UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN

In re:	)	
Express Grain Terminals, LLC,[1]	)	**Case No. 21-11832-SDM**
	)	**Chapter 11**
Debtor(s)	)	

REPLY TO DISCLAIMING FARMERS' LIMITED OBJECTION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AND COMPROMISE (DKT. #2760) AND FARM GROUP'S RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AND COMPROMISE (DKT. # 2761)

UMB Bank, N.A. ("UMB"), by and through undersigned counsel, hereby submits its reply to Disclaiming Farmers'[2] *Limited Object to Joint Motion for Approval of Settlement and Compromise* (Dkt. # 2760) ("Disclaiming Farmer Objection") and the Farm Group's *Response to Joint Motion for Approval of Settlement and Compromise* (Dkt. #2761) (the "Farm Group Response").[3] In support thereof, UMB respectfully states as follows:

I. INTRODUCTION

After significant litigation, mediation and extensive negotiations over the statutorily abbreviated period of only a few months, various parties in interest, including the Debtors, WHR Group,[4] Production Lenders, and various farmers, reached a hard-fought agreement to resolve the

[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.

[2] "Disclaiming Farmers," as used herein, includes all farmers identified on Exhibit A to the Disclaiming Farmer Objection.

[3] Farm Groups I, II, and III and the Mississippi Department of Agriculture and Commerce filed joinders to the Farm Group Response. [Dkt. ## 2762, 2763, 2765].

[4] The WHR Group is comprised of UMB, StoneX Commodity Solutions LLC f/k/a FCStone Merchant Services, LLC ("StoneX"), and Macquarie Commodities (USA) Inc. ("Macquarie").

557 issues currently pending before this Court. The Disclaiming Farmers -- who made the conscious decision to disclaim any interest in the Disputed Grain Asset Pool -- now object to the *Joint Motion for Approval of the Settlement and Compromise* (Dkt # 2718) (the "9019 Motion") and seek to upend the settlement.

The Disclaiming Farmers' litigation counsel now argues that the proposed settlement framework is not fair and equitable[5] -- not to the bankruptcy estate or other creditors -- but to them. The purportedly unfair settlement framework provides farmers with three distinct choices: (1) settle and get money in the near term; (2) disclaim their interest in the Disputed Grain Asset Pool to try their luck in another forum, but get reimbursement of fees and a general release from the bankruptcy estates; or (3) continue to litigate before this Court for an increased share in the Disputed Grain Asset Pool at the Final Determination Hearing. Option 2[6] and Option 3 already exist for the farmers without settlement. As with all choices, each option contains benefits and detriments.

While the Disclaiming Farmers state they only want neutrality and not advantage, in reality what they want are the benefits of both Options 2 and 3 ***without*** the corresponding detriments that come with either. Indeed, they want to enhance their current circumstances, which apparently includes evading this Court's exclusive jurisdiction and continuing to pursue UMB (and likely others) over the Disputed Grain Asset Pool just in a different forum. As discussed herein, the objections raised by the Disclaiming Farmers are without merit, demonstrate unacceptable gamesmanship, and should be overruled.

[5] The Disclaiming Farmers have not alleged that the proposed settlement agreement is unfair or inequitable for lack of compliance with the Bankruptcy Code's priority scheme. The Disclaiming Farmers do not actually have a "fair and equitable" argument. Indeed, the Disclaiming Farmers' concern lies not with the settlement agreement, but with the legal effect of their disclaimers in a non-bankruptcy forum.

[6] Without the benefit of a release and fee reimbursement.

II. BACKGROUND

A. The Bankruptcy Court invokes its exclusive jurisdiction over the Disputed Grain Asset Pool.

As discussed in the *Joint Supplemental Brief in Support of Joint Motion for Approval of Settlement and Compromise* [Dkt. # 2758] (the "Joint Supplement"), since the inception of these bankruptcy cases, this Court has exercised jurisdiction over any and all grain delivered to the Debtors and the products and proceeds thereof, including about $57 million in proceeds. These assets are the subject of the 557 proceedings currently pending before the Court, and in which numerous parties assert interests based on a number of legal theories (all such grain and proceeds together the "Disputed Grain Asset Pool").[7] This Court is tasked with determining who is entitled to receive that cash and how much, if anything, each interested party shall receive.

Specifically, the Court has made it clear that the following legal issues will be decided at the final hearing determining interests, claims, and priorities in the Disputed Asset Grain Pool (the "Final Determination Hearing"):[8]

- Whether the relationship between the farmers and Debtors was a bailment or a buyer/seller relationship;
- Whether a constructive trust was created by operation of Mississippi law;
- When title to the grain passes to the Debtors;
- Whether certain warehouse receipts held by the secured creditors are negotiable documents of title and, if not, how such receipts impact lien priority;
- Whether scale tickets indicate proof of ownership and what, if any, impact such scale tickets have on lien priority;

[7] The Disputed Grain Asset Pool was also defined in the election forms sent to farmers in connection with the Settlement Agreement.

[8] Summarized from the *Final Determination Hearing Order of Legal Issues* circulated by the Court to counsel on February 25, 2022.

- What are the priorities of interests in the Prepetition grain, processed grain product, and identifiable proceeds;
- Whether farmers have valid reclamation claims and what priority any such claims may have in relation to the other claims asserted;
- Whether equal priority interests in limited quantities of grain or grain proceeds thereof share equally or on some other basis.

UMB along with the other WHR Group members have been prepared multiple times to proceed forward with the Final Determination Hearing to resolve the issues related to the Disputed Grain Asset Pool.

B. Three farmers represented by Civil Counsel file an ill-suited lawsuit against UMB in the U.S. District Court for Southern District of Mississippi.

On November 8, 2021,[9] three parties, Island Farms, LLC, Porter Planning Company Partnership, and Wyatt Farm Partnership (the "District Court Plaintiffs"), filed a lawsuit in the United States District Court for the Southern District of Mississippi (the "Southern District") in the case styled *Island Farms, LLC v. UMB Bank N.A.*, Case No. 3:21-cv-00721-HTW-LGI (the "District Court Action"). 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 ("Civil Counsel"). In the District Court Action, the District Court Plaintiffs make several very serious allegations against UMB as it relates to the Debtors and their operations.

In response to UMB's first motion to dismiss, the District Court Plaintiffs filed their First Amended Complaint. In the First Amended Complaint, the District Court Plaintiffs assert the following claims against UMB: (1) Fraud, (2) Civil Conspiracy to Commit Fraud, (3) Aiding and Abetting Fraud, (4) Negligence, Gross Negligence, and Recklessness, (5) Negligent

[9] The District Court Action was filed just five weeks after the bankruptcy cases were initiated.

Misrepresentation, (6) Unjust Enrichment, and (7) Constructive Trust. The Amended Complaint relates to the same grain assets that are at issue before this Court.

UMB has and will continue to fight this unfounded lawsuit and believes such lawsuit is without legal or factual merit. To that end, UMB's Motion to Dismiss First Amended Complaint ("Motion to Dismiss") is pending and fully briefed before the Southern District. In the Memorandum in Support of its Motion to Dismiss, UMB asserts:

> Dismissal does not leave Plaintiffs without recourse. As Plaintiffs' own pleading admits, there is a pending bankruptcy case involving Express Grain and its affiliates in the Northern District of Mississippi. In that proceeding, Plaintiffs can assert (and have asserted) their rights as purported creditors of Express Grain and the bankruptcy court will resolve the claims of all creditors. In fact, the bankruptcy court has already outlined a schedule and expedited procedure for addressing parties' rights, interests, and ownership claims to grain held by the debtors, as well as the proceeds to such grain. Those issues are set for a final determination hearing beginning on March 4, 2022. ***This civil action and the common law claims asserted against UMB are not the proper means for Plaintiffs to raise their disputes***.

UMB *Memorandum Brief In Support of Motion to Dismiss First Amended Complaint*, p. 2, at as **Exhibit 1** ("UMB MTD Memorandum") (footnotes omitted, emphasis added). While Civil Counsel has not been involved in these 557 proceedings, the District Court Plaintiffs have been represented by very qualified and competent bankruptcy counsel.[10]

C. The 557 litigants engaged in good faith settlement negotiations and reached settlement structure.

Recognizing that settlement of the numerous, complex issues between the parties mitigates various costs and risks associated with litigation in this matter, the 557 litigants engaged in mediation and extended settlement negotiations beginning on March 17, 2022, ultimately reaching an agreement as to a settlement structure, which was reflected by the settlement agreement

[10] The District Court Plaintiffs were originally represented by Derek Henderson, Walter Newman, and Eileen Shafffer in the Bankruptcy Court proceedings. The District Court Plaintiffs are now also represented by Michael O'Neil, Michael T. Lewis, Sr. and Pauline Shuler Lewis. Mr. O'Neil and Mr. Lewis signed the Disclaiming Farmer Objection.

submitted to this Court with the 9019 Motion (the "Settlement Agreement"). Pursuant to the settlement structure, numerous farmers executed "Farmer Election Forms" electing thereby to either participate as parties to the Settlement Agreement and receive a portion of the Disputed Grain Asset Pool ("Option 1"), to disclaim any interest in the Disputed Grain Asset Pool and pursue causes of action in another forum ("Option 2"), or to move forward with litigation on their claims and interests in the Disputed Grain Asset Pool before this Court ("Option 3").

Given the parties had been ready to proceed with the Final Determination Hearing on *multiple* occasions, UMB, along with the other WHR Group members, were concerned that upon the eve of trial, the settlement may be just another mechanism to delay the Final Determination Hearing. Accordingly, as a condition to the settlement and ultimately a continuance of the Final Determination Hearing, certain milestones were established including meeting an initial threshold of either consenting or disclaiming farmers. The deadline for such initial thresholds was April 7, 2022.

As represented to the Court and other parties in the case, lawyers representing the Disclaiming Farmers and Farm Group (and other farmers party to these 557 proceedings) convened a town hall meeting on April 6, 2022. Upon information and belief, Civil Counsel or attorneys associated therewith, were in attendance at these town hall meetings and have been in constant communication with the farmers. Further, throughout the settlement negotiations, counsel for the Farm Group communicated with the Civil Counsel regarding the dynamics of the settlement process.

To be counted as either a consenting or disclaiming farmer, the farmers had to execute a "Farmer Election Form." With respect to disclaiming farmers, the Farmer Election Form contained the following waiver:

> 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.**

See Settlement Agreement, attached as Exhibit A to the 9019 Motion. The Farmer Election Form further states, immediately preceding the signature line, that:

> 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.

See *id*.

On April 8, 2022, the various parties requested a status conference with the Court at which time it was announced to the Court that the parties had reached a settlement including that certain initial thresholds had been reached. As such, counsel for UMB made an unopposed *ore tenus* motion to stay the 557 deadlines while the parties finalized the 9019 Motion to be filed on April 11, 2022, which the Court granted.

D. Civil Counsel has "disclaimer's remorse."

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].(emphasis added)
>
> ****
>
> 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] (emphasis added).
>
> ****
>
> 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] (emphasis added).

See Settlement Agreement, attached as Exhibit A to the 9019 Motion.

On the afternoon of April 11, 2022 (after the waivers had already been signed, represented to and relied upon by the Court and other parties), Civil Counsel became concerned about the legal implications that the waivers signed by the Disclaiming Farmers may ultimately have on their

District Court Litigation. When UMB would not agree to unilaterally limit its defenses in the District Court Litigation, Civil Counsel sought to withdraw the waivers of the Disclaiming Famers.

E. The 9019 Motion and Objections are filed.

Counsel for UMB received from Farm Group counsel the tally of the Farmer Election Forms (the "April 11 Tally") in addition to the executed Farmer Election Forms. The April 11 Tally and the Election Forms reflect that (1) 19 farmers want to opt into the settlement representing approximately 289,971.71 bushels of soybean and 182,800.84 bushels of corn, with the estimated combined value of approximately $4.68 million; (2) 109 farmers want to disclaim their interests in the Disputed Grain Asset Pool reflecting 1,867,957.83 bushels of soybeans and 2,343,344.11 bushels of corn with an estimated combined value of approximately $36.4 million; and (3) 10 farmers want to proceed forward with the Final Determination Hearing representing 242,421.90 bushels of soybeans and 171,039.13 bushels of corn with an estimated claim value of approximately $4 million.

On April 12, 2022, numerous parties in interest jointly submitted the 9019 Motion, attaching the fully-executed Settlement Agreement. *See* 9019 Motion (Dkt. # 2718); 9019 Motion Exhibit B. An objection deadline was set for April 22, 2022 at 3:00 p.m. On April 21, 2022, the WHR Group filed the Joint Supplement to further explain the differences between the categories of farmers.

On April 22, 2022, the Disclaiming Farmers filed the Disclaiming Farmer Objection and the Farm Group filed the Farm Group Response. In both the Disclaiming Farmer Objection and Farm Group Response, the Disclaiming Farmers and Farm Group request that certain language be imported to the Settlement Agreement even though such language contradicts express and unequivocal material terms of the Settlement Agreement (and even though the Disclaiming Farmers are not a party to the Settlement Agreement).

Both the Disclaiming Farmers and the Farm Group assert that the 9019 Motion can (or should) be granted only if certain "limiting" or "clarifying" language is included in the Settlement Agreement and/or the order approving the Settlement Agreement. The Disclaiming Farmers propose that the following language "expressly circumscribing the scope" of the Settlement Agreement would adequately resolve their 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.

See Disclaiming Farmer Objection at p. 8.

Farm Group offers a slight variation to the Disclaiming Farmers' proposal, suggesting that the following be included in the proposed order approving the Settlement Agreement:[11]

> Notwithstanding anything contained in the 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 Agreement shall not, and this Order is expressly intended not to:
>
> (a) confer any benefit or advantage whatsoever upon any party in the District Court Action in respect of any Claims asserted, unasserted, or that may in the future be asserted therein by any Disclaiming Farmer that is a plaintiff in such action; or
>
> (b) 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 Debtor, including Claims, asserted, unasserted, or that may in the future

[11] Farm Group specifically states that they do <u>not</u> object to the 9019 Motion or approval of the Settlement Agreement, but requests that the Settlement Agreement be approved subject to the requested "clarification" and inclusion of Farm Group's proposed language. As will be discussed, what is being requested is a material alteration of the terms.

> be asserted, in the District Court Action or (ii) any litigation now or hereafter commenced by any Disclaiming Farmer against third parties.

See Farm Group Response at p. 5. UMB opposes both proposals.

III. ARGUMENT

The Disclaiming Farmers want to alter the law as to who must bear the impact of a waiver and disclaimer. They propose that they, who actually gave the disclaimer and unequivocally waived their interests in the Disputed Grain Asset Pool, should not have to face any legal implications from their disclaimer. Rather, the parties who did not give any disclaimer (i.e., WHR Group) should have to waive or limit certain rights and defenses that have always been available to them and should remain available in future (or current) litigation. Further, as laid bare in their objection, such proposal is in furtherance of the Disclaiming Famers attempt to make an end-run around this Court and its jurisdiction over the Disputed Grain Asset Pool and make claim to such assets before another court. *See* Disclaiming Farmer Objection at p. 6. The Disclaiming Farmers interference and attempt to avoid this Court's jurisdiction should not be permitted.

A. Disclaiming Farmers are not parties to the Settlement Agreement.

As a starting point, it is important to emphasize that the Disclaiming Farmers are not parties to the Settlement Agreement. However, the Settlement Agreement does provide two specific benefits. The Disclaiming Farmers are receiving a release from the Debtors of all potential claims and causes of action, including any and all claims under Chapter 5 of the Bankruptcy Code. *See* Settlement Agreement, ¶ 5. Additionally, they can receive reimbursement of their attorneys' fees on par with the Consenting Farmers. *See* Settlement Agreement, ¶ 3.2. Unlike the Consenting Farmers, they are not giving general releases.

Nevertheless, the Disclaiming Farmers seek additional protections from the Settlement Agreement, despite refusing to be party to it. Further, while the Farm Group wants to cherry pick

the provisions of the Settlement Agreement they want to use (*see* Farm Group Response at p. 4), they choose to ignore other provisions of the Settlement Agreement, specifically the following:

> 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] (emphasis added).

If the Disclaiming Farmers want the full benefit of the Settlement Agreement, they have an easy mechanism to do so -- elect to become a Consenting Farmer.

B. The Disclaiming Farmers signed a waiver.

The Disclaiming Farmers specifically argue that they "never agreed to a settlement which would create new defenses for UMB." Disclaiming Farmer Objection at p.10. First, as discussed above, the Disclaiming Farmers are not parties to the Settlement Agreement, rather they executed waivers and disclaimers of their rights in the Disputed Grain Asset Pool and specifically declined to join in any settlement related to the same. Simply put, the Disclaiming Farmers signed a waiver[12] and did so upon the advice of counsel.

The waiver was effective the moment it was signed by each Disclaiming Farmer. The waiver can only be voided if the Settlement Agreement is not ultimately approved by this Court or if the Disclaiming Farmer wants to opt-in to the Settlement Agreement. Further, the discussion

[12] "Waiver is defined as 'an intentional relinquishment or abandonment of a known right or privilege." *Hinton v. Pekin Insurance Company*, 268 So.3d 543, 557 (Miss. 2019). *See also* WAIVER, Black's Law Dictionary (11th ed. 2019)("The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage."). A disclaimer is "[a] renunciation of one's own legal right or claim." DISCLAIMER, Black's Law Dictionary (11th ed. 2019)

by the Disclaiming Farmers related to lack of mutuality and one-sidedness is a red herring. *See* Disclaiming Farmer Objection at p. 11. "[U]nilateral waivers are not per se unenforceable." *See Vinton-Zimmeran v. MidFirst Bank*, C.A. No. 3:20-CV-171-DPJ-FKB, 2020 WL 7133001, at *5 (S.D. Miss. Dec. 4, 2020); *Penn-Star Insurance Co. v. FPM Realty LLC*, 2022 WL 1085320 at *7 (E.D. N.Y. Feb. 24, 2022) ("Waiver is generally understood as 'a unilateral act of one person that results in the surrender of a legal right' and a court reviewing a question of waiver must determine whether 'the person voluntarily gave up the right' they allegedly waived.") (citing Waiver, LegalDictionary, available at: https://legal-dictionary.thefreedictionary.com/waiver).

Second, the Settlement Agreement does not, and at no point has, created new defenses for UMB, or any other WHR Group member, against the Disclaiming Farmers. However, the act of waiving and disclaiming interest in specific property is an act that has legal significance and consequence. The Disclaiming Farmers are essentially asking the Court to preemptively and inappropriately curtail the legal significance of their waiver and disclaimer in order to preserve their tort claims to be heard in another jurisdiction. In other words, they are asking this Court to issue an advisory opinion as to the validity of the waiver and disclaimer in response to a defense not yet raised in litigation pending before another court.

This Court need only decide whether the thresholds set forth in the Settlement Agreement have been met, and whether the Disclaiming Farmers have withdrawn their interests in the Disputed Asset Grain Pool such that they are no longer participating in the 557 proceedings. Any further legal implication of the waiver and its impact on other litigation is within the purview of the courts such litigation is before.

Finally, the WHR Group has been clear from the outset they had no intention of waiving any defenses to the claims Disclaiming Farmers have asserted or may in the future assert against it. Indeed, the Settlement Agreement broadcasts this message in unequivocal terms:

> 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] (emphasis added).

Further, by signing the Election Form each Disclaiming Farmer affirms:

> 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 Acknowledgments on Page 2 of this Election and has had the opportunity to consult with counsel regarding the Settlement Agreement and the Additional Acknowledgements.

Thus, no party can in good faith claim confusion, misunderstanding, mistake, or surprise that the WHR Group was reserving ***all*** defenses. While it is apparent that certain parties may now regret their decision in signing the waiver and any legal implication it may have in other litigation, such remorse does not give rise to their ability withdraw such waiver. Further, it does not justify limiting any defenses available to other parties based on such an election, nor does it support rejecting the Settlement Agreement that benefits other farmers.

C. It defies reasonableness for UMB to settle 557 proceeding claims in this Court only to allow parties to come after the same money on the same or similar legal theories in another forum.

This Court has exclusive jurisdiction over the grain and grain proceeds because the Debtors had title and/or possessory interest to 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 approximately $57 million in proceeds, which is the central focus of the parties' dispute at this time. This means the Debtors' bankruptcy filing conferred this Court with exclusive jurisdiction over those proceeds.

One of the major issues in the 557 proceedings is whether a constructive trust should be imposed over the grain in favor of the farmers. A necessary element under Mississippi law for constructive trust is that (1) the plaintiff can recover against defendant on an underlying cause of action for unjust enrichment, *Mahli, LLC v. Admiral Ins. Co.*, No. 1:14CV175-KS-MTP, 2015 WL 4915701, at *28 (S.D. Miss. Aug. 18, 2015); and, (2) "that the defendant hold or possess property to which plaintiff 'is rightfully entitled.'" In the District Court Action, the District Court Plaintiffs are asserting unjust enrichment and constructive trust claims against UMB over the same grain assets that is at issue in the 557 proceedings.

The Disclaiming Farmer Objection makes clear that the Disclaiming Farmers had every intention of going after the proceeds of the Disputed Grain Asset Pool once the settlement had been consummated and the Disputed Grain Asset Pool had already been addressed by this Court. *See* Farmer Objection p. 6 ("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."). If the Disclaiming Farmers wanted to pursue the Disputed Grain Asset Pool, they could have easily picked Option 3, not Option 2 in which case the Final Determination Hearing would have gone forward as scheduled. Of course, this begs the question of why they chose not do so.

There could be several reasons. First, the Disclaiming Famers were simply not prepared to proceed forward with the Final Determination Hearing. Second, the Disclaiming Farmers did not want the constraints of this Court imposed upon them. Third, the Disclaiming Farmers are likely concerned about any adverse ruling by this Court having preclusive effect in the District Court Action. Fourth, they were trying to escape UMB's defense in the District Court Action that they had sued the wrong party in the wrong court. While their rationale is uncertain, it is clear they still want to litigate over the Disputed Grain Asset Pool -- just not before this Court.

It simply defies reasonableness for UMB, or any other WHR Group member, to settle 557 proceeding claims in this Court only to allow parties to come after the same money on the same or similar legal theories in another forum, especially when the WHR Group was ready to proceed with the Final Determination Hearing before this Court. Thus, when viewed in this light, the "limiting" or "clarifying" language proposed by the Disclaiming Farmers and the Farm Group is not, as they would have this Court believe, innocuously intended solely to preserve the existing claims of the parties. Rather, it is an attempt to evade and subvert this Court's exclusive jurisdiction over the Disputed Grain Asset Pool, pick what they believe is a more advantageous forum, and to try to evade defenses already raised by UMB in the District Court Action. Accordingly, UMB, and any other WHR Group member, should have all defenses available to it in other litigation.

D. The Disclaiming Farmers' objections to specific provisions in the Settlement Agreement and Proposed Order show that their aim is to pursue claims specifically reserved to this Court under section 557 in another forum.

The Disclaiming Farmers argue that certain language contained in the Settlement Agreement and the Farmer Election Forms undercuts the rights preserved to them by section k of this Court's prior *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").[13] This is false as the Settlement Agreement, as written, specifically tracks this Court's declaration of the scope of its jurisdiction.

First, the Disclaiming Farmers point to decretal paragraph 3d of the Proposed Order that provides that a cause of action released *by the Debtors* "cannot be revived and pursued by any other party, derivatively or otherwise," and argue that this language may ultimately be used to argue that the Proposed Order prevents Disclaiming Farmers from asserting *the Debtors'* claims against the WHR Group. *See* Disclaiming Farmer Objection at p. 6. In settlement negotiations, counsel for the Farm Group raised a concern that the other settling parties could end-run around the Debtors' releases as it relates to the Disclaiming Famers and assert the Debtors' causes of actions against the Disclaiming Farmers. Thus, it is interesting that the Disclaiming Farmers now seem to object to this language, as they are the ones who specifically requested it. Apparently, what the Disclaiming Farmers find objectionable is that *they* cannot end-run around the Debtors' releases and assert the Debtors' causes of action against the other settling parties. This is improper.

Second, the Disclaiming Farmers point to section 3.5 of the Settlement Agreement, which provides that payments made pursuant to the Settlement Agreement are "not subject to claw-back, disgorgement, Claims, or recovery by any other party." *See* Disclaiming Farmer Objection at p. 6. This is true, and purposeful. The parties to the Settlement Agreement did not intend the meaning of this provision to be ambiguous. Again, it defies logic to assume that any party to the Settlement Agreement would settle its claims before this Court and then permit funds received pursuant to such settlement to be attacked in a separate proceeding, particularly by parties who expressly

[13] Section k reads: **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. All issues under 11 U.S.C. § 557(i) are hereby reserved for further order of the Court. *See* 557 Procedures Order. Rights include not just claims, but defenses as well.

disclaimed interest in the funds distributed.

Finally, the Disclaiming Farmers complain that there is no provision in the Settlement Agreement that reserves their rights and claims in the District Court Action. *See* Disclaiming Farmer Objection at pp. 6-7. This is also true. The Disclaiming Farmers are not parties to the Settlement Agreement and so no such reservation *should* be included in the Settlement Agreement. However, the Settlement Agreement does not remove or alter any rights and claims that the Disclaiming Farmers may have with regard to the District Court Action. They are free to pursue those claims subject to all valid defenses available to the parties against whom they are making such claims, as they always have been. As discussed above, while the Settlement Agreement creates no new defenses, there are legal consequences of disclaiming an interest in property in one jurisdiction only to pursue it in another where the party views it will be more advantageous. Such gamesmanship should not be rewarded and certainly does not justify preemptive limitation of the target parties' defenses.

E. The Disclaiming Farmers should be estopped from withdrawing their waivers.

The Disclaiming Farmers argument about changing elections misses the mark. *See* Disclaiming Farmer Objection at pp. 11-12. First, as discussed above, the Disclaiming Famers' waivers were effective upon execution. The only way for the disclaimers not to be effective is if this Court does not approve the settlement. Additionally, a Disclaiming Farmer, by prior agreement of the Settlement Parties, can always opt-in to the settlement as long as it is done by the Election Deadline. *See* Settlement Agreement § 14.1.

Second, the thresholds in the Settlement Agreement have meaning and the Disclaiming Farmers should be estopped from changing their position. "Equitable estoppel is 'the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would

be suffered if such denial or contrary assertion was allowed.'" *In re World Health Jets LLC*, 610 B.R. 118, 149 (Bankr. S.D. Miss. 2019)(quoting *Hancock Bank v. Bates (In re Bates)*, No. 09-05092-NPO, 2010 WL 2203634, at *10 (Bankr. S.D. Miss. May 27, 2010) (citing *Dubard v. Biloxi H.M.A., Inc*., 778 So. 2d 113, 114 (Miss. 2000)). "The goal of equitable estoppel is to 'forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon.'" *World Health*, 610 B.R. at 149 (quoting *Swartzfager v. Saul*, 213 So. 3d 55 (Miss. 2017)).

Alternatively, "[j]udicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding in order "to prevent litigants from playing fast and loose with the courts." *World Health*, 610 B.R. at 150-51 (*Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003)). "There are three requirements for application of the judicial estoppel doctrine: (1) the party has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *World Heath*, 610 B.R. at 151 (citing *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc)).

If a sufficient number of farmers wanted to pursue their 557 rights, then the settlement would be pointless and the parties should just proceed forward with the Final Determination Hearing. In this respect, several parties, including the WHR Group, and the Court relied upon the elections and the representations that the initial thresholds had been met in agreeing to stay certain deadlines and effectively continuing the Final Determination Hearing to some date in the future. The WHR Group was prepared to proceed with the Final Determination Hearing. While new counsel for the Disclaiming Farmers might not be sensitive to (or care about) the amount of work done by the other parties and the Court in preparing for the Final Determination Hearing, it will

come at considerable expense to the WHR Group (and others) to once again prepare a third time for the hearing. Accordingly, the Disclaiming Farmers should not now be allowed to recant their disclaimers.

F. The Settlement Agreement is not an impermissible *sub rosa* plan.

In a single reference, mentioned but unsupported, the Disclaiming Farmers ostensibly suggest that the Settlement Agreement amounts to a *sub rosa* plan in contravention of the Bankruptcy Code. This suggestion is not only unsupported; it is false. In *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, the Fifth Circuit considered a proposed agreement between Debtor and another airline under section 363(b) of the Bankruptcy Code. 700 F.2d 935 (5th Cir. 1983). The court found that certain aspects of the agreement went beyond the scope of section 363, and effected "significant restructuring of the rights of Braniff creditors."

The Fifth Circuit considered three factors in determining that the proposed agreement constituted an impermissible *sub rosa* plan: (1) that the agreement had "the practical effect of dictating some of the terms of any future reorganization plan;" (2) that the agreement "required secured creditors to vote in favor of any future reorganization plan approved by a majority of the unsecured creditors committee;" and (3) that the agreement "provided for the release of claims by all parties against Braniff, its secured creditors, and its officers and directors." *Id*. at 940. The court concluded that, had the sale of Braniff's assets been approved, "little would remain" in the estate and there would be "little prospect or occasion for further reorganization," ultimately holding that "[t]he Debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets." *Id*.

Subsequent decisions by the Fifth Circuit have clarified *Braniff*'s narrow application to only those situations where there is truly an attempt to circumvent the Chapter 11 reorganization

process. *See In re Babcock & Wilcox Co.*, 250 F.3d 955, 960 (5th Cir. 2001) (finding that the financing agreement at issue did not constitute a *sub rosa* plan because it did not have the effect of dictating the terms of any future reorganization plan); *Official Comm. Of Unsecured Creditors v. Cajun Elec. Power Coop.*, 119 F.3d 349 (5th Cir. 1997) (holding that a settlement between a debtor and two of its largest creditors did was not a prohibited *sub rosa* plan because the settlement did not dispose of all claims against the debtor, restrict creditors' rights to vote as they deemed fit on the proposed plan, or dispose of virtually all of the debtor's assets).

Here, the Settlement Agreement is clearly not an attempt to circumvent the requirements of Chapter 11, but rather an attempt to efficiently and effectively resolve claims and interests in specific assets of the Debtors—grain and its proceeds—that are before this Court under section 557 of the Bankruptcy Code.[14] The Settlement Agreement does not dispose of all claims against the Debtors, nor does it have the practical effect of dictating the terms of any future plan of reorganization, any more than this Court's decision at the conclusion of a full 557 Final Determination Hearing would dictate such terms. The Settlement Agreement does not require any claimant, secured or otherwise, to vote in any particular way for any future proposed plan of reorganization. Finally, the Settlement Agreement does not provide for the release of claims by *all parties* against the Debtors, any of its creditors, or officers or directors. Rather, it only provides consensual releases to the Debtor and creditors who are party to the Settlement Agreement. Moreover, it *grants* certain limited releases to the very parties who object to its approval. The Settlement Agreement is not a prohibited *sub rosa* plan and any attempt to characterize it as such is simply disingenuous.

[14] Section 557 itself explicitly contemplates the expedited, pre-plan resolution of claims existing thereunder. *See* 11 U.S.C. § 557 (limiting the initial timetable for determination of interests in grain to 120 days).

IV. CONCLUSION

For the reasons explained in the 9019 Motion, the Joint Supplement, and above, the Disclaiming Farmer Objections and Farm Group Response should be overruled. The waiver executed by the Disclaiming Farmers clearly states they are waiving and disclaiming their interests in the Disputed Grain Asset Pool and that they do not plan to participate in the 557 proceedings. Any legal implication that such a decision carries with it in other litigation should be left to other courts to decide. The proposed settlement and settlement structure 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.

[Signature Blocks to Follow]

Date: April 25, 2022.

Respectfully submitted:

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
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
jlodoen@spencerfane.com
priggs@spencerfane.com
achase@spencerfane.com

Attorneys for UMB Bank, N.A.

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 25th day of April 2022.

/s/ Eric L. Johnson