

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION**

**ISLAND FARMS, LLC; PORTER  
PLANTING COMPANY; and  
WYATT FARM PARTNERSHIP, on  
behalf of themselves and all others  
similarly situated,**

**Plaintiffs,**

v.

**UMB BANK, N.A. and HORNE LLP,  
  
Defendants.**

**Civil Action No.  
3:21-CV-721-HTW-FKB**

**DEFENDANT HORNE LLP’S MEMORANDUM IN SUPPORT OF  
MOTION TO CONSOLIDATE**

Horne LLP (“Horne”) submits this memorandum in support of its motion to consolidate the three cases currently pending in Mississippi federal courts under Federal Rule of Civil Procedure 42(a) and Local Rule 42.

**INTRODUCTION**

There are currently three nearly identical cases pending in Mississippi federal courts. In each case, farmers allege that they sold grain to Express Grain Terminals, LLC, and did not receive payment for that grain. In each case, the farmers—all through the same attorneys—allege that Horne and UMB Bank, N.A. are liable to them under theories of fraud, negligence, and unjust enrichment. Two of these actions are currently pending in the Southern District, and

the third is pending in the Northern District. The parties have already submitted nearly identical motions in the other two cases, and Horne anticipates adapting and re-filing those motions here.<sup>1</sup>

Horne asks this Court to consolidate the three actions under Rule 42(a) to avoid a waste of resources and potential confusion. The cases involve common questions of law and fact, similar parties, and are all pending in Mississippi federal courts. Without consolidation, separate courts would need to issue separate rulings on nearly identical issues. This is both inefficient and could lead to inconsistent rulings on common questions of law. As the court in which the earliest of the three actions was filed, this Court has the power to consolidate under Local Rule 42. It should consolidate the three cases because they involve nearly identical questions of fact and law.

### **BACKGROUND**

On September 29, 2021, Express Grain Terminals, LLC (“EGT”) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby initiating its bankruptcy case. A little more than a month later, Island Farms, LLC, Porter Planting Company, and Wyatt Farm Partnership (collectively, “Plaintiffs”) filed this putative class action complaint (the “Island Farms Action”) against UMB Bank, N.A. (“UMB Bank”). Doc. 1. On March 15, 2023, Plaintiffs filed an unopposed motion for leave to file a second amended complaint (the “Second Amended Complaint”), Doc. 89, which the Court granted on April 28, 2023, Doc. 95. Among other things, the Second Amended Complaint added Horne LLP (“Horne”) as a defendant. *See* Doc. 97. Plaintiffs served this complaint on Horne on May 1, 2023. Doc. 98. The putative class includes “[a]ll persons and entities that deposited agricultural products with Express Grain, and who did

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<sup>1</sup> Horne submits this motion to consolidate now, while at the same time reserving all defenses, some of which it will present by motion within twenty-one days of accepting service of the Second Amended Complaint.

not receive full payment for those products, from January 1, 2020, to October 31, 2021.” Doc. 97 at ¶ 86.

Plaintiffs seek to recover monetary damages from Horne and UMB Bank under various theories of fraud, negligence, and unjust enrichment. Doc. 97 at ¶¶ 97–139. Their claims against Horne rest on the idea that Horne, as EGT’s auditor, owed some duty to Plaintiffs to either (a) resign as EGT’s auditor or (b) proactively notify the Mississippi Department of Agriculture and Commerce (“MDAC”) of EGT’s financial instability. *Id.* at ¶¶ 41–42. But Horne fulfilled its duty to the only foreseeable users of its audits when it expressed “substantial doubt that EGT could continue as a going concern for all years from 2018-2021.” *Id.* at ¶ 28. Plaintiffs allege that EGT’s CEO, John Coleman, fraudulently altered these accurate audits by removing the going concern statement before submitting them to MDAC. *Id.* As Horne has argued in two nearly identical motions to dismiss in two other nearly identical actions, Horne satisfied its duty to EGT by providing these accurate audits and owed no duty to these third parties. Horne will adapt that argument to file in this Island Farms Action also.

On December 7, 2022, two plaintiffs filed a separate action—through the same attorneys as Plaintiffs here—against Horne and UMB Bank in Holmes County, Mississippi. *See Turner v. UMB Bank, N.A.*, No. 2022-0260 (Cir. Ct. of Holmes Cnty., Miss.) (the “Turner Action”), Ex. 1 (complaint). Horne and UMB Bank removed this action to the United States District Court for the Southern District of Mississippi on January 5, 2023 pursuant to 28 U.S.C. §§ 157, 1334, and 1452(a). Ex. 2 (notice of removal). Like in the Island Farms Action, the plaintiffs were farmers who alleged that they sold grain to EGT and were not paid for it prior to EGT’s bankruptcy. Ex. 1 at 1–2. And like in the Island Farms Action, the plaintiffs sought to recover monetary damages from Horne and UMB Bank under various theories of fraud, negligence, and unjust enrichment.

*Id.* at 14–18. Their claims against Horne rested on the same duty theories as those in the Second Amended Complaint. *See id.* at 7–8. There are several motions currently pending in the Turner Action, including motions to dismiss, Horne’s motion to refer to the Bankruptcy Court, and the plaintiffs’ motion to remand.

Then, on February 10, 2023, seventeen plaintiffs filed an action—again through the same attorneys—against Horne and UMB Bank in Tallahatchie County, Mississippi. *M&W Farms v. UMB Bank, N.A.*, No. 3:cv23-9SMT2 (Cir. Ct. of Tallahatchie Cnty., Miss.) (the “M&W Action”), Ex. 3 (complaint). Horne and UMB Bank removed this action to the United States District Court for the Northern District of Mississippi on March 9, 2023 pursuant to 28 U.S.C. §§ 157, 1334, and 1452(a). Ex. 4 (notice of removal). The seventeen plaintiffs each alleged that they had not received payment for grain sold to EGT in August and September of 2021. Ex. 3 at 2–6. Again, the complaint’s allegations were nearly identical to those in the Second Amended Complaint and the Turner Action complaint, arose from the same set of facts, and rested on the same nonexistent duty owed by Horne to those plaintiffs. The court is currently considering the defendants’ motions to dismiss, Horne’s motion to either refer to the Bankruptcy Court or transfer the action for consolidation, and the plaintiffs’ motion to remand.

On March 15, 2023—about a month after filing these two nearly identical actions—counsel for the farmers then decided to amend the complaint in the Island Farms Action to add Horne as a defendant. Doc. 89. This decision created a situation where there are three cases pending in federal court, all against the same defendants, arising from the same set of facts, brought through the same attorneys, making nearly identical allegations. And the plaintiffs in the Turner and M&W Actions—if you credit their complaint allegations—meet the putative class definition in the Island

Farms Action, essentially the same class definition Plaintiffs employed from outset of this action, more than a year before they had ever sued Horne.

### ARGUMENT

This Court should exercise its discretion to consolidate the three cases under Federal Rule of Civil Procedure 42(a) and Local Rule 42. “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Fed. R. Civ. P. 42(a). A district court may order consolidation of such cases either upon motion or *sua sponte*. *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 592 (5th Cir. 2018).

District courts have broad discretion to consolidate cases under Rule 42(a). Indeed, “[t]he trial court’s managerial power is especially strong and flexible in matters of consolidation.” *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013) (citation omitted). Mississippi courts have regularly exercised their discretion to consolidate cases involving “virtually identical facts, claims and theories of recovery” when doing so “will enhance judicial economy” and “minimiz[e] overlapping discovery.” *Necaise v. May*, No. 1:22-CV-100-LG-RPM, 2023 WL 379739, at \*2 (S.D. Miss. Jan. 24, 2023); *Allstate Ins. Co. v. Simpson*, No. 1:17-CV-182-HSO-JCG, 2017 WL 11428644, at \*1 (S.D. Miss. Oct. 17, 2017); *Jones v. Singing River Health Servs. Found.*, No. 1:14CV447-LG-RHW, 2015 WL 12672726, at \*3 (S.D. Miss. June 5, 2015). On the other hand, consolidation is improper “if it would prejudice the rights of the parties.” *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass’n of New Orleans, Inc.*, 712 F.2d 978, 989 (5th Cir. 1983).

Both the Island Farms Action and Turner Action are currently pending in the Southern District. “The Court may consolidate actions only if they are pending in the same district.” *Fid.*

*& Deposit Co. of Maryland v. Casablanca Constr., Inc.*, No. 5:19-CV-62-DCB-MTP, 2020 WL 1238194, at \*1 (S.D. Miss. Mar. 13, 2020). Under Local Rule 42, “the action bearing the lower or lowest docket number will control the designation of the district or magistrate judge before whom the motion to consolidate is noticed; the docket number will also determine the judge before whom the case or cases will be tried.” The Island Farms Action bears the lowest docket number and therefore controls the designation of the judge before whom the motion to consolidate is noticed. Thus, this Court can consolidate the Island Farms and Turner Actions at its discretion with no additional procedural hurdles.

The M&W Action is currently pending in the Northern District. “In the event that overlapping cases are pending in different districts, the Court can transfer one or the other case so that they may be then consolidated.” *Fid. & Deposit*, 2020 WL 1238194, at \*1 (citing 28 U.S.C. § 1404). And 28 U.S.C. § 1404(a) permits a district court to “transfer any civil action to any other district or division where it might have been brought”—in other words, an action may be transferred to a venue where it “originally could have been filed.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008). The M&W Action could have originally been filed in the Southern District because a substantial part of the events giving rise to the plaintiffs’ claims occurred there. 28 U.S.C. § 1391(b). Thus, the Court should arrange for the M&W Action to be transferred to the Southern District so that it can proceed with consolidation.

**I. Consolidation will produce superior efficiency.**

This Court should consolidate the three actions currently pending in Mississippi federal courts. First, the actions all involve “virtually identical facts, claims and theories of recovery.” *Necaise*, 2023 WL 379739, at \*2 They arise from the same events—a lack of payment for grain resulting from EGT’s bankruptcy. They make nearly identical claims of fraud, negligence, and

unjust enrichment. They were brought through the same attorneys against the same defendants. And as to Horne, they all make the same allegations that Horne owed a duty to third party farmers arising from its relationship with EGT (notwithstanding the total lack of support for such a duty under established Mississippi law).

There have already been inefficiencies arising from these similarities, and there will be more without consolidation. Horne, UMB Bank, and the plaintiffs have filed very similar complaints, motions to dismiss, motions to transfer, motions to remand, and opposition motions in the Turner and M&W Actions. Horne plans to file a third motion to dismiss in the Island Farms Action on substantially the same basis. Given the similarity of the underlying facts and legal arguments, it would serve the goal of judicial economy to consolidate these cases and permit only one court to rule on each motion. Consolidation would also reduce the risk of inconsistent judgments by avoiding a situation where one court grants a motion and another denies it. Finally, it would reduce the burdens of discovery and costs of litigation—without consolidation, the parties would need to produce a nearly identical set of discovery documents in three separate actions.

**II. Consolidation will avoid the potential confusion between individual adjudication and class adjudication.**

The plaintiffs in both the Turner and M&W Actions are part of the putative class in the Island Farms Action. That class includes all persons and entities that “deposited agricultural products with Express Grain” in the time period of “January 1, 2020, to October 31, 2021” and did not receive payment for it. The plaintiffs in the other actions allege that they did not receive payment for grain sold and/or delivered to EGT in August and September of 2021 and therefore fall squarely within the putative class. And Plaintiffs’ own complaint also alleges “[t]here are questions of law and fact common to the class” including questions relating to fraud, unjust

enrichment, and the defendants' duties to members of the class.<sup>2</sup> These exact questions were raised by the plaintiffs in both the Turner and M&W Actions. Although individual plaintiffs may opt out of the class if this Court ever certifies it, allowing these other actions to proceed prior to that class determination—and without any coordination with the class determination—would be inefficient and could lead to confusion.

Consider, for example, that plaintiffs' counsel—the same counsel in all three pending actions—must demonstrate that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,” Fed. R. Civ. P. 23(b)(3), **and** also explain why they concluded that litigating the Turner and M&W Actions through an entirely **different method** (i.e., individual adjudication) was superior. Counsel needs to square that circle in one place for one audience.

### CONCLUSION

For these reasons, Horne requests that this Court exercise its discretion to consolidate the three pending actions under Federal Rule of Civil Procedure 42(a) and Local Rule 42.

Dated: May 8, 2023

By: /s/ Simon T. Bailey  
J. William Manuel (MS Bar No. 9891)  
Simon T. Bailey (MS Bar No. 103925)  
BRADLEY ARANT BOULT CUMMINGS LLP  
One Jackson Place  
188 E Capitol Street, Ste 1000  
Jackson, MS 39201  
Phone: 601.948.8000  
Fax: 601.948.3000  
wmanuel@bradley.com  
sbailey@bradley.com

*Attorneys for Defendant  
Horne LLP*

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<sup>2</sup> To be clear, the similarity among the cases is sufficient to satisfy the Rule 42 standard for consolidation. Horne disputes that the claims share the commonality necessary for class certification and reserves all defenses to the certification of any class.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2023, a true and correct copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ Simon T. Bailey  
OF COUNSEL