678

Arsalan Muhammad (admitted *pro hac vice*) Texas Bar No. 24074771

1221 McKinney Street, Suite 4000

Houston, Texas 77010

(t) (713) 547-2000

(f) (713) 236-5621

[kelli.norfleet@haynesboone.com](mailto:kelli.norfleet@haynesboone.com)

[arsalan.muhammad@haynesboone.com](mailto:arsalan.muhammad@haynesboone.com)

**Attorneys for Macquarie Commodities (USA) Inc.**

/s/ Justin B. Little

Justin B. Little, Esq.

REYNOLDS, REYNOLDS & LITTLE, LLC

Post Office Box 2863

Tuscaloosa, Alabama 35401

Telephone: (205) 391-0073

Facsimile: (205) 391-091

**Attorney for AgriFund, LLC, Ag Resource Holdings, LLC,**

**Ag Resource Management**

/s/ Christopher H. Meredith

Copeland Cook Taylor & Bush

1076 Highland, MS 39157

Telephone: 601-427-134

[cmeredith@cctb.com](mailto:cmeredith@cctb.com)

**Attorney for BankPlus**

/s/ Jeffrey R. Barber

Jeffrey R. Barber, MSB #1982  
Kristina M. Johnson, MSB #9382  
JONES WALKER LLP  
190 East Capitol Street, Suite 800 (39201)  
Post Office Box 427  
Jackson, Mississippi 39205-0427  
Telephone (601) 949-4900  
Telecopy (601) 949-4804  
jbarber@joneswalker.com  
kjohnson@joneswalker.com  
**Attorneys for Bank of Commerce  
And First South Farm Credit, ACA**

/s/ Gregory G. Hesse

Gregory G. Hesse (admitted *pro hac vice*)  
Texas Bar No. 09549419  
HUNTON ANDREWS KURTH LLP  
1445 Ross Avenue, Suite 3700  
Dallas, Texas 75202  
Tel: (214) 979-3000  
Fax: (214) 880-0011  
Email: [ghesse@HuntonAK.com](mailto:ghesse@HuntonAK.com)

Eric Wilson (admitted *pro hac vice*)  
Virginia Bar No. 95065  
HUNTON ANDREWS KURTH LLP  
951 East Byrd Street  
Richmond, Virginia 23219  
Tel: (804) 788-8200  
Fax: (804) 788-8218  
Email: [ewilson@HuntonAK.com](mailto:ewilson@HuntonAK.com)

and

Jeff Rawlings  
Rawlings & MacInnis, P.A.  
P.O. Box 1789  
Madison, MS 39130-1789  
Tel: (601) 898-1180 ext. 101  
Fax: (601) 605-8522  
Email: [jeff@rawlingsmacinnis.net](mailto:jeff@rawlingsmacinnis.net)  
**Counsel to Guaranty Bank & Trust Company**

/s/ James P. Wilson, Jr.

James P. Wilson, Jr. (MSB # 10783)  
Mitchell, McNutt & Sams, P.A.  
P.O. Box 1366  
Columbus, MS 39703  
jwilson@mitchellmcnutt.com  
(662) 328-2316  
**Attorney for Planters Bank & Trust Company**

/s/ Douglas C. Noble

Douglas C. Noble  
McCraney Montagnet, Quin & Noble, PLLC  
602 Steed Road, Suite 200  
Ridgeland, MS 39157  
601-707-5725  
(601) 510-2939 (fax)  
[dnoble@mmqlaw.com](mailto:dnoble@mmqlaw.com)  
**Attorneys for Staple Cotton Discount Corporation**

/s/ Jeffrey M. Williams

Jeffrey M. Williams  
Southern AgCredit, ACA  
402 West Parkway Place  
Ridgeland, MS 39157  
[Jeff.williams@SouthernAgCredit.com](mailto:Jeff.williams@SouthernAgCredit.com)  
(601) 499-2859  
**Attorneys for Southern AgCredit, ACA**

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**CERTIFICATE OF SERVICE**

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I hereby certify that a copy of the foregoing was filed electronically through the Court's CM/ECF system and served electronically on all parties enlisted to receive service of electronic notice, and the Notice of Electronic Filing indicates that Notice was electronically mailed to all parties in interest. A supplemental certificate of service will be filed with the Court indicating further service of the Joint Motion.

SO CERTIFIED, this the 12<sup>th</sup> day of 2022.

/s/ Eric L. Johnson