

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:	Chapter 11 Bankruptcy
EXPRESS GRAIN TERMINALS, LLC, ¹	Case No. 21-11832-SDM
Debtor.	Judge Selene D. Maddox

**LIMITED OBJECTION TO CONFIRMATION OF PLAN OF LIQUIDATION AND
RESERVATION OF RIGHTS**

The “**Disclaiming Farmers**” (as defined in this Court’s *Memorandum Opinion and Order Approving Joint Application to Compromise Controversy* (the “**Settlement Order**”), ECF No. 2785), by and through their counsel, file this limited objection (the “**Limited Objection**”) to confirmation of the Debtors’ proposed plan of liquidation (the “**Plan**”), ECF No. 2932, and reserve all of their rights relative to the Plan.

SUMMARY OF DISCLAIMING FARMERS’ POSITION

The Debtors’ First Amended Disclosure Statement (the “**Disclosure Statement**”), ECF No. 3001, references the Settlement Order repeatedly when describing what transpired in these chapter 11 cases and why the Plan is being promulgated. In filing this limited objection, the Disclaiming Farmers have only one goal: to ensure that all rights and claims obtained or preserved under the Settlement Order are not in any way affected by the Plan or any order confirming it. So long as any such confirmation order includes the language set forth in ¶10 below, the Disclaiming Farmers will withdraw this objection.

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.

OBJECTIONS TO PLAN CONFIRMATION

1. The Disclaiming Farmers object that three provisions of the Plan could cause needless confusion and potentially impair their rights and claims against non-Debtor third parties in derogation of the Settlement Order. Those provisions contain language that purports to improperly allow a discharge of obligations or, at the very least, create confusion over whether there is a discharge, despite the fact that the Plan is expressly a liquidating one and that the Debtor will no longer be engaging in business after consummation. The offending language is found in (1) Article V.D. Discharge of Officers and Directors; (2) Articles V.G. Injunction and VII Invalidation of Liens; and (3) Article VIII Revesting of Property.

2. Title 11 of the United States Code (the “**Bankruptcy Code**”) provides that a chapter 11 debtor does not receive a discharge if “the plan provides for the liquidation of all or substantially all of the property of the estate” or “the debtor does not engage in business after consummation of the plan.” 11 U.S.C. § 1141(d)(3). Here, the Plan expressly provides for liquidation and specifically indicates that the Debtor will no longer engage in business after consummation. Indeed, both the title of the Plan and the first sentence of the Plan provide that it is a “Plan of Liquidation.” ECF No. 2932 at 1.

3. The Plan is also rife with references confirming that it is a liquidating plan. For example, throughout Article II the Plan refers to an auction that occurred prior to the filing of the Plan, such as when it describes “Class 3: Secured Claims of Bank of the West (“BOTW”)” and states that “BOTW credit bid on the boom lift at the auction of substantially all of the Debtor’s assets and was the highest and best bid in connection with the boom lift.” The Plan also provides that the debtor will be dissolved (Article V.C.) and that there will no longer be any directors, officers, managers or any other agents of the debtor (Article V.D.). It should go without saying

that a company cannot engage in business if there are no officers, directors, or managers. Because all property of the estate will be liquidated and the debtor will not engage in business moving forward, the debtor is not eligible for a discharge of debts.

4. Because the Plan is a liquidating one and the Debtor is not entitled to a discharge, the Disclaiming Farmers object that Article V.D., “Discharge of Officers,” creates confusion about whether the officers of the Debtor will receive a discharge of any personal liability that they may have in their capacity as officers of the Debtor. The word “discharge” is a term of art in bankruptcy that encompasses voiding of judgments against a debtor and injunctions against actions to collect, recover, or offset any debts. 11 U.S.C. § 524(a). This makes the use of the word “discharge” in Article V.D. of the Plan at best confusing. At the very least, a person reading the Plan could easily conclude that Article V.D. constitutes a non-debtor release or exculpation in violation of the Fifth Circuit’s holding in *Matter of Highland Capital Management, L.P.*, 48 F.4th 419, 435-38 (2022) (holding that there is no statutory basis for a non-debtor exculpation).

5. Significantly, the word “discharge” could easily be deleted without changing the meaning of the provision. When Article V.D. says that “any then-currently serving directors, officers, managers or other members of any governing body of the Debtor will be discharged and removed from any office, directorship, position as manager or member or other position...” it appears to use the word “discharge” to mean terminated from employment or position. The same meaning could be expressed by merely deleting the words “discharged and” so that Article V.D. would simply say that any such person “will be removed from any officer, directorship” or other position. With the deletion of those two words, the provision would no longer create confusion about whether claims against the officers are discharged.

6. Equally significant, Article V.D. serves no purpose. Article V.C. provides for the dissolution of the debtor and a dissolved company would not be able to have any directors, officers, or managers. Even if it could have directors, officers, or managers, a dissolved company would have no means for compensating them. Simply stated, Article V.D. serves no purpose other than to make express what everybody understands, that a liquidated and dissolved company does not have any directors, officers, or managers. Therefore, the Disclaiming Farmers alternatively request that any order confirming the Plan provide that the Plan is modified to strike out or remove Article V.D. entirely.

7. The Disclaiming Farmers also object that Article V.G., entitled “Injunction,” purports to grant the debtor a discharge. Article V.G. of the Plan appears to have been carefully worded to avoid using the actual word “discharge” while providing all the benefits and appurtenances of a discharge. In fact, Article V.G. largely mirrors the language of 11 U.S.C. § 541(a)(2), which describes the effect of the discharge and the discharge injunction. Therefore, the Disclaiming Farmers respectfully request that any order confirming the Plan provide that the Plan is modified to strike out or remove Article V.G.

8. The Disclaiming Farmers also object that Article VII, entitled “Invalidation of Liens,” expressly grants the Debtor a discharge. Article VII provides in relevant part:

The provisions of the confirmed Plan shall bind all creditors and parties-in--interest, whether or not they accept the Plan and shall discharge the Debtor from all claims that arose prior to Confirmation. The distributions provided under the Plan shall be in exchange for and in complete satisfaction of all claims and interests regarding any of the Debtor's assets or properties, including claims arising after the date of filing of the Petition and prior to Confirmation. Unless otherwise specifically provided to the contrary herein or in the Confirmation Order, on or after Confirmation, all holders of claims or interests shall be precluded from asserting any claim against the Debtor or its assets or properties.

Plan, Art. VII, at p. 9. Such language is entirely improper and its effects are belied by the liquidating nature of the Plan. Therefore, the Disclaiming Farmers respectfully request that any order confirming the Plan provide that the Plan is modified to strike out or remove the language of Article VII quoted above.

9. Likewise, the Disclaiming Farmers object that Article VIII, entitled “Revesting of Property,” provides for a nonsensical result because there is no property after liquidation and there is no reorganized debtor in whom property could re-vest. Article VIII of the Plan purports to re-vest property in the reorganized debtor. In a plan of reorganization, this would be allowed under 11 U.S.C. § 1123(a)(5)(B). But, this provision conflicts with Article V.C., which provides that the debtor is dissolved such that there would be no reorganized debtor. Furthermore, Article II of the Plan frequently refers to an auction through which all of the debtor’s physical assets were sold. Therefore, the Plan on its face asserts that no property exists that could re-vest in the debtor, reorganized or otherwise. Article VIII makes sense only if there is some un-administered asset that would survive liquidation. Since any un-administered assets would be subject to creditor claims pursuant to 11 U.S.C. § 1141(d)(3), this provision makes sense only if the debtor receives a discharge. Because this is not permissible under the Bankruptcy Code, a reasonable proposal would be for the order confirming the plan to strike out Article VIII. Therefore, the Disclaiming Farmers respectfully request that any order confirming the Plan provide that the Plan is modified to strike out or remove Article VIII.

RESERVATION OF RIGHTS

10. Notwithstanding the purported effects of Articles V.D., V.G., VII., and VIII of the Plan, the Disclaiming Farmers reserve all rights to pursue claims they have, or may have, against any non-debtor third party, including but not limited to the Debtors’ lenders, auditors, officers,

directors, and principals, whether (i) relating to false statements, misrepresentations and omissions made to the Mississippi Department of Agriculture and Commerce (“MDAC”) and/or to the Disclaiming Farmers, regarding the financial condition of the Debtors, or (ii) otherwise.

11. In addition, the Disclaiming Farmers specifically reserve all rights and claims obtained or preserved under the Settlement Order and otherwise.

WHEREFORE, the Disclaiming Farmers respectfully request that the Court deny confirmation of the Plan or, in the alternative, include in any confirmation order an express reservation of rights mirroring ¶10 above and a provision expressly striking or removing Articles V.D., V.G, VII, and VIII or any equivalent provisions of a modified plan as objected to above.

Dated: March 7, 2023

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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 and served electronically on all parties listed to receive service of electronic notice, including the following:

Office of the U.S. Trustee
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Dated: March 7, 2023

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