

The Mississippi Grain Warehouse Law codified at §§ 75-44-1 through 75-44-71 (the “Grain Warehouse Law”). Indeed, the Bonds provide separate and independent financial assurance. The Warehouseman’s Bond and the obligations thereunder relate solely to the Grain Warehouse Law and the Dealer Bond and the obligations thereunder relate solely to Grain Dealer Law.

2. In consideration for the issuance of the Bonds, the Debtors, along with other indemnitors, executed an indemnity agreement in favor of Travelers.

3. On September 29, 2021 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Mississippi (the “Court” or “Bankruptcy Court”).

4. On December 20, 2021, the Department of Agriculture filed its *Motion for Relief from the Automatic Stay* (the “Stay Relief Motion”) [Dkt Entry No. 1526], which sought, *inter alia*, to revoke the licenses held by Express Grain pursuant to the Grain Dealer Law and the Grain Warehouse Law and generally exercise its police powers and regulatory powers related to Express Grain.

5. On February 10, 2022, the Court granted the Stay Relief Motion.

6. On March 10, 2022, Gene Robertson, Director of the Grain Division of the Department of Agriculture, filed the *Petition for Determination and Payment of Claims* (the “Petition”) with the Department of Agriculture. The Petition seeks to initiate a claims process whereby interested parties seeking to make claims against the Bonds must file a claim with the Department of Agriculture within 60 days of a notice being first filed in the newspaper of general circulation for Leflore County, Mississippi. The Petition asserts that the Commissioner of the

Department of Agriculture (the “Commissioner”) is authorized to determine the validity of claims against the Bonds and Travelers’s liability under the Bonds.

7. On April 6, 2022, Travelers filed its response to the Petition (the “Travelers Response”). The Travelers Response, *inter alia*, (i) disputes the authority of the Commissioner to determine Travelers’s liability under the Warehouse Bond, (ii) asserts that, upon information and belief, farmers sold grain to Express Grain and did not store grain with Express Grain, which means any losses suffered by the farmers are not assured by the Warehouse Bond, and (iii) suggests a stay of any determination related to the Bonds until this Court has held the 557 Proceedings.² Travelers reserves all rights regarding the Petition, any associated proceeding, and any claims against the Bonds.

8. On April 12, 2022, the WHR Group, certain Production Lenders, and the Debtors filed the 9019 Motion. No farmers or groups of farmers were listed as movants. The 9019 Motion seeks Court approval of a *Settlement Agreement Related to Disputed Grain Assets* (the “Settlement Agreement”) under Federal Rule of Bankruptcy Procedure 9019.

9. According to the 9019 Motion, approximately \$58,942,674.30 of grain proceeds are available for distribution (the “Disputed Grain Asset Pool”). Upon information and belief, all farmers’ claims for grain proceeds are less than the amount of the Disputed Grain Asset Pool. The Settlement Agreement includes the following material terms:

- a. The Disputed Grain Asset Pool, net of (i) an estate carveout of \$1,125,000 and (ii) any amounts paid Nonconsenting Farmers pursuant to the Non-Consenting Farmer Reserve (the “Net Disputed Asset Pool”), will be divided up between the Consenting Farmers (and their respective

² Any capitalized terms not defined herein shall have the meanings ascribed them in the 9019 Motion or the Settlement Agreement.

Production Lenders) on one hand and the WHR, on the other hand. The split is approximately 16%/84% in favor of the WHR.

b. The Farmers are divided into four groups (i) Consenting Farmers, (ii) Disclaiming Farmers, (iii) Nonconsenting Farmers, and (iv) Defaulting Non-Participating Farmers.

i. Consenting Farmers have opted into the Settlement Agreement and will be paid pro rata from the 16% share of the Net Disputed Grain Asset Pool.

ii. Disclaiming Farmers have elected to disclaim any Assertion of Interest filed with the Court and any interest in the Disputed Grain Asset Pool, while receiving a release from the Debtors' estates.

iii. Nonconsenting Farmers will proceed with the 557 Proceedings, retain their rights against various parties outside of bankruptcy court, and are not granting or receiving releases.

iv. Defaulting Non-Participating Farmers failed to appear to prosecute their claims at the Initial Claims Hearing and their claims to grain will be disallowed pursuant to the pending objections.

c. WRH waive their claims against the Bonds.

10. Accordingly, if the Settlement Agreement is approved, the Consenting Farmers and the Disclaiming Farmers, as well as the Defaulting Non-Participating Farmers, to the extent any will exist, will have compromised or released their claims to the Disputed Grain Asset Pool.

COMMENT AND RESERVATION OF RIGHTS

11. Travelers is cognizant of the hurdles that the parties in these bankruptcy cases have faced and the herculean efforts of the parties that have resulted in the Settlement Agreement and the filing of the 9019 Motion. That being said, elections have consequences and the elections by the Consenting Farmers and the Disclaiming Farmers to compromise or release claims to the Net Disputed Grain Asset Pool impair Travelers's equitable subrogation rights to the Net Disputed Grain Asset Pool and release, in whole or in part, Express Grain as principal under the Bonds. These elections establish another defense to any claim by the Consenting Farmers and Disclaiming Farmers against the Bonds.

12. Mississippi law recognizes the fundamental principal "that a creditor cannot increase the secondarily liable entity's risk by actions that release the primarily responsible entity in whole or in part." *McClatchy v. Anthony Farms*, 936 So. 2d 456, 461 (Miss. Ct. App. 2006); *Restatement (Third) of Suretyship & Guaranty* § 36. Put another way, the release of the primarily liable party (the principal) establishes a release of the secondarily liable party (the surety). *Anthony v. Capel*, 1876 WL 7383 (Miss. 1876). Similarly, an obligee's impairment of the surety's equitable subrogation rights also establishes a defense to a bond claim by the obligee. *Restatement (Third) of Suretyship & Guaranty* § 44; see *Fort Worth Indep. Sch. Dist. v. Aetna Cas. & Sur. Co.*, 48 F.2d 1, 4 (5th Cir. 1931)

13. The release of Express Grain by the Consenting Farmers and the Disclaiming Farmers increases the risks to Travelers as it cannot equitably subrogate to the Consenting Farmers' and the Disclaiming Farmers' rights in the Net Disputed Grain Asset Pool. This is particularly true given that, according to Travelers's analysis, if the farmers were successful in the 557 Proceedings, the Net Disputed Grain Asset Pool would satisfy all claims for grain they sold to

the Debtors. But for the releases contemplated in the Settlement Agreement, Travelers could subrogate to these rights. For the avoidance of doubt, Travelers does not consent to the release, in whole or in part, of Express Grain or any release by potential bond claimants of their rights to the Net Disputed Grain Asset Pool.

14. Travelers files this *Comment and Reservation of Rights* to provide clarity and transparency regarding its position concerning the Consenting Farmers and the Disclaiming Farmers. Travelers has not laid in the weeds waiting to spring a trap on the farmers. Indeed, Travelers has previously apprised counsel for the various Farm Groups of the consequences of releasing Express Grain. In the end, the farmers must decide whether to prioritize the potential certainty of being a Consenting Farmer or Disclaiming Farmer but that choice also means that such farmers have released the principal under the Bonds and established a defense to a claim under the Bonds.

Wherefore, Travelers reserves all rights regarding the Settlement Agreement and any farmer that elects to not be a Non-Consenting Farmer.

Respectfully Submitted,

MANIER & HEROD, P.C.

/s/ Adrienne Fazio

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, a true and correct copy of the foregoing pleading was served by the Court's CM/ECF System on the parties who are registered to receive electronic filings in this case.

/s/ Adrienne B. Fazio

Adrienne B. Fazio