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' SUR-REPLY TO REPLY OF UMB BANK

The Disclaiming Farmers[1] hereby submit this sur-reply to the Reply of UMB to their Limited Objection to the Settlement Motion. *See* Reply, ECF No. 2766 ("UMB's Reply"). In light of UMB's unyielding effort to gain approval of the Proposed Settlement without agreeing to include suitable limiting language in any final order approving it, the Court should either (i) include in its final order approving the Proposed Settlement Agreement the revised Protective Language suggested by Disclaiming Farmers below, or (ii) deny the Settlement Motion outright (albeit without prejudice), because it will 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.

1. The Disclaiming Farmers Do Not Dispute That The Bankruptcy Court Has Jurisdiction Over The Disputed Grain Asset Pool.

In their Limited Objection, the Disclaiming Farmers raise legitimate concerns regarding the appropriate scope of the Proposed Order and the Proposed Settlement Agreement (which includes the Farmer Election). In reply, UMB tries to recast those concerns as "an attempt to make

[1] Unless otherwise defined, capitalized terms used in this response have the meaning given them in the Disclaiming Farmers' Limited Objection. *See* Ltd. Obj., ECF No. 2760.

an end-run around this Court and its jurisdiction over the Disputed Grain Asset Pool and make claim to such assets before another court." UMB's Reply at 11. This is a blatant mischaracterization of the Disclaiming Farmers' position. The Disclaiming Farmers do not dispute that the Court has jurisdiction over the Disputed Grain Asset Pool, and they have always been prepared to live with the legal consequences of disclaiming their interests in that *res* under 11 U.S.C. § 557, in exchange for certain limited considerations from the bankruptcy estates alone. What the Disclaiming Farmers *do* object to—and what is beyond this Court's jurisdiction or adjudicative authority to impose upon them—is having to countenance any legal effects of disclaiming such interests that go beyond the scope of Section 557 and the *res* or that inappropriately affect their independent claims against third parties.

Indeed, the Disclaiming Farmers readily acknowledge that they will not be seeking recovery from the actual Disputed Grain Asset Pool to satisfy a judgment against UMB in the District Court Action. That action involves UMB's alleged independent wrongdoing and the Debtors are not parties. Once UMB receives settlement proceeds from the Disputed Grain Asset Pool, it will undoubtedly apply such sums against the Debtors' loan balance, and all of those dollars will become fungible in UMB's accounts. If UMB has to eventually satisfy a judgment entered against it in the District Court Action, it will not be possible to satisfy that judgment from the specific *res* that comprises the Disputed Grain Asset Pool, which will no longer exist once funds are disbursed; rather, it will be from the fungible assets of UMB.

Unquestionably, the fact that the Disclaiming Farmers may give up an interest in the Disputed Grain Asset Pool within this bankruptcy case should not provide UMB with an argument that any judgment against it in the District Court Action is unrecoverable, or that any aspect of the Proposed Settlement bars claims against UMB that relate in any way to the claims being settled

through the Debtor releases, or somehow fixes the amount of damages that can be recovered from UMB on account of its own alleged bad acts. Those are completely legitimate concerns—particularly in light of UMB's recent intractability on the topic—not some attempt at an end-run. In the end, all the Disclaiming Farmers request is some language in the Proposed Order that protects against those legitimate concerns.

2. **The Fact That The Disclaiming Farmers Are Not Parties To The Proposed Settlement Agreement Must Not Have Hidden Consequences.**

In its Reply, UMB argues that although Disclaiming Farmers are not parties to the Proposed Settlement Agreement, they nonetheless receive benefits from it. *See* UMB's Reply at 11-12. Why make that point unless one is intending to later argue that certain burdens go along with those benefits? For example, although Section 5 of the Proposed Settlement Agreement provides the benefit of broad releases by the Debtors in favor of all Parties, including the Disclaiming Farmers, the Proposed Order imposes a corresponding burden, providing that once a bankruptcy estate cause of action or claim has been released by the Debtors, "it cannot be revived and pursued by any other party derivatively or otherwise." Proposed Order at 3. And Section 3.5 of the Proposed Settlement Agreement amplifies this burden by providing that once the WHR Group Share is paid to the respective beneficiaries, which includes UMB, it will not be "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 (bold italicized emphasis added).

In light of such language, even though they are not "Parties," the Disclaiming Farmers are concerned that 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 in the District Court Action by arguing that the Proposed Order prevents them from asserting such released claims, even tort claims against UMB.

Defining "Parties" in the Proposed Settlement Agreement to exclude the Disclaiming Farmers must mean that nothing in that agreement, or in any order approving it, should bind the Disclaiming Farmers relative to UMB or the WHR Group. As non-parties, the Disclaiming Farmers' non-section 557-related rights must be carefully reserved, just as the Court recognized when it entered the 557 Procedures Order and excluded from those procedures the rights of all parties in interest in respect of "claims, causes of action, cross claims, or counter-claims 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." 557 Procedures Order at 7. By refusing to even negotiate possible versions of Protective Language to be included in the Proposed Order, UMB not only demonstrates a disdain for the very rights of the Disclaiming Farmers that this Court intended to preserve, but also suggests that there may be some hidden agenda.

3. **UMB's Conduct Is Only Increasing The Concerns Of The Disclaiming Farmers Regarding The Potential Effect Of The Proposed Settlement Agreement And The Proposed Order On The District Court Action.**

UMB's arguments in court and in its Reply continue to add to the Disclaiming Farmers' concerns regarding the potential effect of the Proposed Settlement on the District Court Action. First, UMB attaches to its Reply its own motion to dismiss in the District Court Action. *See* UMB's Reply, Exh. A. In that motion UMB argues that "Plaintiffs' remedies, if any, are against the bankruptcy estate of Express Grain." UMB's Reply, Exh. A at 10. Yet in this Court UMB argues that the Disclaiming Farmers' rights are inferior to UMB's and that they should recover nothing.

Second, UMB improperly characterizes the Disputed Grain Asset Pool as the *res* from which it would eventually have to satisfy a judgment in the District Court Action, stating that "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 disclaimed interest in the funds distributed." UMB's Reply at 17-18. Yet the WHR Group Share that will be distributed to them is on account of a claimed interest in the *res*, which, as explained above, is completely distinct from any funds it would expend to satisfy a later judgment against it in the District Court Action on account of its own alleged wrongdoing vis-à-vis the Disclaiming Farmers.

And third, even as the Court conducted the hearing on the Proposed Settlement on April 25, 2022 other attorneys for UMB were in the District Court ***at the same time,*** telling the Magistrate in that action that UMB fully intends to use the Settlement Agreement and Farmer Elections as defenses in the District Court Action. UMB wants to have the best of both worlds and is unabashed when it comes to using the Proposed Settlement to its advantage. So, who is really involved in "gamesmanship?"

All that the Disclaiming Farmers ask in order to alleviate the concerns that UMB is creating by its self-serving drafting and interpretation of the Proposed Settlement Agreement and Proposed Order, and by its Janus-faced arguments in this Court and the District Court, is that the revised Protective Language, as presented on attached Exhibit A, be inserted in the eventual order approving the Proposed Settlement. Indeed, even UMB anticipated that changes would be made to the Proposed Order by requiring in the Proposed Settlement Agreement that it be "in form and substance that is reasonably satisfactory to the Debtors, WHR Group, and the Production Lenders." Thus, the Protective Language remains the simplest way to eliminate any possibility of an improper future attempt by UMB to utilize the Court's approval of the Proposed Settlement Agreement as a means of foreclosing or limiting any claims or causes of action in the District Court Action and thereby circumvent the protections already afforded to the Disclaiming Farmers with regard to the Excluded Claims in this Court's 557 Procedures Order.

4. **The Disclaiming Farmers Have Not Waived Anything, Nor Can They Be Estopped From Changing Their Elections.**

Contrary to UMB's argument that the Disclaiming Farmers should be estopped from changing their Farmer Elections, the Proposed Settlement Agreement itself actually contemplates that Farmer Elections may be changed at any time before the Effective Date. As mentioned in the Limited Objection, 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 misplaced. Perhaps that is why UMB fails to address the Disclaiming Farmers' contract construction argument in its Reply, choosing instead to rely on the Farmer Elections as waivers.

But the Farmer Elections do not stand on their own as independent waivers. The elections are entitled FARMER ELECTION REGARDING THE SETTLEMENT AGREEMENT RELATED TO DISPUTED GRAIN ASSETS. Their preambles describe the forms as an "election with respect to the Settlement Agreement." They further state that: "This Disclaimer is conditional upon Bankruptcy Court approval of the Settlement Agreement." In short, the Farmer Elections are completely reliant on, and must be interpreted context of, the Proposed Settlement Agreement. And, as previously argued in the Limited Objection, the elections are merely conditions precedent to the Effective Date of such agreement. Therefore, until the occurrence of that Effective Date, the Settlement Agreement is inchoate and affords the WHR Group optionality. They can decide to go forward with the settlement or scuttle it based on what elections have been submitted by the Election Deadline, a date that is actually after Court approval, and on whether any of those elections has been retracted, modified, or invalidated.

CONCLUSION

If the Protective Language, or something close to it, is included in the order that is entered, then the Disclaiming Farmers' Limited Objection is resolved. Otherwise, regrettably, the Court must deny the Settlement Motion without prejudice, for the reasons described above and in the Limited Objection.

Dated: April 27, 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 11:59 p.m. CDT and served electronically on all parties listed to receive service of electronic notice.

Dated: April 27, 2022.

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

EXHIBIT A: PROPOSED PROTECTIVE LANGUAGE

Consistent with this Court's prior 557 Procedures Order, ECF No. 1070:

(i) approval of the Settlement Agreement is solely for the purposes of resolving the 557 Proceedings in this Court only;[1]

(ii) the Settlement Agreement and Farmer Elections do not create new defenses for UMB or any other WHR Group member against the Disclaiming Farmers;[2] and

(iii) the execution of a Farmer Election pertains only to the Disputed Grain Asset Pool and it shall not and cannot be construed to create any new or additional claims, defenses or rights of any kind for any parties in any other proceedings, including, but not limited to, the District Court Action.[3]

[1] This is axiomatic, consistent with, and in furtherance of, the 557 Procedures Order.
[2] This is *verbatim* extract from the first sentence of the first full paragraph on page 13 of the UMB Reply.
[3] This is the reasonable, natural and necessary conclusion to be drawn.