IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: EXPRESS GRAIN TERMINALS, LLC **CHAPTER 11**

BANKRUPTCY CASE NO: 21-11832-SDM

FARM GROUP I'S OMNIBUS RESPONSE IN OPPOSITION TO STONEX COMMODITY SOLUTIONS LLC'S, MACQUARIE COMMODITIES (USA) INC.'S, UMB BANK N.A.'S, AND EXPRESS GRAIN TERMINALS, LLC'S OPENING BRIEFS ON COMMON LEGAL ISSUES [DKT. # 1508, 1511,1513, 1516]

Farm Group I[1] responds to Stonex Commodity Solutions LLC's ("StoneX"), Macquarie Commodities (USA) Inc.'s ("Macquarie"), UMB Bank N.A.'s ("UMB"), and Express Grain Terminals, LLC's ("EGT") Opening Briefs on Common Legal Issues [Dkt. #s1508, 1511,1513 1516] as follows:

I. STONEX, MACQUARIE, AND UMB ARE NOT HOLDERS OF VALID WAREHOUSE RECEIPTS.

a. The warehouse receipts were invalid as a matter of law.

In their brief on the common issues, the repo lenders, StoneX and Macquarie, and UMB, the largest creditor of EGT, assume as if it is a given, that that the warehouse receipts EGT

[1] Farm Group I consists of the following: Adron Farms, Ashton Planting Company, BC Farms, Black Dog Farms, Buck Harris Planting Company, Champion Farms, D.W. Clark, Jr., Tonia T. Clardy, Corley Moses Farms, DLH Farms, David Bratton Farms, Davis and Davis Farms, DeLoach Farms, Dodson Planting Company, Fulgham Farms, Tyler Gilliland, Highlandale Planting Company, Howard Farms, Idlewood Plantation, Jennings Planting Company, KMC Farms, Jacob Lindsey, Lake Lindsey, Little Bee Lake Farms, LLC, Jim Locke, MBM Farms, Inc., O'Neal Planting Company, Poe Planting Company, Fred J. Poindexter, Porter Farms, Prestidge Farms II, Ridgecrest Farms, Scott Farms, Mary Annette Morgan Smith, Tackett Planting Company II, Taylor Farms, Kelsie Fennell Trible, VK Farms, W B Farms, W.M. Jennings & Son, Westwood Farms, Lawyer Wheeler and Wolf Run Farms.

issued to them are valid and they own the soybeans covered by the warehouse receipts. They are wrong.

StoneX, Macquarie and UMB Bank are not producers of grain. It is undisputed that none of these entities delivered any soybeans to be stored at EGT. According to StoneX's Amended Assertion of Interest, Dkt. #1437, it purchased, not delivered, soybeans from EGT for which EGT issued warehouse receipts:

> StoneX provides cash flow to Express Grain Terminals by way of a series of repurchase agreements, whereby StoneX purchases and takes title to specified quantities of soybean bushels stored in Express Grain's grain terminals, and then resells the bushels and surrenders title to the soybeans back to Express Grain at a specified date and price only after Express Grain has paid cash in full pursuant to a contract.
>
> (Emphasis added.)

Likewise, Macquarie purchased soybeans from EGT in return for EGT's issuing Macquarie various warehouse receipts. See Macquarie's Assertion of Interest, addendum, Dkt. #1429. Finally, EGT issued warehouse receipts to UMB Bank with no stated reason. Assertions of Interest, Dkt. #1417, Exhibit I.

According to the information provided in these respective parties' Assertion of Interest, the following Warehouse Receipts were issued for which no grain was delivered to EGT:

HOLDER	BUSHELS	DATE	LOCATION
StoneX	300,000	11/16/18	Sidon
StoneX	500,000	5/9/19	Sidon
StoneX	350,000	6/1/20	Sidon
StoneX	200,000	6/1/20	Minter City
UMB Bank	385,000	10/22/20	Sidon
StoneX	450,000	12/1/20	Greenwood

Macquarie	1,000,000	1/15/21	Sidon[2]
UMB Bank	300,000	1/21/21	Minter City
StoneX	200,000	6/28/21	Greenwood
Macquarie	800,000	7/16/21	Sidon[3]
Macquarie	100,000	7/16/21	Sidon[4]
StoneX	195,000	7/21/21	Greenwood
UMB Bank	600,000	8/31/21	Minter City
Macquarie	50,000	9/21/21	Sidon[5]
Macquarie	650,000	9/28/21	Sidon
Macquarie	100,000	9/28/21	Sidon

As of September 1, 2021, EGT had issued outstanding warehouse receipts totaling 4,480,000 bushels of soybeans to these three entities, none of whom delivered the first bushel of soybeans to EGT.

Under Mississippi law, EGT is prohibited from issuing any warehouse receipts except in cases where there is an actual delivery of soybeans into the warehouse for which the soybeans are delivered. Specifically, Miss. Code Ann. §75-44-61 (Rev. 2016) states:

> No warehouse receipt shall be issued except upon actual delivery of grain into storage in the warehouse from which it purports to be issued, nor shall any receipt be issued for a greater quantity of grain than was contained in the lot or parcel or received for storage, nor shall more than one (1) receipt be issued for the same lot of grain, except in cases where a receipt for a part of a lot is desired, and then the aggregate receipts for a particular lot shall cover that lot and no more.

StoneX, Macquarie and UMB Bank, by their own admissions, did not deliver any soybeans to EGT and certainly did not deliver bushels in a quantity "in the lot or parcel received for storage . . ." As such, EGT had no authority to issue any warehouse receipts to these entities

[2] Returned to EGT on 7/16/21
[3] Returned to EGT on 9/28/21
[4] Returned to EGT on 9/21/21
[5] Returned to EGT on 9/28/21

and their warehouse receipts are invalid as a matter of law. StoneX, Macquarie and UMB Bank have no claim for any soybeans represented by the illegal warehouse receipts.[6]

Further, although Miss. Code Ann. §75-44-63 allows for the "sale or pledge of any warehouse receipts for grain of which the warehouseman is the owner, . . . and recital of ownership in the receipt shall constitute notice of the right to sell or pledge the same," EGT did not sell its warehouse receipts to StoneX, Macquarie or UMB. It sold already delivered grain for which it issued warehouse receipts to StoneX, Macquarie and UMB. As such, this statute does not apply and even if it did, the warehouse receipts issued to StoneX, Macquarie and UMB Bank do not state on their face that EGT owns the grain as is required by Mississippi law.[7] A copy of one of Macquarie's warehouse receipts is attached hereto as Exhibit 1.

The case of *Central States Corp. v. Luther (In re Garden Grain & Seed Co., Inc.)*, 215 F.2d 38 (10th Cir. 1954) is on point. In *Garden Grain & Seed Co., Inc.*, the court held that the elevator's warehouse receipts issued to Central States were illegal and therefore unenforceable in bankruptcy. The court based its ruling on two Kansas statutes that are similar to the Mississippi Grain Warehouse Law, Miss. Code Ann. §75-44-1 *et seq*. (Rev. 2016). The Kansas statutes allowed for a warehouse receipt to only be issued "upon actual delivery of grain into the warehouse from which it purports to be issued," and allowed a warehouseman to make a sale or pledge of warehouse receipts for grain upon which it was the owner provided the warehouse receipt states on its face that the warehouse owns the grain. *Id*. at 41-42. The court held the warehouse receipts that were issued in violation of those statutes were not enforceable:

[6] The actual warehouse receipts appear to contain inaccurate information about the source of the soybeans. For example, the warehouse receipt issued to Macquarie on September 28, 2021, which is attached hereto, states that 100,000 net bushels of soybeans were received by truck; however, Macquarie did not deliver any grain to EGT by truck or otherwise.

[7] Further, the warehouse receipts of StoneX, Macquarie and UMB Bank are not numbered as required by Miss. Code Ann. §75-44-59.

> "The claimant did not deliver any grain to the bankrupt for storage. No physical deposit of grain was made and none was ever intended by the parties. The receipts were never registered and the word 'registered' was never stamped upon them with the official registration stamp. The claimant knew that no grain was deposited with the bankrupt for storage, and it knew that the receipts did not indicate on their face that they had been registered. The receipts were not conventional bona fide vouchers issued to a depositor of grain. Neither were they receipts for grain belonging to the bankrupt and then presently stored in its warehouse. It seems clear that the transactions between the claimant and the bankrupt, which included as an integrated part thereof the issuance and delivery of the receipts, did not conform to the statutory exactions of the state in respect to the issuance of warehouse receipts. Our attention has not been called to any case decided by the Supreme Court of Kansas involving the validity of warehouse receipts issued under similar or fairly comparable circumstances to those present here. But in Kipp v. Goffe & Carkener, 144 Kan. 95, 58 P.2d 102, 108 A.L.R., it was held that one dealing with a warehouseman who had not been licensed under the act was bound to know that the warehouseman had no right, power, or authority as a public warehouseman to receive grain for storage or transfer for the public; and that one storing grain with such a non-licensed warehouseman and taking receipts therefor could not invoke the protection of the act. If one who accepts from a warehouseman not licensed under the act receipts for grain stored in his warehouse cannot invoke the protective provisions of the act, it must follow by appropriate analogy that where one, in disregard of the act, obtains warehouse receipts from a licensed public warehouseman without depositing with such warehouseman any grain for storage and without the receipts being registered in the manner specified in the CT cannot be heard to urge with success that the receipts were validly issued under the act and therefore constitute sustainable basis for the assertion in bankruptcy of a right of reclamation, an equitable lien, or preferred claim."

Id. at 42-43.

In *Fidelity State Bank v. Central Sur. & Ins. Corp.*, 228 F. 2d 654, 656 (10th Cir. 1955), another case arising out of the bankruptcy of Garden Grain & Seed Company, the court rejected a bank's claim to grain represented by warehouse receipts that were not issued in accordance with the Kansas statute.

> The bank deposited no grain in the elevator for storage, and the receipts which it accepted could relate only to grain which the bankrupt represented that it owned. A warehouseman may under Section 34-240 pledge his grain through the medium of warehouse receipts. He may do this, however, only by a strict compliance with the statute. He must strictly follow the requirements of the statute as to

> registration of the receipts. One who accepts receipts from the warehouseman which have been issued contrary to the statutory requirements, may not be heard to say that he had no notice that there was no compliance with the provisions of the Act. If the receipt is for grain purportedly owned by the warehouseman, the person who accepts it is bound to know that it must recite that the warehouseman is the owner, either solely or jointly or in common with others, and he must be held to know that the receipt which he accepts is registered or unregistered.

StoneX, Macquarie and UMB Bank knew these warehouse receipts were not issued in accordance with Mississippi law. They "may not be heard to say" that they had no notice of EGT's failure to follow the law. The warehouse receipts are unenforceable as a matter of law and this Court should reject any claim based upon those warehouse receipts.

b. There were no soybeans covered by the warehouse receipts issued to StoneX, Macquarie and UMB Bank.

Even if the warehouse receipts were valid, which they were not, StoneX, Macquarie and UMB Bank knew that the soybeans they were "purchasing" were being used in the crushing operations. Once EGT used the farmers' soybeans in that operation, they were gone. Invalidly issued warehouse receipts do not create a floating lien that attaches to all soybeans that come into EGT's possession. Indeed, this is why Mississippi law requires that warehouse receipts only be issued for grain that is actually delivered to the warehouse and only in the amount delivered for storage.

EGT was not only a "grain warehouse" under Mississippi law, but also a "grain dealer." As a grain dealer, EGT made no secret that it was using the soybeans delivered to it to create soybean oil and soybean meal. This Court has already recognized that EGT is a grain dealer processing its soybeans:

> Express Grain is a large grain terminal operating in several locations among the Mississippi Delta. The terminal functions in several ways, from physically storing crops (grain, soybeans, corn, sorghum, etc.) purchased by Express Grain from its contracted farmers to operating as a "crushing facility" where certain delivered crops are processed to yield byproducts such as hulls, meal, and oil. Express

> Grain then sells the byproducts for a profit over and above the crop purchase price.
>
> Dkt. #1468, pp. 2-3.

EGT's very own website prominently states:

> Soybeans are brought to Express Grain Terminals by local farmers and processed into soybean meal, hulls, and oil. The meal and hulls are used as feed ingredients for all the major livestock groups. At Express Grain's newly opened biodiesel plant, the soybean oil is further refined into a renewable fuel which is blended up to 20 percent into the existing on and off-road diesel fuel supply chain.

https://www.expressgrain.com/article/We're-your-source-for-Grain-Handling-Soybean-Processing-and-Biodiesel-Production

It is unclear at this point what if any soybeans existed prior to the farmers' delivery of their crops for 2021. As stated above, as of September 1, 2021, EGT had outstanding warehouse receipts totaling 4,480,000 bushels of soybeans, 1,350,000 of which were issued to StoneX over a year before bankruptcy.[8] All of the outstanding warehouse receipts were issued before the farmers had delivered most of their soybeans for 2021. EGT has not disclosed its soybean inventory as of September 1, 2021. Based on the only facts available to the farmers, as contained in the Grain Report, Dkt. #1070, as of September 28, 2021, EGT had 3,264,857 bushels of soybeans in its inventory. According to the Grain Report, 3,130,954.22 bushels were delivered in the 20 days prior to the bankruptcy. According to the Break-Even Analysis prepared by CR3, a copy of which is attached as Exhibit 2, in the period between the week ended September 3, 2021, through October 1, 2021, EGT crushed an average of 160,000 bushels of soybeans per week. It is reasonable to conclude that when EGT actually provides the true inventory of soybeans as of September 1, 2021, it will demonstrate EGT had very few bushels of soybeans on September 1

[8] Mississippi law requires all warehouse receipts issued by a licensed warehouse to contain a provision requiring the holder of the warehouse receipt to demand delivery of the crops within one year of the warehouse receipt's issuance. Miss. Code Ann. §75-44-49 (1)(a).

and clearly no soybeans delivered by UMB, StoneX or Macquarie. StoneX, Macquarie and UMB Bank plainly knew that EGT had very few soybeans, plainly knew they had not delivered any soybeans to EGT and plainly knew EGT was using any soybeans delivered by the farmers in its crushing operations. StoneX, Macquarie and UMB knew that without the farmers' 2021 soybeans, their warehouse receipts would be worthless. Accordingly, even if their warehouse receipts were validly issued, StoneX, Macquarie and UMB are estopped as a matter of law from claiming any interest in the soybeans delivered by the farmers in 2021.

II. A CONSTRUCTIVE TRUST SHOULD BE IMPOSED FOR THE BENEFIT OF THE FARMERS.

Since the initial brief, we have now learned that on May 27, 2021, EGT submitted an Independent Auditor's Report of EGT dated May 20, 2021, allegedly prepared by Horne LLP, to the Mississippi Department of Agriculture and Commerce ("the Department") to obtain a renewal of its licenses as a grain warehouse and a grain dealer, as required under Mississippi law. According to the Department, EGT presented an audit report that was significantly different from the actual audit report Horne LLP prepared. The differences included

- Removal of "Emphasis of Matter Regarding going Concern,"
- Alteration of Operating Income on p. 2 from a loss to a positive income,
- Changing Horne, LLP's letterhead by substituting a letterhead that Horne, LLP no longer uses,
- Other *material alterations* to be shown at a hearing. (Emphasis added.)

Mississippi Department of Agriculture and Commerce's Motion for Relief from Automatic Stay, Dkt. #1526, p. 3-4.

But for these altered audits, it is likely the Department would not have renewed EGT's licenses, and this fiasco would have been avoided. It is now clear that EGT's actions, beginning as early as January of 2021, if not sooner, were fraudulent. EGT was insolvent and it needed two

things to keep its scheme going into 2021. First, EGT needed the Delta farmers to deliver their 2021 corn and soybean crops so it could continue to borrow money to operate, and second, it had to convince the Department to renew its licenses, while hiding its deepening insolvency.

To accomplish the first goal, it set upon a course of reassuring the farmers that EGT was financially sound and would pay them for their crops. As previously noted, Bubba Deloach, a farmer from Greenwood, Mississippi, testified to this Court on November 30, 2021, that EGT did not timely pay farmers for their 2020 crops, and it caused him concern. To address these concerns in April 2021, EGT told the farmers:

> We are excited to see another crop go in the group. We are looking forward to another busy fall, and this time we'll be more prepared financially having moved our fiscal year to the calendar year as opposed to June 30. June 30 is good physical cutoff for old/new crop, but the calendar fiscal year will give us more time to have our inventory financing secured and in place in time for harvest, so things will run like normal. We all have a lot to look forward to this coming year. Let's make the most of it!

April 6, 2021, email from John Coleman to farmers, Exhibit 3.

On September 28, 2021, the day before EGT filed bankruptcy, John Coleman, the President of EGT, assured the farmers that EGT was financially sound:

> I hope everyone is having a great harvest this year. I wanted to update you all on how we are doing. This harvest Express Grain has received approximately 7.5 million bushels of corn! This is the 2nd largest in our history just behind 2013. A lot of this was made possible due to the inverted market and high moisture harvesting program. We have shipped approximately 6.5 million bushels of corn out to the market. We have to thank the CN railroad for doing an excellent job of keeping trains rolling in and out of our Sidon Facility, and for you getting it out of the field! We are so thankful a large portion got their corn out of the field and to market before the Hurricane. Soybeans are rolling in as well. Due to issues with the river this year, we are definitely going to see more bushels come our way. We are steadily crushing beans, and will start shipping trains of beans so we have ample space for everyone. I also wanted to let you know that we are in good shape financially. We have funding in place from multiple sources to make sure everyone gets paid on time. Stay safe out there and keep those combines rolling!

September 28, 2021, email from John Coleman to farmers, Exhibit 4.

In addition to the "reassuring" emails already submitted to the Court, EGT hired "producers" whose sole job was to visit the farmers and encourage them to deliver all their grain, soybeans, and corn, to EGT in 2021. EGT instructed the "producers" to advise the farmers that EGT was in sound financial condition and had a line of credit to ensure timely payment for the grain, which is what the "producers" did. Of course, we now know EGT was hopelessly insolvent and had no way to pay for the soybeans.[9]

To accomplish the second goal, EGT altered the Horne LLP audit to hide its deepening insolvency from the Department. All of this worked until UMB Bank pulled the plug on September 28, 2021, which conveniently was at the same time when the farmers had delivered to EGT almost all of their corn and soybeans for 2021.[10]

Mississippi law has long recognized constructive trusts where justice demands an equitable remedy. In *Sojourner v. Sojourner*, 153 So. 2d 803, 807 (Miss. 1983), the Mississippi Supreme Court defined a constructive trust as follows:

> A constructive trust is one that arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, to hold and enjoy.

The bankruptcy court has the power to impose a constructive trust, provided it is not done "cavalierly." *Matter of Haber Oil Co., Inc.*, 12 F.3d 426, 436 (5th Cir. 1994) (holding that "[w]e

[9] Farm Group I is without knowledge or information as to whether the "producers" were aware of the fraud or whether, like the farmers, they were also lied to by EGT's management.

[10] As set forth more fully in the Equitable Subrogation section of this brief, UMB was fully aware of the soybean inventory issue by its own admission on September 22, 2021, and most likely sooner given the illegally issued warehouse receipts and its knowledge that EGT was not storing soybeans but crushing them.

have thus consistently recognized that §541(d) accords the beneficiary of a constructive trust, properly imposed under state law, the right to recover the trust property from the bankruptcy trustee or the debtor."). Once a constructive trust is imposed, the property subject to the trust is not property of the estate under §541(d) and the "trustee will be ordered to turn over the property or proceeds [to the trust beneficiary]." *Id.*

Mississippi cases state that a constructive trust arises by "implication from the relationship and conduct of the parties . . . ." *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985). In *Allred v. Fairchild*, 785 So. 2d 1064, 1068 (Miss. 2001), the Mississippi Supreme Court recognized that the relationship necessary for a constructive trust does not need to be restricted unnecessarily:

> "While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices. . . ." *Sojourner*, 153 So. 2d at 807. In harmony with the equitable purpose of constructive trusts, we are careful not to apply too narrow a definition of confidential relationship. "An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an information relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one." *Id.* at 808.

In that case, much like with the farmers and EGT, the plaintiff and defendant had done business together over the years. At some point in their dealings, the plaintiff declared he never intended to give the defendant an interest in his properties. The court observed that "[t]he lack of any intention to fulfill an agreement is strong evidence that a constructive trust would be appropriate. '[A] constructive trust will be raised where at the time the promise is made the grantee does not intend to perform it . . . ." *Id.* (citing *Sojourner*, 153 So. 2d at 807).

In *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024 (Miss. 1990), the court recognized that a constructive trust was an appropriate remedy in farm-related cases where a party held funds that "in equity and good conscience" belonged to another. The court held that:

> Any transaction may provide an appropriate setting for creating a constructive trust where, for any reason, one party holds funds "which in equity and good conscience should be possessed by" another party. Their forms and varieties "are practically without limit."

Id. at 1034 (quoting 89 C.J.S. *Trusts*, §142 at 1027(1955)).

There the bank was paid the proceeds of a crop sale that were subject to a landlord's lien. The court imposed a constructive trust for the benefit of the landlord on the funds in possession of the bank irrespective of the nature of the relationship of the parties.

Like in *Allred* and *Sklar*, the present situation demands the imposition of a constructive trust. EGT and its secured creditors, who were in a position to know the true financial status of EGT, seek to profit from the fraud perpetrated on the farmers. But for EGT's lies to the farmers and to the Department, there would be no grain to fight about. The lies to the farmers and to the Department were generated in a confidential relationship, one in which the farmers and the Department trusted EGT to provide accurate financial information about their stability.[11] The farmers and the Department relied on those lies to their detriment. But for those lies, the Department would not have issued a license to EGT to operate in 2021 and the farmers would not have taken their grain to EGT. StoneX, Macquarie and UMB cannot claim to be prejudiced by a constructive trust as they knew or should have known their warehouse receipts did not represent delivered soybeans as required under Mississippi law and were illegal. A constructive

[11] Indeed, Miss. Code Ann. §75-44-69 recognizes the confidential nature of the relationship between the grain warehouse and the Department. Clearly the farmers, who the Department is charged with protecting, are also beneficiaries of that confidential relationship.

trust is required on these egregious facts to protect the farmers from the massive fraud that EGT perpetrated upon them.

III. THE FARMERS' RECLAMATION CLAIMS ARE SECURED AND ARE SENIOR TO THE CLAIMS OF EGT'S LENDERS.

Although StoneX, Macquarie and UMB ignore §546(d), the farmers' reclamation claims are governed by 11 U.S.C §546(d), *not* §546(c). Section 546(d) specifically pertains to reclamation claims of producers of grain, such as the farmers here. Pursuant to this section, a court may deny a reclamation right to a grain producer "only if the court secures such claim by a lien." §546(d)(2). And importantly, unlike in §546(c), there is no language in §546(d) that states the reclamation rights are "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof. . . ." *See* §546(c). *See also* 5 COLLIER ON BANKRUPTCY, ¶ 546.05[2][c][iii] (Richard Levin and Henry J. Sommer, 16th Ed.) Instead, §546(d) states as follows:

> In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent but –
>
> (1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and
>
> (2) <u>The court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.</u>

(Emphasis added).

The terms of §546(d) are mandatory, not discretionary. If the farmer makes a timely reclamation claim under §546(d), the court must either grant it and allow the farmer to reclaim his grain or the grain proceeds or deny the reclamation claim and provide the farmer with a secured claim. 5 COLLIER ON BANKRUPTCY ¶ 546.05[3] (Richard Levin and Henry J. Sommer, 16th Ed.). Because the farmers have a secured claim if reclamation is denied, the claim must have priority. Otherwise, it means nothing.

StoneX, Macquarie and UMB claim that under Miss. Code Ann. §75-2-702, any reclamation claims of the farmers are not entitled to priority over their claims because they are buyers in the ordinary course of business or good faith purchasers. StoneX, Macquarie and UMB Bank are wrong. They are not "a buyer in the ordinary course or other good faith purchaser." *See* Section (3) of Miss. Code Ann. §75-2-702. As discussed in detail in Section I *supra*, StoneX, Macquarie, and UMB do not hold valid warehouse receipts under Mississippi law. *See* Miss. Code Ann. §75-44-61 (Rev. 2016) ("No warehouse receipt shall be issued except upon actual delivery of grain into storage in the warehouse . . . .").[12] Thus, EGT could not issue valid warehouse receipts to StoneX, Macquarie, and UMB and they are not "good faith purchaser[s]" who can prime the liens of the farmers.

[12] Macquarie and StoneX cannot credibly contend their transactions are actual loans given the effort they have expended to say otherwise. Therefore, they cannot be considered good faith lenders or good faith purchasers without notice. Also, Macquarie, StoneX and UMB all knew that the soybeans that were delivered to EGT were being used by EGT in its crushing operations. They cannot be considered good faith purchasers without notice irrespective of the validity of their warehouse receipts. Further, UMB is not a good faith lender without notice. First, the timing of its last warehouse receipt for 600,000 bushels of soybeans is particularly suspect, (issued on August 31, 2021) given the fact that the farmers had just started delivering their 2021 crops. Second, UMB knew or should have known the status of EGT's soybean inventory in relation to the outstanding warehouse receipts because UMB knew EGT had to have soybeans to run its crushing operations. After all, UMB participated in some fashion in the loan pursuant to which EGT's "biodiesel" facility was established to crush soybeans. Without soybeans, there is no crushing operation.

IV. COMMINGLED GRAIN IS SUBJECT TO RECLAMATION.

Grain is a fungible good. *See* Miss Code Ann. §75-1-201(18) ("Fungible good" means: (A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit…."). Denying reclamation because a grain elevator, by necessity, commingles fungible goods such as corn and soybeans would read the reclamation provisions of 11 U.S.C. §546(d) out of the Bankruptcy Code. It would also make meaningless the reclamation provisions of Miss. Code Ann. §75-2-702.

Other courts routinely allow reclamation claims of fungible goods that are commingled. *See In re Charter Co.*, 54 B.R. 91, 93 (Bankr. M.D. Fla. 1985) ("As Congress did not limit the definition of 'goods' in either 11 U.S.C. §546 or U.C.C. §2-702, it is apparent and we hold that fungible crude oil can be the subject of reclamation."); *In re Bearhouse, Inc.* 84 B.R. 552, 559 (Bankr. Ark. 1988) ("In cases where fungible goods were commingled . . . the right to reclaim has been upheld.").

V. THE LIENS OF STONEX, MACQUARIE, AND UMB MAY BE SUBJECT TO EQUITABLE SUBORDINATION.

The farmers in Farm Group I assert that they are entitled to the grain or the proceeds thereof as a result of the constructive trust that should be imposed and/or as a result of bailment and/or reclamation rights. The farmers alternatively reserve all rights to seek equitable subordination of the lenders' claims under 11 U.S.C. §510(c). The parties have learned since filing Opening Briefs on Common Legal Issues that the Department plans to utilize its police and regulatory powers to investigate EGT's likely submission of fraudulent financial documents to the Department. The parties are entitled to discovery from the lender parties to find out what they knew about EGT's financial status, and when they knew it. Moreover, the parties are entitled to discovery regarding documents or other information EGT submitted to the lenders during the

loan application process. If the documents and information are such that the lenders knew, or should have known, of improprieties in the financial information, equitable subordination is proper. *See, e.g.*, *In re Exide Technologies, Inc.*, 299 B.R. 732, 744 (D. Del. 2003) (holding that the parties stated a claim for equitable subordination where the Pre-Petition Banks:

> (a) had full access to the books and records of the Debtors:
> (b) had full opportunity to determine the then existing financial condition of the Debtors;
> (c) had full opportunity to asses [sic], with all relevant information, what the financial condition of the Debtors would be after each decision (i) to provide funding to the Debtors; (ii) to cause the Debtors to grant additional collateral, pledges and guarantees without providing reasonably equivalent value in return; (iii) to cause the Debtors to pay or reimburse fees, including professional fees and expenses of the Pre-Petition Banks; and (iv) to cause the Debtors not to file timely petitions; and
>
> (d) had full opportunity to determine what the Debtors' ability would be to pay their obligations as they came due in the ordinary course of business including obligations owed to general unsecured creditors . . . .)

UMB now concedes it knew there was an issue with the soybeans inventory by September 22, 2021. On January 6, 2022, UMB filed its Supplemental Response, Dkt. #1631. The supplemental response states that representatives of EGT told UMB on September 22 there was an issue with the soybean inventory, which John Coleman confirmed on September 24. But didn't UMB already know there was an issue with the soybean inventory? UMB knew or should have known that the warehouse receipts issued to Macquarie, StoneX and itself, were not for delivered soybeans in violation of Mississippi law and it knew that soybeans were not being stored but were being used in EGT's daily crushing operation, the same operation it has fought so hard to keep going post-petition. UMB purposefully stayed silent to protect its own self-interest as the unsuspecting farmers, "lead like sheep to the slaughter," continued to deliver their soybeans to EGT, 24 hours a day, 7 days a week during the harvest season beginning in late

August up until the bankruptcy was filed, creating over $40,000,000 in soybeans inventory, upon which UMB now claims it has a first priority security interest.

Any determination by the Court with regard to priority should be subject to further proceedings regarding whether the Debtors' lenders' claims are subject to equitable subordination.

VI. THIS COURT SHOULD ENFORCE MARSHALING OF ASSETS.

Alternatively, because the reclamation claims are secured claims as a matter of law, if the Court should determine that any other secured creditor with liens on assets other than grain or grain proceeds is the first priority lienholder on pre-petition grain or proceeds from the grain, or that such first priority lienholder is on equal footing with others who do not have interests in other assets of the Debtor, like the farmers with reclamation claims, the farmers reserve their rights to ask this Court to enforce the doctrine of marshaling to subrogate the claims of the lienholders who can look to other assets to the claims of the farmers with secured reclamation claims.[13]

In *In re Coors of North Mississippi, Inc.*, 66 B.R. 845, 866 (Bankr. N.D. Miss. 1986), the court described the doctrine of marshaling as follows:

> [w]here two or more creditors seek satisfaction out of the assets of their debtor, and one of them can resort to two funds whereas another creditor has recourse to only one of the funds – for example where a senior or prior mortgagee has a lien on two parcels of land, and a junior mortgagee has a lien on but one of the parcels – the former may be required to seek satisfaction out of the fund which the latter creditor cannot touch, so that by this means of distribution both creditors may be paid, or the single fun creditor may, if possible, have his claim satisfied out of the fund which is subject to the claims of both creditors.

[13] Secured creditors are entitled to enforce marshaling. *In re Evans*, 2011 WL 4712180 at *7 (S.D. Miss. 2011) ("[S]ecured creditors have authority to invoke the doctrine of marshaling."). The farmers are secured creditors under all arguments advanced herein.

The court summarized the elements required for marshaling as follows:

> (1) two persons that are creditors of a common or the same debtor;
> (2) that common debtor owns or is in control of at least two funds; and
> (3) one creditor has the right to resort to at least two of the funds while the other creditor has the right to resort to only one of the funds.

Id. In addition, the court noted that "both funds must be within the jurisdiction and control of the court." *Id.*

Here, all assets are within the "jurisdiction and control" of this Court. There are secured creditors with purported liens on assets other than the grain and grain proceeds. But the farmers with secured claims under 546(d) only have access to the grain and grain proceeds to make them whole or to provide any satisfaction of the amounts owed them by the Debtor. Thus, all elements of marshaling are met and it would "promote fair dealing and justice." *Id.* The farmers reserve all their rights to require marshaling of assets.

VII. EGT DOES NOT HAVE OWNERSHIP OF THE FARMERS' GRAIN OR GRAIN PROCEEDS.

As outlined *supra* in Section II, this Court should impose a constructive trust and hold that EGT never acquired ownership of the farmers' grain. EGT induced the farmers to bring their grain to its facilities with lies regarding its financial condition. It is likely that EGT was not even operating pursuant to valid licenses because the Department has alleged that EGT submitted falsified financial statements to it so that it could obtain licensing.

Farm Group I also disputes EGT's statement (made with no supporting evidence) that there has been a course of conduct establishing that the farmers intended to transfer ownership of their grain when brought to the EGT facility, even where there was no contract.

Where there was no contract in place pre-petition, nothing more than a bailment relationship was established. Title to the grain never passed to EGT. A bailment is defined in the Miss. Plain Lang. Model Jury Instr. Civ. 3200 as follows:

> A bailment is when one person gives personal property to another person who will keep, use, and return the personal property in a certain condition. The bailor is the person who gives the personal property; the bailee is the person who receives the personal property.

See also In re Hawkins Co., Ltd., 104 B.R. 317, 319 (Bankr. D. Idaho 1989) (holding that a bailment is "[a] deposit of the commodity for 'storage, handling, processing, reconditioning or shipment.'"). The court confirmed that if no document of title passed to the grain elevator, the producers retained title ("[t]o the extent the producers possess documents of title under §3001(g) their claims are prima facie valid, subject to evidence which the debtor-in possession or other parties must produce to defeat or alter the claim."). *Id.* at 320. In this case, EGT in some instances has no documents of title to indicate that it gained title to the farmers' grain. In those cases, EGT was merely a storer of grain for the farmers and a bailment relationship was established.

Notably, in *In re Esbon Grain Co.*, 55 B.R. 308 (Bankr. D. Kan. 1985), the court rejected the argument that secured lienholders are on an equal footing with the rights of grain depositors who stored their grain at the debtor's warehouse. The court noted that the expedited procedures of 11 U.S.C. §557 were intended to allow "distribution of the stored grain (or proceeds) to the producer/depositor *before* distribution to debtor's secured creditors." *Id.* at 314 (emphasis in original). The same priority applies where there is a shortfall: "After payment of trustee costs all grain is committed to the bailment claims of producer/depositors, thus shifting the loss to debtor's secured creditors." *Id.*

Contrary to EGT's assertions, there likewise is no "ordinary course of business" which governs the unpriced basis contracts. In these cases, the farmers have contracts that were unpriced at the time of the bankruptcy. The "contracts" lacked essential terms, such as when the farmer gets paid and how much. Importantly, EGT has, since the filing of bankruptcy, sent

farmers who had unpriced contracts, "new" proposed contracts with a different basis and a different futures month, thus completely changing the purported contracts. If the initial unpriced basis contracts (which are subject to motions to assume filed by EGT) were actually enforceable contracts, there would be no reason for EGT to attempt to enter into new contracts.

Without essential terms in these so-called contracts, there are only two options:

1. The grain belongs to the farmer; or
2. The contract (with actual terms supplied) is a post-petition contract, and the farmer must be paid by the debtor-in-possession.

VIII. CONCLUSION.

Farm Group I respectfully requests that this Court impose a constructive trust and order that the farmers have title to the grain and/or grain proceeds delivered by them to EGT, as that equitable remedy is demanded here to afford justice to the farmers who were lied to by EGT so that they would deliver their corn and soybeans. Moreover, had EGT not lied to the Department of Agriculture, it would not have had a license to operate and would not have been open, thus saving the farmers from financial devastation. Alternatively, this Court should recognize the reclamation rights of the farmers pursuant to § 46(d) and find that the farmers have a first priority, secured lien on the grain and grain proceeds. Finally, before any liens are prioritized, this Court should employ the equitable doctrines of equitable subordination and marshaling of assets as justice demands the farmers have first resort to their own grain and grain proceeds.

Farm Group I requests such other relief as the Court deems just and appropriate.

This 10th day of January, 2022.

FARM GROUP I

By: /s/ Jim F. Spencer, Jr.
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CERTIFICATE OF SERVICE

I, Jim F. Spencer, Jr., do hereby certify that I have caused to be served the above and for going pleading on all parties requesting notice by using the ECF filing system of the court.

This 10th day of January, 2022.

/s/ Jim F. Spencer, Jr.
Jim F. Spencer, Jr.