

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

In re: Express Grain Terminals, LLC,¹ <p style="text-align: right;">Debtor(s)</p>)))))))))	Case No. 21-11832-SDM Chapter 11
---	---	---

**SUPPLEMENTAL BRIEF IN SUPPORT OF JOINT MOTION FOR APPROVAL OF
SETTLEMENT AND COMPROMISE (DKT. #2718)**

As all involved are keenly aware, since Debtors filed for bankruptcy in September 2021, the interested parties have engaged in extensive litigation in this Court related to grain and grain proceeds. Last month, the interested parties participated in mediation and then continued their negotiations, which culminated in the interested parties developing a settlement framework with multiple options for farmers. Pursuant to that framework, some farmers elected to obtain a share of the cash proceeds without the need for further litigation; others elected to withdraw from the section 557 proceedings in the bankruptcy court to pursue claims in civil litigation (having to face all defenses available to defendants in that forum); and, others elected to try to obtain a larger share of the grain assets by pursuing their claims at the section 557 final determination hearing.

After submitting election forms and obtaining a continuance of the final determination hearing based on those election forms, counsel for three farmers with pending civil claims against UMB and purported other farmers (“Civil Counsel”) advised that their clients wanted to withdraw

¹ Jointly administered with *In re Express Biodiesel, LLC*, Case No. 21-11834-SDM and *In re Express Processing LLC*, Case No. 21-11835-SDM.

disclaimers of interest unless current and future civil defendants agreed to waive defenses that would otherwise be available to them. This supplemental brief will compare the farmers' options with and without the settlement, so any objectors can address the various effects in their objections to the *Joint Motion for Approval of Settlement and Compromise* (Dkt. #2718), which are due at 3 p.m. on April 22 (Dkt. #2720).²

I. BACKGROUND

Since the inception of these bankruptcy cases, the Court has exercised jurisdiction over the grain and grain proceeds at issue in the 557 proceedings. Indeed, this Court has exclusive jurisdiction over the grain and grain proceeds because the Debtors had title and/or possessory interest of that grain. 28 U.S.C. § 1334(e)(1) (the bankruptcy court “shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate”); 11 U.S.C. § 541(a)(1); *State of Mo. v. U.S. Bankruptcy Court for E.D. of Ark.*, 647 F.2d 768, 774-75 (8th Cir. 1981) (possessory and minute interest by debtor of grain enough to trigger bankruptcy court jurisdiction). The grain assets in this case include about \$57 million in proceeds. This means the Debtors' bankruptcy filing conferred this Court with jurisdiction over \$57 million in cash (as proceeds of the grain in question) and this Court now has the onerous task of determining who is entitled to receive that cash and how much, if anything, each interested party shall receive.

Section 557 requires the bankruptcy court to “expedite the procedures for the determination of interests in and the disposition of grain and the proceeds of grain.” 11 U.S.C. § 557(c)(1). This Court did so by implementing an expedited time frame for discovery and setting a section 557 final

² Since April 11, Civil Counsel have stated their concerns with the existing settlement language and requested certain additions. Counsel for UMB responded to proposed additional language via e-mail on April 12. UMB will reserve argument on any alterations proposed by any objectors until they formalize suggestions and proposals in the written objections due April 22.

determination hearing to establish interests in the grain assets. The section 557 final determination hearing was originally scheduled to begin on March 4 (Dkt. #1800). After outlining procedures for objecting to assertions of interest and clarifying the evidentiary burden of interested parties, the Court postponed the final determination hearing to March 31 (Dkt. #2206). Then, the Court postponed the final determination hearing to April 1 to enable the parties to participate in mediation (Dkt. #2543). Following mediation, the Court postponed the final determination hearing to April 18 to give the parties additional time to focus on settlement efforts (Dkt. #2624).

The parties then reached an agreement to resolve the 557 issues. That agreement contemplated minimum thresholds of farmers who either consented to the settlement and would be paid, or would disclaim their interest in the grain and grain proceeds. These thresholds were addressed by counsel for certain farmers on April 7, 2022. On that date, farmers' bankruptcy counsel updated the parties on the status of election forms collected and stated: "I am requesting the WRH's and the other parties to consider this result as meeting the initial threshold." On April 8, 2022, the parties advised the Court that they had agreed on a settlement structure. Farmers' bankruptcy counsel participated during the April 8 status hearing and confirmed that farmer election forms received to date had met initial thresholds. Based on the representations related to the settlement and the status of farmers' elections, the Court stayed pre-trial deadlines and indefinitely postponed the section 557 final determination hearing. At the April 8 status hearing, the parties also stated their plan to file the motion to approve settlement by Monday, April 11.

On the afternoon of April 11, Civil Counsel (specifically Mr. Don Barrett), who is counsel for three farmers in the civil case against UMB and purportedly other unidentified farmers, advised: "all our clients withdraw their 'Farmer Elections' and advise you not to file any motion based on these elections until this discrepancy [sic]." Based on communications from earlier in

the day on April 11, it appears Civil Counsel was attempting to withdraw farmer elections unless the settling parties agreed that any defenses that parties had emanating from the farmers' waiver and disclaimer³ of their claim to the grain at issue would be waived—a material change to the settlement terms.

Effectively, Civil Counsel want to alter the law as to who must bear the impact of a disclaimer. They propose that the parties who actually gave the disclaimer (the farmers who chose to withdraw from the section 557 proceedings) should not have to face any effects from their disclaimer while the parties who did not give a disclaimer (the warehouse receipt holders) should have to waive certain rights and defenses. In addition, Civil Counsel's request seeks to alter the impact of withdrawing from the section 557 proceedings, even in the absence of a settlement. And, they want to interfere with the settlement after having already signed election forms and after all parties relied upon those election forms in asking the Court to continue the final determination hearing. Further, this improper attempt to withdraw certain farmers' elections, if permitted by the Court, would eliminate the benefits these farmers, *as well as other farmers*, would receive only if the settlement is approved. This supplemental brief will address those issues.

II. OPTIONS IF SETTLEMENT IS APPROVED AND CONDITIONS PRECEDENT ARE SATISFIED

Farmers have four options if the settlement is approved and all conditions precedent are met:

³ The disclaimer and waiver terms come from the election forms signed by Disclaiming Farmers, which state: "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." *See* Exhibit 1 attached hereto (emphasis added).

Option 1 (get cash now without the need for additional litigation): A farmer can consent to the settlement agreement to receive a proportionate share of the farmer settlement fund (“Consenting Farmers”). Consenting Farmers would (1) receive cash in the near future in exchange for mutual releases with settling parties, including a release of all claims by the bankruptcy estate (meaning the bankruptcy estate cannot assert breach of contract or Chapter 5 claims, or seek to claw back any funds these farmers received from the Debtors during the 90-day period before Debtors filed for bankruptcy or after Debtors filed for bankruptcy), (2) recover attorneys’ fees paid to date via the farmer settlement fund, and (3) save fees because they would no longer be pursuing litigation related to the grain assets.

Option 2 (withdraw assertion of interest in bankruptcy case to try to pursue claims elsewhere): A farmer can elect to withdraw from the section 557 proceedings and disclaim any interest in the grain assets at issue in the bankruptcy proceeding (“Disclaiming Farmers”). If Disclaiming Farmers plan to pursue claims in civil litigation, they would have to address defenses related to their waiver and disclaimer in the bankruptcy case, as well as all other defenses available to the defendants in the civil litigation. These farmers get benefits via settlement that are not otherwise available: (1) they would recover attorneys’ fees paid to date via the farmer settlement fund, and (2) they would obtain a release of all claims by the bankruptcy estate (meaning the bankruptcy estate cannot assert breach of contract or Chapter 5 claims, or seek to claw back any funds these farmers received from the Debtors during the 90-day period before Debtors filed for bankruptcy or after Debtors filed for bankruptcy). Moreover, Disclaiming Farmers have the option to change their election to become a Consenting Farmer, so they could share in the farmer settlement fund in exchange for mutual releases. This option, however, expires 10 days after the entry of the Order approving the settlement.

Option 3 (pursue assertion of interest via section 557 final determination hearing):

Farmers who want to advocate for a larger share of the grain proceeds can do so at the section 557 final determination hearing. These farmers have the risk of recovering nothing or less than they would have recovered if they had elected to become a Consenting Farmer; these farmers do not receive a release from the bankruptcy estate (meaning the bankruptcy estate could assert breach of contract or Chapter 5 claims, or seek to claw back any funds these farmers received from the Debtors during the 90-day period before Debtors filed for bankruptcy or after Debtors filed for bankruptcy); and, these farmers may also pursue civil litigation (but would have to address all defenses to that litigation). To avoid these risks and share in the farmer settlement fund in exchange for mutual releases, these farmers could change their election to become a Consenting Farmer. This option, however, expires 10 days after the entry of the Order approving the settlement.

Option 4 (non-participating farmers): Farmers who assert an interest in the grain assets but (a) have not elected to be a Consenting Farmer and (b) have not elected to be a Disclaiming Farmer on the Farmer Election (“Non-Participating Farmer”), would need to appear at an initial claims hearing in the bankruptcy case. Failure to appear at such hearing could result in any objection to the claim of the Non-Participating Farmer being sustained and such Non-Participating Farmer would have only a general unsecured claim in the non-objected to amount. If a Non-Participating Farmer appears at the initial claims hearing, the claims of such Non-Participating Farmers would then be taken up as part of the final determination hearing. These farmers also have the option to become a Consenting Farmer, so they could share in the farmer settlement fund in exchange for mutual releases. This option, however, expires 10 days after the entry of the Order approving the settlement.

III. OPTIONS IF SETTLEMENT FAILS

If the settlement does not proceed, farmers have fewer options.⁴

Without a settlement, is there an “option 1” so farmers can get cash without the need for additional litigation? No. If settlement fails, the “option 1” farmers, and indirectly production lenders, would lose all benefits outlined above. To try to recover any grain proceeds without a settlement, these farmers and production lenders would need to advocate for a share of the grain assets at the section 557 final determination hearing or try to pursue claims in civil litigation. The “option 1” farmers would also be subject to any claims brought by the bankruptcy estate or other releasing parties, who do not release absent approval of the settlement.

Without a settlement, is there an “option 2” for farmers who do not want the bankruptcy court to address their assertion of interest? Yes. These farmers can elect to withdraw from the section 557 proceedings. If these farmers plan to pursue claims in civil litigation, they would still have to address defenses related to their waiver and disclaimer in the bankruptcy case, as well as any other defenses available to the civil defendants. *These defenses exist whether a farmer withdraws with a settlement or withdraws without a settlement.*

Moreover, without the settlement, these farmers would *not* get the benefits of recovering attorneys’ fees via the farmer settlement fund and these farmers would *not* obtain a release from the bankruptcy estate, so they could be the target of Chapter 5 causes of action seeking to claw back certain funds paid by the Debtors to the farmers or other claims. According to the Schedule included as part of the Statement of Financial Affairs filed by Debtor Express Grain Terminals, LLC (Dkt. # 1701) (the “SOFA Schedule”), approximately 50% of the farmers who (as of April 11, 2022) picked either “option 1” or “option 2” received payments in the 90 days prior to the

⁴ Exhibit 2 attached hereto compares the options with a settlement and without a settlement.

bankruptcy filing that would be subject to potential preference claw-back, in the aggregate amount of nearly \$22,000,000.00.⁵ Additionally, as outlined in the Amended Chapter 11 Monthly Operating Report for the Month Ending 9/30/2021 (Dkt. # 1875) and the Amended Chapter 11 Monthly Operating Report for the Month Ending 10/31/2021 (Dkt. # 1876), each filed on behalf of Debtor Express Grain Terminals, LLC, several of the farmers who (as of April 11, 2022) picked either “option 1” or “option 2” received or benefitted from payments that occurred on or after September 29, 2021 and would be subject to Section 549 claw-back liability, in the aggregate amount of approximately \$5,200,000.00.⁶ Under the circumstances of this case, there are likely no defenses to these Section 549 claw-back claims. Finally, many farmers stopped delivering grain to the Debtors after the bankruptcy filing. Such parties may have sold their grain to alternative outlets, which potentially gives rise to breach of contract claims held and recoverable by the bankruptcy estates. Thus, if the settlement fails, these farmers would lose a significant benefit related to claims belonging to the bankruptcy estate.

Without a settlement, is there an “option 3” for farmers who want to pursue their assertion of interest via section 557 final determination hearing? Yes. Just like if there was a settlement, farmers can elect to present their claims related to the grain proceeds at the section 557 final determination hearing; they would face the risk of Chapter 5 causes of action seeking to claw back certain funds paid by the Debtors to the farmers, as well as other claims;⁷ and, if these farmers

⁵ These calculations include only those farmers who have made a settlement election of “option 1” or “option 2.” Other farmers may have additional exposure related to potential preference claw-backs. Additionally, these calculations are based solely on the Debtors’ records as filed with the Court. UMB reserves its rights to recalculate and reevaluate the figures included herein.

⁶ These calculations include only those farmers who have made a settlement election of “option 1” or “option 2.” Other farmers may have additional exposure related to potential preference claw-backs. Additionally, these calculations are based solely on the Debtors’ records as filed with the Court. UMB reserves its rights to recalculate and reevaluate the figures included herein.

⁷ According to the SOFA Schedule, several of the farmers that (as of April 11, 2022) picked “option 3” received payments in the 90 days prior to the bankruptcy filing that would be subject to potential preference claw-back, in the

planned to pursue civil litigation, they would have to address any additional defenses created by the bankruptcy court's rulings related to the grain at issue. Without a settlement, however, these farmers would lose the ability to select "option 1" to allow them to share in the farmer settlement fund, without the need for further litigation, in exchange for mutual releases.

Without a settlement, is there an "option 4" for farmers who do not want to participate? Yes. There are consequences to not participating, but those exist regardless of whether the settlement proceeds. Farmers would need to participate at the section 557 final determination hearing to pursue any claims to grain and grain proceeds. A failure to appear and participate would waive any claim to those assets. If the settlement fails, however, these farmers would lose the ability to select "option 1" to allow them to share in the farmer settlement fund, without the need for further litigation, in exchange for mutual releases.

IV. CONCLUSION

There are numerous issues with the attempts made to date by Civil Counsel to upend approval of the settlement:

First, Civil Counsel are seeking to deprive *all parties* of the benefits of the settlement, including other farmers, unless certain settling parties agree to a new term that could potentially benefit only "option 2" farmers in their current or future civil litigation.

Second, the "option 2" farmers are concerned about defenses that arise based on their decision to abandon rights by withdrawing from the section 557 proceeding—*these defenses were not created by the settlement*. If the settlement fails, "option 2" farmers will face the same predicament: either pursue claims at the section 557 final determination hearing (and face any

aggregate amount of nearly \$1,000,000.00. This calculation includes only those farmers who have made a settlement election of "option 3." Other farmers may have additional exposure related to potential preference claw-backs. Additionally, these calculations are based solely on the Debtors' records as filed with the Court. UMB reserves its rights to recalculate and reevaluate the figures included herein.

defenses related thereto in later civil litigation) or withdraw from the section 557 proceedings. They may also try to pursue civil claims (and face any defenses related to withdrawal in that litigation). At least with the settlement, the latter provides the “option 2” farmers with the benefits of recovering attorneys’ fees from the farmer settlement fund and receiving a release from the bankruptcy estate.

Third, by their very definition, the “option 2” farmers are not parties to the settlement. They chose to opt out of the settlement by disclaiming and waiving any interest in the grain so they could try their luck in a civil forum,⁸ and it is reasonable for parties to litigation to maintain and pursue any and all available defenses to such litigation, especially when there was never a representation related to waiver of those defenses. The legal effects for “option 2” farmers in civil litigation mirror those that would occur in the absence of a settlement should such parties elect to disclaim their interests in the grain.

Fourth, Civil Counsel did not raise any concerns until after farmers submitted election forms. The other parties and Court relied on those elections when continuing the April 18 final determination hearing.

Fifth, if “option 2” farmers no longer want to opt out of the section 557 proceedings due to the effects of their withdrawal, they can elect to become a Consenting Farmer to receive cash from the settlement fund now and avoid the expense and risk of further litigation. These farmers have an alternative that would not destroy the settlement and not deprive the other parties of the benefits of that settlement.

⁸ UMB has moved to dismiss the current civil litigation, and it plans to continue vigorously defending against those claims and any other claims asserted by Disclaiming Farmers in the future, which UMB believes are without legal or factual merit.

Date: April 21, 2022.

Respectfully submitted:

ATTORNEYS FOR UMB BANK, N.A.

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

/s/ R. Spencer Clift, III
R. Spencer Clift, III (MSB #100208)
E. Franklin Childress, Jr. (TN #7040)
(Admitted Pro Hac Vice)
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Tel: (901) 577-2216
Fax: (901) 577-0834
sclift@bakerdonelson.com
fchildress@bakerdonelson.com

SPENCER FANE LLP

/s/ Eric L. Johnson
Eric L. Johnson (MOB # 53131)
James A. Lodoen (MN # 0173605)
Peter L. Riggs (MOB # 57268)
Andrea M. Chase (MOB # 66019)
Kersten L. Holzhueter (MOB # 62962)
(All Admitted Pro Hac Vice)
1000 Walnut St., Suite 1400
Kansas City, Missouri 64106
Tel: (816) 474-8100
Fax: (816) 474-3216
ejohnson@spencerfane.com
jlodoen@spencerfane.com
priggs@spencerfane.com
achase@spencerfane.com
kholzhueter@spencerfane.com

ATTORNEYS FOR MACQUARIE COMMODITIES (USA) INC.

**BRUNINI, GRANTHAM, GROWER &
HEWES, PLLC**

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

HAYNES AND BOONE, LLP

/s/ Arsalan Muhammad
Kelli S. Norfleet (admitted *pro hac vice*)
Texas Bar No. 24070678
Arsalan Muhammad (admitted *pro hac vice*)
Texas State Bar No. 24074771
Garrett Martin (admitted *pro hac vice*)
Texas Bar No. 24050995
1221 McKinney Street, Suite 4000
Houston, Texas 77010
(t) (713) 547-2000
(f) (713) 236-5621
kelli.norfleet@haynesboone.com
arsalan.muhammad@haynesboone.com
garrett.martin@haynesboone.com

- and -

/s/ Charles M. Jones, II
Charles M. Jones, II (admitted *pro hac vice*)
Texas State Bar No. 24054941
Martha Wyrick (admitted *pro hac vice*)
Texas State Bar No. 24101606
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Telephone: 214.651.5000
Facsimile: 214.651.5940
charlie.jones@haynesboone.com
martha.wyrick@haynesboone.com

**ATTORNEYS FOR STONEX COMMODITY SOLUTIONS LLC F/K/A FCSTONE
MERCHANT SERVICES, LLC**

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)
Joshua W. Stover (MS Bar No. 105472)
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

CERTIFICATE OF SERVICE

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.

SO CERTIFIED, this the 21st day of April 2022.

/s/ Eric L. Johnson