IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

In re:	)	
Express Grain Terminals, LLC,	)	**Case No. 21-11832-SDM**
(Jointly Administered)	)	**Chapter 11**
Debtor(s)	)	

DISCLAIMING FARMERS' LIMITED OBJECTION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AND COMPROMISE

The farmers listed on the attached Exhibit A ("Disclaiming Farmers") hereby submit this limited objection to the Joint Motion for Approval of Settlement and Compromise ("Settlement Motion") filed by the Debtors, UMB Bank, N.A. ("UMB"), and certain other movants. Mot., ECF. No. 2718. On its face, the Settlement Motion appears innocuous. It seeks approval of a proposed settlement agreement ("Proposed Settlement Agreement"), Mot. Ex. B., ECF No. 2718-2, that purports to resolve certain disputed interests in grain and grain proceeds under 11 U.S.C. § 557, and is accompanied by a proposed order ("Proposed Order"), Mot. Ex. A, ECF. No. 2718-1, that purports to approve the settlement under Bankruptcy Rule 9019. But below the surface, it is considerably more far-reaching in scope. In fact, as drafted, the Proposed Settlement Agreement in combination with the Proposed Order will likely compromise claims, causes of action, cross claims, or counterclaims sounding in tort, contract, or statute that are not directly related to the determination of interests in the grain and grain proceeds, claims that the Court has expressly ordered to be reserved for non-bankruptcy adjudication. Given its excessive scope, the Settlement Agreement is not fair, equitable, or in the best interest of the estate. Unless appropriate limiting

language is included in any final order approving the Proposed Settlement Agreement, the Court should deny the Settlement Motion.

I. INTRODUCTION

Although the Disclaiming Farmers do not generally oppose the overall resolution described in the Settlement Motion, they remain extremely concerned that, whether intentional or not, certain language in the Proposed Settlement Agreement and the Proposed Order—documents largely drafted by the WHR Group[1]—will improperly shield certain Parties from liability or otherwise advantage them in present or future litigation, including in the District Court Action. The Disclaiming Farmers therefore file this objection out of an abundance of caution to obtain continuing affirmation from this Court, by way of appropriate language in any order granting the Settlement Motion, that their rights in respect of the District Court Action remain reserved and that their selection of Option 2 on their Farmer Elections will not create new defenses to, or otherwise adversely impact, their claims against UMB in that action or in any case they may file in the future. Contrary to the assertions of the WHR Group in their Supplemental Brief in Support of Joint Motion for Approval of Settlement and Compromise, ECF No. 2758[2] at pages 2 and 4, the Disclaiming Farmers seek only neutrality, not an advantage.

The Disclaiming Farmers have attempted to resolve this issue with UMB and will continue to do so in advance of the April 25 hearing. To date, however, the Disclaiming Farmers have been unsuccessful in those efforts, which merely reinforces their concerns regarding certain equivocal language. To that end, attached as Exhibit B is a red-lined version of the Proposed Order which

[1] Unless otherwise defined, capitalized terms used in this limited objection have the meaning given them in the Settlement Agreement.

[2] That Brief was filed after hours on April 21, 2022, and contains other misstatements and inaccuracies as well, which the Disclaiming Farmers may address at the hearing, or in a supplemental filing before the hearing.

includes language making clear that neither the Disclaiming Farmers nor the WHR Group are obtaining any advantage in the District Court Action, or otherwise, by executing the Farmer Elections or entering into the Proposed Settlement Agreement, respectively.

II. LEGAL STANDARD

A bankruptcy court may approve a compromise or settlement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure only when it determines that the settlement is "fair, equitable and in the best interest of the estate." *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop, Inc*., (*In re Cajun Elec. Power Coop., Inc*.), 119 F.3d 349, 355 (5th Cir. 1997); *Rivercity v. Herpel*, (*In re Jackson Brewing Co*.), 624 F.2d 599, 602 (5th Cir. 1980) (internal quotations omitted). The Court must make a well-informed decision "comparing the terms of the compromise with the likely rewards of litigation." *Id*. at 356. To that end, sufficient evidence must be presented by the movant to allow a bankruptcy judge to come to an educated estimate of the "complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to the full and fair assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

"[U]nder the 'fair and equitable' standard, the court looks to the fairness of the settlement to the other parties, *i.e.*, the parties who did not settle." *In re Washington Mutual, Inc.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011) (quoting *Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 645 (3d Cir. 2006)). In determining whether a settlement is fair and equitable to those parties, "[a] bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all

other factors bearing on the wisdom of the compromise." *Official Comm. of Unsecured Creditors v. Moeller*, (*In re Age Ref., Inc.*), 801 F.3d 530, 540 (5th Cir. 2015). These other factors include: (1) the best interests of the creditors, with proper deference to their reasonable views and (2) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion. *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp*., (*In re Foster Mortg. Corp*.), 68 F.3d 914, 917-18 (5th Cir. 1995). If, after engaging in such an analysis, any of these factors is unsatisfied, the authority to deny approval of a compromise and settlement is within the discretion of the bankruptcy court. *In re Myers*, 546 B.R. 363, 376 (Bankr. S.D. Miss. 2016).

The reasonableness of a proposed settlement also depends in important part on the context in which it is negotiated, and certain types of circumstances warrant heightened scrutiny—for example, where, as here, a settlement by its sheer size has obvious centrality to the future course of the proceedings. As in the case of a sale of substantially all of a debtor's assets prior to and without the protections of the chapter 11 plan process, a pre-plan settlement such as this one, that apportions virtually all of the estate's assets among the various creditor constituencies, should be closely scrutinized. The Debtors and the WHR Group should not be able to short circuit the requirements of chapter 11 for confirmation of a reorganization plan by establishing the terms of a plan *sub rosa* in connection with a sweeping settlement such as this. *See Pension Benefit Guar. Corp. v. Braniff Airways, Inc*., (*In re Braniff Airways, Inc*.), 700 F.2d 935, 940 (5th Cir.1983).

III. ARGUMENT

A. The Proposed Settlement Agreement And The Proposed Order Contain Language That Runs Counter To This Court's Prior 557 Procedures Order And That Could Be Used To Undermine The Disclaiming Farmers' Claims In The District Court Action.

The Disclaiming Farmers' concerns with respect to the Settlement Motion center on the potential unintended (or perhaps intended) consequences of certain carefully-crafted nomenclature contained in the Proposed Settlement Agreement and the Proposed Order, nomenclature that

undermines their rights in derogation of this Court's prior order entered in connection with the section 557 claims process. Specifically, certain equivocal language undercuts the rights of the Disclaiming Farmers that were expressly preserved by this Court as "Excluded Claims" in its Order Establishing Procedures for Determination of Rights, Ownership Interests, Liens, Security Interests and All Other Interests in and to Grain and Proceeds of Grain. *See* Order, ECF No. 1070 ("557 Procedures Order"). The Settlement Motion should not be granted unless it is clear that those protections remain in place. Only then will the Proposed Settlement Agreement be fair and equitable with regard to the parties who are not "Parties" to that agreement but who are nonetheless are materially affected by it, *i.e*., the Disclaiming Farmers.

1. <u>The 557 Procedures Order Reserved The Disclaiming Farmers' Rights By Excluding Claims Such As Those Alleged In The District Court Action.</u>

In the 557 Procedures Order, the Court acknowledged the existence of the District Court Action and prudently excluded from the Interest Procedures claims such as those asserted by the Disclaiming Farmers' against UMB while simultaneously reserving all of their rights in that regard:

> k. Other Claims Preserved. These Interest Procedures will not apply to the determination of any claims, causes of action, cross claims, or counterclaims sounding in tort, contract, or statute that are not directly related to the determination of interests in the Pre-Petition Grain and the Proceeds pursuant to 11 U.S.C. § 557 (the "Excluded Claims"). The rights of all parties in interest regarding the Excluded Claims are expressly reserved.

557 Procedures Order at 7. Yet certain language in the Proposed Settlement Agreement and the Proposed Order harbor the potential to undermine such protections.

2. <u>The Proposed Settlement Agreement And The Proposed Order Contain Language That Undercuts Those Rights.</u>

Section 5 of the Proposed Settlement Agreement, for example, contains broad releases by the Debtors in favor of all Parties, including the Disclaiming Farmers. But those releases must be read in conjunction with decretal paragraph 3d. of the Proposed Order, which states that:

> d. 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.

Proposed Order at 3. In other words, the comprehensive releases granted to the Parties by the Debtors in the Settlement Agreement—which includes a release of UMB—may ultimately be used against the Disclaiming Farmers by the WHR Group arguing that the Proposed Order prevents the Disclaiming Farmers from asserting such claims, even tort claims against the WHR Group.

Section 3.5 of the Proposed Settlement Agreement carries this concept forward by providing that:

> The Settlement Order shall provide that the payment of the Consenting Farmer Share and the WHR Group Share as set forth in Sections 3.2 and 3.3 shall be indefeasibly paid to the respective beneficiaries of such payments and *not otherwise subject to claw-back, disgorgement, Claims, or recovery by any other party including a Disclaiming Farmer* or Non-Consenting Farmer.

Proposed Settlement Agreement at 6-7 (italicized emphasis added). Again, UMB could argue that amounts paid to it from the settlement are not subject to recovery by anyone, even the Disclaiming Farmers as plaintiffs in the District Court Action, regardless of whether they represent ill-gotten gain.

Finally, although Section 11.8 of the Proposed Settlement Agreement expressly provides that the WHR Group does not release any causes of action or rights relative to the Disclaiming Farmers and reserves all of the their rights and defenses in the District Court Action, **<u>there is no</u>**

similar reservation of rights in favor of the Disclaiming Farmers. Moreover, the "Farmer Election" provides, in relevant part that:

> 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.

(*italicized emphasis added*). Once more, UMB could argue that such language prevents recoveries against it in the District Court Action, as the italicized text goes beyond the defined term Disputed Grain Asset Pool as used elsewhere.

3. The Proposed Order May Be Used By UMB To Preclude Claims In The District Court Action And This Court Therefore Lacks The Jurisdiction Or Adjudicative Authority To Enter Such An Order.

In light of such language, it is not difficult to foresee an attempt by UMB to construct an argument asserting that the Proposed Order bars claims against it that relate in any way to the claims being settled through the Debtor releases, or that the Proposed Settlement Agreement somehow fixes the amount of damages that can be recovered from UMB or the WHR Group on account of their own alleged wrongdoing. Clearly, that would be an inequitable and unjust—and legally impermissible—result.

Moreover, to the extent the Parties to the Proposed Settlement Agreement *do* intend for any provision of the Proposed Order or the Proposed Settlement Agreement to release, preclude, or otherwise adversely impact the claims and causes of action of the Disclaiming Farmers against UMB in the District Court Action, this Court lacks jurisdiction to enter the Proposed Order under the auspices of the Debtors' bankruptcy cases because such claims and causes of action do not arise under the Bankruptcy Code, did not arise in the Debtors' bankruptcy cases, and do not relate

to the Debtors' bankruptcy cases. *See* 28 U.S.C. § 1334(b). Furthermore, such a disguised release of claims by a non-debtor against another non-debtor is not authorized by the Bankruptcy Code, or (to the extent ordered solely by this Court) the United States Constitution as interpreted by the United States Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011).

4. Protective Language Must Be Included In The Proposed Order.

The simplest way to eliminate any possibility of an improper future attempt to utilize the Court's approval of the Proposed Settlement Agreement as a means of foreclosing or limiting any claims or causes of action (or defenses) in the District Court Action is to include in any order granting the Settlement Motion language expressly circumscribing the scope thereof. The Disclaiming Farmers respectfully submit that including the following language (the "Protective Language") in the Proposed Order would adequately resolve its concerns:

> Notwithstanding anything contained in the Settlement Agreement (including Exhibit A thereof) or the Joint Motion, or anything contained in another portion of this Order that is inconsistent with this paragraph, the Settlement Agreement shall not, and this Order is expressly intended not to:
>
> > (i) confer any benefit or advantage whatsoever upon any party in the District Court Action in respect of any Claims or Defenses asserted, unasserted, or that may in the future be asserted therein by any party in such action; or
> >
> > (ii) release, discharge, diminish, impact, impair, or alter in any manner (i) any Claims that the Disclaiming Farmers may have against any Party other than the Debtors, including Claims, asserted, unasserted, or that may in the future be asserted, in the District Court Action, or (ii) any litigation now or hereafter commenced by any Disclaiming Farmer against third parties.

B. The Conduct Of The Parties Lends Credence To The Concerns Of The Disclaiming Farmers Regarding The Potential Effect Of The Proposed Settlement Agreement And The Proposed Order On The District Court Action.

On March 15, 2022, the Court ordered the parties to the Interest Procedures to mediation and appointed Judge Brown as the mediator. *See* Med. Ord., ECF No. 2543. On March 17, 2022, those parties conducted a mediation with the Disclaiming Farmers each represented by their respective bankruptcy counsel. Counsel for the Disclaiming Farmers in the District Court Action sought to attend the mediation, but were informed by the mediator that the farmers' claims in that action were not within the scope of the negotiation and that such counsel need not participate. District Court Action counsel, relying on the representations of the mediator as to the scope of the negotiations, left the mediation.

At approximately noon on April 6, 2022, the Disclaiming Farmers received by email a draft version of the Proposed Settlement Agreement and were informed that the drafting parties, including UMB, needed a decision by farmers as to their election of several options within 24 hours. After the Disclaiming Farmers submitted their Farmer Election forms, District Court Action counsel expressed concern that the language of the Farmer Election could be read as contradicting the (then draft) Proposed Settlement Agreement's stated reservation of Disclaiming Farmers' rights in the District Court Action.

On April 12, 2022, UMB and other drafting parties filed the Settlement Motion, noting that "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.***" *See* ECF No. 2718, at p. 9. The italicized language did not appear in the draft versions of the motion that were sent to the Disclaiming Farmers' counsel. Also on April 12, 2022, District Court Action counsel proposed to UMB's counsel that certain clarifying language be added to the Settlement Agreement and Farmer Election forms to clearly state that,

by execution of the Farmer Election form and operation of the Settlement Agreement, no new defenses would be created for UMB or any other member of the WHR Group. To date, UMB has declined to add the proposed clarifying language, stating that such would be a "material change" to the Proposed Settlement Agreement. Accordingly, on April 20, bankruptcy counsel for many of the Disclaiming Farmers proposed the addition of the Protective Language to the Proposed Order.

Based on UMB's initial refusal to clarify that Disclaiming Farmers' election would not create new defenses, District Court Action counsel notified UMB and the other settling parties that the farmers who had elected the "Disclaiming" option revoked their Farmer Elections, pending clarification. And, as a final protective measure, the Disclaiming Farmers filed this limited objection requesting that the Court include the Protective Language in any final order approving the Proposed Settlement Agreement.

C. Disclaiming Farmers Never Agreed To A Settlement Which Would Create New Defenses For UMB.

Mississippi law controls the question of whether the elements of a contract are present. Under Mississippi law, the existence of a contract is a question of fact. *Hunt v. Coker*, 741 So.2d 1011, 1014 (Miss. Ct. App. 1999). The elements of a valid, binding contract are two or more contracting parties; consideration; a sufficiently definite agreement; parties with legal capacity to make the contract; mutual assent at the time of its formation; and no legal prohibition precluding the contract being made. *See* generally, *Stellar Group v. Pilgrim's Pride Corp*., 2007 WL 955293, at *4 (S.D. Miss. 2007) (citations omitted).

1. Disclaiming Farmers Never Agreed To A Settlement Creating New Defenses.

Again, Disclaiming Farmers object to the Settlement Motion to the extent that any interested party in the 557 proceedings may contend that the Proposed Settlement Agreement and Farmer Election creates any new defenses to their claims in the Class Action or other non-

bankruptcy litigation. Disclaiming Farmers are not even signatories to the Proposed Settlement Agreement. The Proposed Settlement Agreement, at page 5, defines "**Party**" and "**Parties**" to mean "the Debtors, UMB, StoneX, Macquarie, the Production Lenders and the Consenting Farmers." Disclaiming Farmers are only brought into the multi-party settlement by way of the Farmer Election form.

2. <u>The Farmer Election Is A One-Sided Writing With No Counterparty to the Disclaiming Farmers.</u>

The Farmer Election form does not constitute a valid agreement between Disclaiming Farmers and UMB that would permit UMB to assert any new defenses arising out of the settlement. The Disclaiming Farmers never bargained for the creation of any new defenses based on the settlement. Moreover, UMB is providing zero consideration to the Disclaiming Farmers under the Proposed Settlement Agreement. Instead, the Disclaiming Farmers' execution of the Farmer Election form is a condition precedent to the consummation of the Proposed Settlement Agreement. The Farmer Election form:

1) is limited to the disposition of the 557 issues, per the Court's Order; and

2) was the product of negotiations and mediation which were undertaken with the express understanding that farmers retained their rights to pursue their District Court Action claims.

3. <u>The Proposed Settlement Agreement Itself Contemplates that Elections May Be Changed At Any Time Before Its Effective Date.</u>

If Mississippi law regarding contract formation were not enough, the Proposed Settlement Agreement itself actually contemplates that a Farmer Election may be changed at any time before the Effective Date. As mentioned above, the drafters of the Proposed Settlement Agreement chose to characterize Farmer Elections as conditions precedent to the Effective Date of the agreement. As such, the argument that farmers cannot change their election before the Effective Date of the agreement is plain sophistry.

Section 2.14 of the Proposed Settlement Agreement defines its "Effective Date" as the later of (a) the date the Proposed Settlement Order becoming final and non-appealable, or (b) the date all the conditions precedent in Section 14 of the agreement are satisfied or waived. Section 14 of the Proposed Settlement Agreement in turn sets up those conditions precedent. Entitled *Conditions Precedent to the Effectiveness of the Agreement*, it establishes the following as conditions to effectiveness—*i.e.*, to the binding effect—of the Proposed Settlement Agreement that can either be waived by the WHR Group or give it an ability to scuttle the settlement entirely:

> (i) meeting a deadline for submission of Farmer Elections (14.1);
>
> (ii) achieving *initial* benchmarks of sufficient participation in terms of Farmer Elections (14.1.1);
>
> (iii) achieving *final* benchmarks of sufficient participation in terms of Farmer Elections (14.1.2):
>
> (iv) retracting or modifying a Farmer Election once submitted unless a Disclaiming Farmer wants to become a Consenting Farmer (14.1); and
>
> (v) invalidating sufficient numbers of Farmer Elections so as to materially undermine the benchmarks (14.1.4).

Based on these conditions to effectiveness, the WHR Group can decide to go forward with the settlement or scuttle it depending on whether (a) farmers have submitted a sufficient number of desired Farmer Elections, (b) farmers have retracted or modified their elections so as to make the settlement undesirable, or (c) a sufficient number of elections are invalidated so as to make the settlement undesirable. In other words, the WHR Group has decided to keep the agreement inchoate until it is certain that it has achieved its goal of gaining satisfactory closure and finality to the claims being settled. Indeed, to argue that farmers may not change their Farmer Elections before the Proposed Settlement Agreement even becomes enforceable is not only belied by the

plain language of the agreement itself—an agreement largely drafted by the WHR Group—it is simply nonsensical.

IV. CONCLUSION

If the Protective Language is agreeable to the Parties and the Court, then the Disclaiming Farmers' limited objection is resolved. If, for some reason, however, the Parties are unable or unwilling to appropriately clarify the impact of the Farmer Election forms, then, regrettably, the Court must deny the Settlement Motion because: (i) it is not fair and equitable, especially with regard to those parties in interest who are not "Parties" to the Proposed Settlement Agreement, but who are nonetheless are materially affected by it, *i.e.*, the Disclaiming Farmers; (ii) the conduct of the parties and totality of the circumstances indicates the parties did not have a meeting of the minds and an enforceable contract is a prerequisite to a Rule 9019 motion; (iii) the settlement represents a *sub rosa* plan; and (iv) this Court lacks jurisdiction or adjudicative authority to enter the Proposed Order as submitted.

Dated: April 22, 2022.

Respectfully submitted,

/s/ *Michael P. O'Neil*
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CERTIFICATE OF SERVICE

I, Michael P. O'Neil, do hereby certify that a copy of the foregoing was filed electronically through the Court's CM/ECF system before 3:00 p.m. CDT and served electronically on all parties listed to receive service of electronic notice and the Notice of Electronic Filing indicates that Notice was electronically mailed to all such parties.

Dated: April 22, 2022.

/s/ *Michael P. O'Neil*
Michael P. O'Neil