

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

In re: _____)
Express Grain Terminals, LLC,¹ _____)
Debtor(s) _____)
_____)

Case No. 21-11832-SDM
Chapter 11

**JOINT MOTION TO CLARIFY ORDER GRANTING MOTION TO SELL
SUBSTANTIALLY ALL OF THE ASSETS OWNED BY EXPRESS GRAIN
TERMINALS, LLC, FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS, WITH
LIENS ATTACHING TO PROCEEDS OF SALE, OUTSIDE THE ORDINARY COURSE
OF BUSINESS [DOC 2708] AND NOTICE OF ASSIGNMENT OF PURCHASE RIGHTS**

Debtor Express Grain Terminals, LLC (“Express Grain” or the “Debtor”) and Buyer UMB Bank, N.A., (“UMB”) for their *Joint Motion to Clarify Order Granting Motion to Sell Substantially All of the Assets Owned by Express Grain Terminals, LLC, Free and Clear of liens, Claims and Interests, with Liens Attaching to Proceeds of Sale, Outside the Ordinary Course of Business [Doc. 2708] and Notice of Assignment of Purchase Rights* (the “Motion”), state as follows:

BACKGROUND

1. The Debtors commenced the captioned cases by filing their Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code (the “Code”), Code §§ 101 through 1146, on September 29, 2021 (the “Petition Date”).

2. The Business Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to Code §§ 1107 and 1108. On December 14, 2021, the

¹ Jointly administered with *In re Express Biodiesel, LLC*, Case No. 21-11834-SDM, and *In re Express Processing*, Case No. 21-11835-SDM. See (Dkt. # 1158).

Court appointed Dennis Gerrard, with CR3 Partners, LLC, as chief restructuring officer (the “CRO”) in its bench ruling and then later in its Memorandum Opinion and Order [Doc 1767].

3. The Debtor filed, prosecuted, and obtained approval of a *Motion for Entry of (I) Order Approving Bidding Procedures and Stalking Horse in Connection with Sales of Assets of Debtor, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing and (IV) Granting Related Relief* [Doc. 1688] (the “Bid Procedures Motion” seeking approval of bidding procedures, scheduling an auction and sales hearings and related matters. The Court entered an Order of February 16, 2022 [Doc. 2018] approving the Debtor’s bid procedures (the “Bid Procedures Order”).

4. On February 16, 2022, the Debtor filed its *Motion to Sell Substantially All of the Assets Owned by Express Grain Terminals, LLC, Free and Clear of Liens, Claims, and Interests, with Liens Attaching to Proceeds of Sale, Outside the Ordinary Course of Business* [Doc. 2024] (the “Sale Motion”). In the Sale Motion, the Debtor requested the Court authorize the CRO to execute such instruments of transfer as commercially reasonable and necessary to effectuate the transaction including implementing the Bid Procedures Order and scheduling and conducting the auction. *See Sale Motion*, p. 11.

5. The auction of substantially all of the Debtor’s assets took place on February 25, 2022 (the “Auction”). At the Auction, UMB ultimately submitted the highest and best bid for all of Debtor’s assets for which it asserted a lien (the “UMB Credit Bid”).

6. On April 11, 2022, the Court entered its *Order Granting Motion to Sell Substantially All of the Assets Owned by Express Grain Terminals, LLC, Free and Clear of liens, Claims and Interests, with Liens Attaching to Proceeds of Sale, Outside the Ordinary Course of Business* [Doc. 2708] (the “Sale Order”) confirming the UMB Credit Bid.

7. In the Sale Order, the Court made several rulings including the following:
 - a. Authorized and directed to consummate the sale of the Purchased Assets, pursuant to and in accordance with the terms and conditions of the UMB Credit Bid, including, without limitation to convey to UMB, or its successor or assigns, the Purchased Assets.² (Sale Order, p. 15).
 - b. Authorized the CRO to execute and deliver, to perform under, consummate, and implement the UMB Credit Bid, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the UMB Credit Bid, and to take all further actions as may be reasonably requested by Buyer or otherwise required under the UMB Credit Bid.
 - c. Authorized UMB to assign its purchase rights to another party as long as such assignment is disclosed to the Debtors and the Court prior to closing and such assignment does not violate 11 U.S.C. § 363(n). (Sale Order, p. 16).
 - d. Found that if an assignment were to occur, references to “Buyer” would also mean UMB’s successors and assigns. (Sale Order, p. 16).

8. On April 16, 2022, the Court entered an *Agreed Order Granting Joint Ex Parte Motion to Extend Closing Date* [Doc. 2730] from April 14, 2022, to April 30, 2022.

9. On April 29, 2022, the Court entered a second *Agreed Order Granting Joint Ex Parte Motion to Extend Closing Date and TSA Expiration Date* [Doc. 2779], extending the date from April 30, 2022, to May 31, 2022.

10. On May 27, 2022, Debtor and UMB filed their *Joint Notice of Extension of Outside Close Date and TSA Expiration Date* [Doc. 2846], extending the date from May 31, 2022, to June 30, 2022.

11. The Purchased Assets include certain property located in Greenwood, Mississippi (the “Greenwood Property”), which is legally described on Exhibit D attached to the Sale Order. The Greenwood Property was conveyed to Debtor by Warranty Deed dated September 19, 2015

² Unless otherwise defined herein, capitalized terms shall have the same meaning as set forth in the Sale Order.

from Delta Oil Mill. A portion of the Greenwood Property sits on Sixteenth Section Land in Leflore County (the “Sixteenth Section Land”).³

12. The Sixteenth Section Land is subject to five ninety-nine year leases: (1) the lease between Leflore County and Charles M. Harris (the “Harris Lease”); (2) the lease between Leflore County and Joe and Cora Flowers (the “Flowers Lease”); (3) the lease between Leflore County and The Buckeye Cotton Oil Company (the “Buckeye Cotton Lease”); (4) the lease between Leflore County and A.R. Bew, Trustee (the “Bew Lease”); and (5) the lease between Leflore County and May S. Johnson (the “Johnson Lease”) (collectively the “99-Year Leases”).

13. The Harris Lease runs from July 3, 1947, to July 2, 2046. Under the Harris Lease, the lessor was required to pay \$1,500.00 and another \$2,452.50 in the form of three promissory notes in the amount of \$817.50 each in the years 1948, 1949, and 1950, which presumably have all been paid. Under the Harris Lease, Leflore County retained title to all timber, minerals, oil, and gas on and under the leased land. There were no other obligations under the lease. Additionally, the lessee under the Harris Lease executed a Land Deed of Trust with Means Johnston as the Trustee. This Land Deed of Trust has the same term as the Harris Lease.

14. The Flowers Lease runs from July 3, 1947, to July 2, 2046. Under the Flowers Lease, the lessee was required to pay \$15.00 cash and then make payment on ten notes for \$13.50 each from 1948 until paid in full—presumably paid on or before 1958.

15. The Buckeye Cotton Lease runs from July 3, 1947, to July 2, 2046. Under the Buckeye Cotton Lease, the lessee was required to pay a lump sum of \$2,158.50. Under the Buckeye Cotton Lease, Leflore County retained title to all timber, minerals, oil, and gas on and under the

³“Title to Sixteenth Section Land is vested in the State of Mississippi, in trust for the support of public education. Sixteenth Section Lands are not ordinary public lands. They are trust land, and legal principles regarding the management of trust apply. Law imposes on those responsible for the management of trusts, the highest standards of care and attention.” See <https://www.sos.ms.gov/index.php/public-lands/16th-section-faqs>.

leased land. There were no other obligations under the lease.

16. The Bew Lease runs from July 3, 1947, to July 2, 2046. Under the Bew Lease, the lessee was required to pay a lump sum of \$1,886.25. Under the Bew Lease, Leflore County retained title to all timber, minerals, oil, and gas on and under the leased land. There were no other obligations under the lease.

17. The Johnson Lease runs from July 3, 1947, to July 2, 2046. Under the Johnson Lease, the lessee was required to pay a lump sum of \$150.00. Under the Johnson Lease, Leflore County retained title to all timber, minerals, oil, and gas on and under the leased land. There were no other obligations under the lease.

18. The 99-Year Leases do not have any current payment obligations and do not contemplate termination prior to their expiration. The 99-Year Leases were not reflected in Schedule G.

19. UMB has reached an agreement in principle to assign its purchase rights under the UMB Credit Bid and Sale Order. UMB proposes to assign its purchase rights to Thoroughbred AgriFuel Holdings LLC (“Thoroughbred”) and FSB Companies (or an affiliate thereof) (“FSB”, together with Thoroughbred, the “Assignees”). Both Thoroughbred and FSB participated in the Auction. *See* Sale Order ¶ 20. Collectively, they were the next highest bid after the UMB Credit Bid. Thoroughbred and FSB are not insiders of the Debtor and have no affiliation with the Debtor, CR3, UMB or any other interested party relating to the Auction or the Purchased Assets. Both have acted at all times in good faith, at arms’ length, and without collusion with any other party.

20. Debtor has no objection to the assignment of UMB’s purchase rights to the Assignees. It is anticipated the assignment will be contemporaneous with the closing of the Purchased Assets.

RELIEF REQUESTED

21. Pursuant to the Sale Order, “Court may supplement this Order with one or more additional orders within the scope of this Order, with or without additional notice or opportunity for a hearing to other parties depending upon the facts and circumstances as determined by the Court at the time the Court is requested to enter such separate order(s).” Sale Order, p. 24–25.

22. By this Motion, the Debtor and UMB seek an Order from this Court:

- a. Finding that the 99-Year Leases (i) are not executory, (ii) fall outside the purview of 11 U.S.C. § 365, and (iii) no action is required under 11 U.S.C. § 365 with respect to the 99-Year Leases and any rights thereunder.
- b. Finding that all right, title, and interest of the Debtor in the Greenwood Property including, without limitation, all rights under the 99-Year Leases are being conveyed as part of the UMB Credit Bid and Sale Order;
- c. Finding that Dennis Gerrard, has full authority to sign on behalf of the Debtor all instruments and documents that may be reasonably necessary or desirable to implement the closing of the Purchased Assets including, without limitation, any required deeds, affidavits, releases, terminations, or estoppels.
- d. Finding that the Assignees as “Buyer” are entitled to the benefit of all findings of fact and conclusions of law and to the same protections granted to UMB under the Sale Order including, without limitation, those protections found in paragraphs f, g, i, j, k, l, m, n, o, p, q, r, t, y, z, and aa of the Sale Order.
- e. Finding that the Assignees are good faith purchasers of the Purchased Assets, having conducted themselves at arms’ length and without collusion or improper conduct of any kind, and are entitled to the protections provided under § 363(m) of the Bankruptcy Code.
- f. Finding, except as may otherwise be expressly agreed as between the Assignees and UMB or required pursuant to the APA (as defined in the Sale Order), that no obligation of UMB set forth in the Sale Order shall be the obligation of the Assignee.
- g. Finding that neither the avoidance or invalidity of some or all of UMB’s liens in the Purchased Assets, nor any liability of UMB to the Debtor’s estate or any of the Debtor’s creditors, shall affect the Buyer’s title to the Purchased Assets, and the Buyer shall not be liable to the Debtor, the Debtor’s estate, or any third party as a consequence of such avoidance or

invalidity of any UMB security interest or liability.

- h. Finding that the notice of assignment set forth herein satisfies the notice requirement set forth in the Sale Order related to assignments of UMB's purchase rights.

BASIS FOR RELIEF

A. The 99-Year Leases are not subject to 11 U.S.C. § 365

23. Section 365 applies only to “true” or “bona fide” leases. “Thus, while state law may treat the agreement as a “lease”, this does not mandate the application of section 365.” *Schachter v. Lefrak (In re Lefrak)*, 223 B.R. 431, 434–35 (Bankr. S.D.N.Y. 1998). Rather, courts will consider the “economic substance” of the transaction. *Int’l Trade Admin v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 749 (2d Cir. 1991). When determining whether a contract falls under the purview of Section 365 courts have also considered whether the contract is executory. *See City of San Francisco Market Corp. v. Walsh (In re Moreggia & Sons)*, 852 F.2d 1179 (9th Cir. 1988).

24. “A contract is executory if ‘performance remains due to some extent on both sides’ and if ‘at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.’” *RPD Holdings, L.L.C. v. Tech Pharmacy Services (In re Provider Meds, L.L.C.)*, 907 F.3d 845, 851 (5th Cir. 2018) (citing *Phoenix Exploration, Inc. v. Yaquinto (In re Murexco Petroleum, Inc.)*, 15 F.3d 60, 62 (5th Cir. 1994)).

25. In *Rensselaer Polytechnic Inst.*, the Second Circuit considered whether a lease was “true” or “bona fide” lease such that § 365(d)(4) would apply. 936 F.2d 744 (2d Cir. 1991). The court noted that the fact an agreement is called a “lease” does not necessarily “transform an agreement into a bona fide lease for the purposes of [§ 365(d)(4).]” *Id.* at 749. Rather, the court must look to the “economic substance” of the transaction. In doing so, the court considered the lengthy lease term—ninety-years—in conjunction with the facts that the entire rent amount owed

was due and paid in the first three years of the lease and there were no continuing payments obligations of the lessee. The court determined that the agreement was missing many characteristics of a normal lease and instead was closer to “a sale for a term of years than to a lease.” *Id.* at 751. As such, the court held that this ninety-nine year lease with its pre-paid nature fell outside the purview of § 364(d)(4).

26. In *Moreggia*, the Ninth Circuit determined Section 365 did not apply to the “lease” at issue, in part, because it was no longer executory. *Moreggia*, 852 F.2d at 1184–85. In *Moreggia*, the purported lease had an initial term of twenty years with options that could extend it for an additional thirty years. *Id.* at 1185. Additionally, the lessee’s payment of rent was structured to cover the lessor’s bonded indebtedness; once the bonded indebtedness ceased, the lessee’s obligation to pay rent ceased as well, despite that there were years remaining on the lease. Some obligations remained under the lease during the remaining term, but the court determined that none converted this into an ordinary executory lease with current and significant financial obligations.

27. The *Moreggia* court determined that the lessee’s interest was a prepaid right of possession for a substantial future term with no material future obligations and the agreement no longer carried executory burdens to assume or reject. Thus, because the agreement was not a “true” or “bona fide” lease and because it was not executory, Section 365(d)(4) did not apply.

28. Here, each of the 99-year Leases fall outside the purview of Section 365. Despite the contracts being titled “leases,” the economic substance of the agreements suggest they are something different. Like the “lease” in *Rensselaer Polytechnic Inst.*, the leases here are both for ninety-nine year terms. Like “leases” in both *Rensselaer Polytechnic Inst.* and *Moreggia*, the 99-Year Leases are “pre-paid” in nature. Once the initial payments were made, neither of the leases contain any other obligations of either party. Thus, they lack the typical hallmarks of a lease. As

such, Section 365 should not apply and whatever interest Debtor has in the property may be assigned or sold to another party pursuant to Section 363.

B. The Sale Order provides that Dennis Gerrard may sign the closing documents on behalf of the Debtors.

29. Dennis Gerrard is the CRO of the Debtor. The Sale Order authorized the CRO to execute and deliver, to perform under, consummate, and implement the UMB Credit Bid, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the UMB Credit Bid, and to take all further actions as may be reasonably requested by UMB (or its assignees) or otherwise required under the UMB Credit Bid. Such actions would include execution of any deed conveying the properties to the ultimate buyer. Accordingly, for clarity purposes, the parties request that Dennis Gerrard be specifically approved and authorized to sign on behalf of the Debtor all deeds and closing documents related to the Purchased Assets.

C. The Assignees should receive the same protections as UMB under the Sale Order.

30. The Sale Order provides several protections to a buyer of the Purchased Assets. As both the Sale Order and the UMB Credit Bid contemplate, the purchase rights thereunder may be assigned by UMB. Specifically, the Sale Order recognizes that if an assignment were to occur, references to “Buyer” would also mean UMB’s successors and assigns. (Sale Order, p. 16). Likewise, “Purchaser” under the UMB Credit Bid means UMB or it is assignee. Accordingly, the Assignees, as good faith purchasers, should be entitled to the same protections granted to UMB under the Sale Order including, without limitation, those found at paragraphs f, g, i, j, k, l, m, n, o, p, q, r, t, y, z, and aa of the Sale Order.

NOTICE OF ASSIGNMENT

31. Pursuant to the Sale Order, the Debtor and UMB hereby give notice of the proposed assignment of UMB to the Assignees of UMB’s purchase rights as reflected in the UMB Credit

Bid and the Sale Order.

WHEREFORE, the Debtor and UMB respectfully request that the Court grant the Requested Relief, and for such other and further relief as the Court may deem just and proper.

Dated: June 13, 2022

Respectfully submitted,
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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 13th day of June 2022.

/s/ Eric L. Johnson