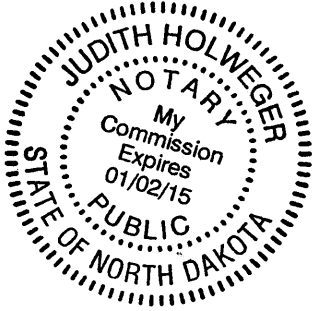


and depositing the same, with postage prepaid, in the United States mail at Grand Forks, North Dakota.

Heidi Sundquist
Heidi Sundquist

Subscribed and sworn to before me this 20th day of July, 2012.



Judith Holweger
NOTARY PUBLIC

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WALSH

NORTHEAST JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Grabanski Grain LLC

and

Platte River Insurance Company,

Respondents.

Civil No.: 50-2011-CV-00029

**POST MOTION HEARING
BRIEF OF PLATTE RIVER
INSURANCE COMPANY**

PSC Case No. GE-10-498

In responding to the Petitioner's Motion and in filing this Brief, Respondent Platte River Insurance Company (hereinafter Platte River) is entitled to and has relied on the representations of the Public Service Commission (hereinafter PSC) that it has provided all materials filed with it by the claimants listed in Petitioner's Exhibit 15 which was received by the court and that it has done its due diligence as Trustee in seeking additional information from the claimants, whether it be for a Cash-sale claim or a Credit-sale claim.

Three attorneys participated in the presentation for most or all of the Motion hearing. Ilona Jeff-Coat Sacco represented the PSC. Gordon W. Myerchin represented Platte River. Dwayne Johnston represented Louis Slominski Jr. and Merlin and Delores Grabanski.

Attorney Ted Sandberg appeared on behalf of Field Brothers to argue Field Brothers position on the Petitioner's Motion that the Field Brothers Farms claim be denied as an invalid claim. The matters presented to the court were the timeliness of filing of the claim. The Court after it considered all arguments ruled that the court could not overlook the failure of Field Brothers to respond in a timely manner and that their claim would not be heard any further. It is Platte River's understanding that this claim will be held to be an invalid cash claim and the court will grant the Petitioner's motion as to that claim.

Attorney R. Scott Stewart appeared on behalf of John Schumacher. A signed copy of a Basis Fixed contract was received as Exhibit A. Mr. Schumacher that this is not a Cash-sale claim. John Schumacher had not filed a timely claim, but the PSC

testified they were aware of the claim. Mr. Schumacher appeared at the hearing by phone.

Mr. Erdmann testified that he had now seen the Basis Fixed Grain Purchase Contract (Exhibit A) signed by Mr. Schumacher and that if this was a valid claim and the court agrees to allow Mr. Schumacher to make the claim at the late date this was a Credit-sale contract claim, not a Cash-sale contract. Mr. Schumacher testified that he had signed the Basis Fixed credit contract, Exhibit A, and that he believes he returned it to Grabanski Grain, but did not know when. Mr. Schumacher stated that he was asking the court that this claim be ordered paid as a Credit-sale claim by the Indemnity Fund. Since Mr. Schumacher is not making a claim against the Platte River bond Platte River takes no position.

Attorney Dewayne Johnston appeared on behalf of Louis Slominski Jr. and Merlin and Delores Grabanski. Both parties' claims are presented in the PSC's Motion as invalid claims.

Louis Slominski Jr. is listed under the PSC's Motion as an Invalid Cash-sale claim. Platte River will briefly discuss the Louis Slominski Jr. claim later in this brief, as should the claim be allowed it could potentially be a Cash-sale claim. As long as it remains an Invalid Cash Sale Platte River takes no position on the Louis Slominski Jr. claim.

Merlin and Delores Grabanski's claim is presented as an Invalid Credit-sale claim. Since the PSC has acknowledged that Merlin and Delores Grabanski invalid claim is a Credit-sale claim and were it to be a valid claim it would be a Valid Credit-sale claim Platte River Bond Platte River takes no position.

Platte River provided Surety Bond 41134564 for Grabanski Grain, LLC (hereinafter "Grabanski") for the time period from October 26, 2009 to October 25, 2010 and extended to November 28, 2010 (actually November 29, 2010 as November 28, 2010 was a Sunday) because of the 90 day notice requirement of the State of North Dakota related to the cancellation of the bond. Notice of cancellation was given August 28, 2010 (Petitioner's Exhibit 5). That bond is in the sum of \$340,000. Bond 41134564 was provided to the PSC as is acknowledged by the PSC in their Application and Brief in support of their appointment as Trustee. It was received by the court as part of Petitioner's Exhibit 1.

At no time prior to October 26, 2009 was Platte River the bonding company for Grabanski Grain, LLC. The Platte River bond liability exists only for those certain valid and proven outstanding receipts referred to by the PSC as claims and hereinafter referred to by Platte River as "Claims" that have been presented to the PSC and are from the time period of October 26, 2009 to November 28, 2010 and after. There are no claims for grain delivered after November 28, 2010. The bond specifically provides that "the surety bond shall not accrue to the benefit of any person entering into a credit-sale contract with the Principal" who is Grabanski Grain, LLC.

Platte River's surety bond is not intended to provide coverage for receipts which become due and payable outside of the bond period. Whether a particular claim "occurred" before, during or after the bond period or is a "cash sale", "credit sale" or "not covered" by the North Dakota law applying to Grain and Seed Warehouses must be determined by the facts applicable to each claim.

Platte River's bond is not liable for any Credit-sale contract claims. The bond specifically addresses this. Platte River believes that the PSC does not dispute this.

Under North Dakota statute 60-02-01 a "*Credit-sale contract*" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery of the grain for sale and which contains the notice provided in subsection 7 of section 60-02-19.1. If a part of the sale price of a contract for the sale of grain is to be paid more than 30 days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract.

A Cash-sale is not defined under North Dakota statute. It is reasonable to assume that if a *Credit-sale contract* means a written contract for the sale of grain pursuant to which the sales price is to be paid or may be paid more than thirty days after delivery of the grain for sale then the key fact to consider as to whether the contract between the grower and Grabanski Grain, LLC was a Cash-sale contract would be when grain receipts are or were to be paid in less thirty days or less after the delivery of the grain and the presentation of the receipts to the grower.

Platte River does not dispute that the PSC complied with all of the notice requirements of North Dakota Chapter 60-04 as it relates to this proceeding.

On June 11, 2011 Platte River filed a Response to Petitioners Motion which was the subject matter of the June 20 and June 21, 2102 hearings. In that response Platte River agreed that it was obligated to make payment of certain "Valid Cash Claims" subject to the examination of the PSC and other witnesses regarding certain parts of the "Valid Cash Claims", the matter of payment of fees and regarding the amount of bond to be deposited in the Bank of North Dakota for payment of claims, interest and fees. In addition, Platte River states that its bond was intended to cover claims for grain sold to and held at Grabanski Grain, LLC, and not paid for only during the period of the bond after October 26, 2009.

The issue of grain sold to Grabanski Grain, LLC prior to the existence of the Platte River bond is solely an issue as to the Paul Grzadzielewski claim.

The docket record reflects that Docket ID #59 is the Affidavit of Mailing indicating that the **Response of Platte River Insurance Company to North Dakota Public Service Commissioner's Motion for Order Approving The Report and Recommendation of Trustee and Requiring Deposit of Bond Proceeds** was served on all of the claimants specifically including Paul Grzadzielewski, Wayne Knudson, Louis Slominski Sr. and the Suda Group. From the docket filings no response has been

received by the Court nor did Paul Grzadzielewski, Wayne Knudson, Louis Slominski Sr. or a member of the Suda Group appear at the Motion hearing.

Platte River's questions related to the payment of claims the PSC proposed to pay as "Valid Cash Claims" for which the PSC had found partially signed written Basis Fixed Contracts: and which if those contracts were honored as stated would be paid as Contract-sale claims instead of Cash-sale claims. These include contracts with Paul Grzadzielewski, Wayne Knudson, Louis Slominski Sr. and the Suda Group.

Platte River's concern regarding payment of PSC fees from the bond was discussed in court at the motion hearing and Platte River believes it is no longer an issue in that the PSC has agreed and Platte River has agreed that the PSC will provide a statement of the costs that would be allowed by statute, Platte River will review it and if it has no questions Platte River will pay half of the costs allowed by statute and the Indemnity Fund will pay half of the costs allowed by statute.

Platte River objects to PSC's request that Cash-sale claims be required to pay 3.25 % interest on the claim amount beginning on July 23, 2010. No one was earning 3.25% interest on their money in 2010 nor are they earning that at this time. Platte River would object to paying a prime rate and would propose a 1% interest rate. Platte River would also request that the court order that the interest be paid from the date of the court order approving the Motion of the PSC. There is nothing significant about July 23, 2010 except that is the day the PSC considered Grabanski Grain, LLC insolvent. The Trustee was not appointed, none of the claims were even filed at that time and liability had not been determined. Interest should be from the date of the court's ruling on the Motion. Platte River realizes that this is not what the North Dakota Century Code says but wishes to state it's position that interest should be a lesser amount in current economic times.

Discussion of Specific Claims

PSC Motion Cash-sale Claims to which Platte River has no objection to payment from The Platte River bond

Platte River has no objection to a finding that it has an obligation under its bond for Cash-sale claims moved by the PSC for payment to Lance Lenton in the sum of \$50,580.15 recommended by the PSC, to Mark and Lori Martinson in the sum of \$9,302.68 and to Dennis McGeary in the sum of \$18,757.06. These claims totaling \$78,639.89 without interest.

PSC Motion Cash-sale Claims to which Platte River has objection to payment from the Platte River Bond.

Paul Grzadzielewski

The record reviewed and provided by the PSC indicates that it was the intention of Paul Grzadielewski that he have Credit-sale contracts with Grabanski Grain, LLC. Most of Paul Grzadielewski's claim relates to 15873.57 bu. delivered to Grabanski on June 30, 2009, several months prior to the issuing of Platte River bond 41134564. That exact bushel amount is shown on Basis Fixed Grain Purchase Contract # 9257 (this is the old contract #) dated 10-15-09, again which is dated prior to the issuing of Platte River bond 41134564. The scale tickets indicate delivery in 2008 and 2009. Paul Grzadielewski in his claim letter dated January 24, 2011 (Exhibit 16a) claims some of the corn was being marketed (paid for) in 2008 and the rest was placed on a Basis Fixed Contract, referring to a Credit-sale contract. There are several other references in that letter to a Basis Fixed contract. The Paul Grzadielewski elevator tickets from the year listed as 2008 on them make reference a "contracted price" when other grower's statements with elevator scale tickets refer to a "cash price". (Exhibit A).

The PSC investigator and witness, Timothy Erdmann, testified as follows regarding his understanding of the Paul Grzadielewski claim letter of January 24, 2011 (Exhibit 16a). This is directly from the record.

Myerchin	2012620	"#16A-referral reads based on the fixed basis
Gordon	14:10:40	contract .He believes basis fixed contract or not?"
Erdmann	2012620	"I'll take the letter at its word, basis fixed contract."
Timothy	14:11:46	

#16 A is Exhibit 16A. "He" refers to Paul Grzadielewski.

All of the events of this sale occurred prior to the effective date of Platte River's bond. The PSC's position is that the Basis Fixed Grain Purchase Contracts (both his old and new) are not applicable because Paul Grzadielewski has not signed them. The documentary evidence supplied to the PSC and in the record does not support the PSC position that part of this claim should be considered a cash sale. If this was to be a cash sale then the cash sale should have been found to have occurred during the period (2008 and prior to October 26, 2009) in which a different bonding company, not Platte River, was providing bond coverage. The Platte River bond provides that "Liability for this undertaking commences on 10-26-09". 122 days passed between the delivery of the grain to Grabanski by Paul Grzadielewski and the first date of the bond liability. Much more than the 30-45 days required by law for a cash sale.

The 286.85 bushels that also is found in a Basis Fixed Contract appear to have been delivered (sold) on November 23, 2009. The sale does appear to be in the bond period. The amount of this claim according to Exhibit A would be 719.99. The Basis Fixed Grain Purchase Contract #9282 refers the exact amount of bushels claimed.

The 15873.57 bushel sale occurred prior to the existence of Platte River's bond. Also from the record presented by the PSC there substantial evidence in the

documentation that Paul Grzadzielewski intended the 15873.57 sale to be a Credit-sale contract.

Platte River's position that the claim that 286.85 bushels contract was also a Basis Fixed Contract is found in the existence of Basis Fixed Contract #9282.

Paul Grzadzielewski did not appear or otherwise file any response contesting Platte River's position.

Wayne Knudson

The PSC found and provided as part of Exhibit A (Part of Petitioner's Exhibit 5) a Basis Fixed Grain Purchase Contract #9293 for Wayne Knudson. Platte River does not dispute the amount of the claim as \$25,254.82 but Platte River has asserted that this was intended to be a Basis Fixed Contract sale and therefore a Credit-sale contract.

During the hearing PSC witness Timothy Erdmann testified that he conducted regular visitation and inspection of the elevators. He testified that he often finds unsigned Basis Fixed Contracts and that was true at Grabanski Grain, LLC. These were not visitation and inspections resulting from Grabanski being found to be insolvent, but conducted prior and at least on an annual basis as part of its responsibility by the PSC.

Mr. Erdmann testified that the elevator and the contracts are written up in the Memorandum of Adjustment with a requirement, among other things, that the elevator get the contracts signed. He testified the Memorandum of Adjustment is then sent to the elevator and the elevator, including Grabanski, have 30 days to comply or make progress.

Mr. Erdmann testified that while the PSC and Grabanski are provided a copy of the Memorandum of Adjustment prepared by the PSC that the Memorandum of Adjustment is not provided to the bonding company, in this case Platte River, despite the risk of the bonding company. So the PSC has knowledge of the unsigned contract issue and Grabanski had knowledge of the unsigned contract issue and a Grabanski has a chance and is "directed" to get it corrected Platte River was not notified of this risk to their bond, as determined by the PSC, and therefore was not given an opportunity during the time that Grabanski was still operating to act.

Mr. Erdmann testified that as part of their duties as Trustee in this matter now before the court the PSC never asked this grower or any of the others with unsigned contracts what type of contract they intended. That could have been done by the PSC in follow up to their investigation in relation to each of these claims and we would not have these issues. The PSC did not do so. They found the Wayne Knudson Basis Fixed Contract in the file at Grabanski and never contacted Mr. Knudson to ask him about it.

Platte River is not arguing that the PSC did not provide notice to the grower regarding his obligation to present their claims. The PSC did that. Platte River is

arguing that the PSC had a duty to follow up where they found these Fixed Basis claims in the files of Grabanski.

Wayne Knudson was provided with the Motion before the court by the PSC. He was provided with the Response of Platte River. He did not appear or provide first-hand knowledge or his position on this claim.

Louis Slominski Sr.

The PSC found and provided as part of Exhibit A (part of Petitioner's Exhibit 5), the Basis Fixed Grain Purchase Contract #9280 of Louis Slominski Sr. Platte River does not dispute the dollar amount of the claim as \$34,023.45. Platte River asserts this sale was intended to be a Basis Fixed Contract sale and therefore a Credit-sale contract.

While the Louis Slominski Sr. tickets state "cash price" it also states 7% interest is to be paid. Why would interest be showing on these tickets if this was a cash sale for a cash price claim to be completed in less than 30 days?

The remainder of our argument regarding the Louis Slominski Sr. claim is the same as is stated in the Wayne Knudson above relative to the testimony of Timothy Erdmann. The next four paragraphs in this Brief are reinserted for that purpose.

During the hearing PSC witness Timothy Erdmann testified that he conducted regular visitation and inspection of the elevators. He testified that he often finds unsigned Basis Fixed Contracts and that was true at Grabanski Grain, LLC. These were not visitation and inspections resulting from Grabanski being found to be insolvent, but conducted prior and at least on an annual basis as part of its responsibility by the PSC.

Mr. Erdmann testified that the elevator and the contracts are written up in the Memorandum of Adjustment with a requirement, among other things, that the elevator get the contracts signed. He testified the Memorandum of Adjustment is then sent to the elevator and the elevator, including Grabanski, have 30 days to comply or make progress.

Mr. Erdmann testified that while the PSC and Grabanski are provided a copy of the Memorandum of Adjustment prepared by the PSC that the Memorandum of Adjustment is not provided to the bonding company, in this case Platte River, despite the risk of the bonding company. So the PSC has knowledge of the unsigned contract issue and Grabanski had knowledge of the unsigned contract issue and a Grabanski has a chance and is "directed" to get it corrected Platte River was not notified of this risk to their bond, as determined by the PSC, and therefore was not given an opportunity during the time that Grabanski was still operating to act.

Mr. Erdmann testified that as part of their duties as Trustee in this matter now before the court the PSC never asked this grower or any of the others with unsigned contracts what type of contract they intended. That could have been done by the PSC in

follow up to their investigation in relation to each of these claims and we would not have these issues. The PSC did not do so. They found the Louis Slominski Sr's. Basis Fixed Contract in the file at Grabanski and never contacted Mr. Slominski Sr. to ask him about it.

Louis Slominski Sr. was provided with the Motion before the court by the PSC. He was provided with the Response of Platte River. He did not appear or provide first-hand knowledge or his position on this claim. His attorney, Dewayne Johnson appeared but made no further argument for Louis Slominski Sr. Under North Dakota Centruy Code 60-04-09 failure to serve or file (or otherwise appear-*mine*) is a waiver of the right to object.

Suda Group

This PSC found Suda Group Basis Fixed Grain Purchase Contract # 9289 with the documents. Platte River will stipulate to \$9,411.54 recommended by the PSC, but reserved the right to ask about the Basis Fixed Grain Purchase Contract and the payment of the check.

The remainder of our argument regarding the Suda Group claim is the same as is stated above relative to the testimony of Timothy Erdmann. The next four paragraphs in this Brief are reinserted for that purpose.

During the hearing PSC witness Timothy Erdmann testified that he conducted regular visitation and inspection of the elevators. He testified that he often finds unsigned Basis Fixed Contracts and that was true at Grabanski Grain, LLC. These were not visitation and inspections resulting from Grabanski being found to be insolvent, but conducted prior and at least on an annual basis as part of its responsibility by the PSC.

Mr. Erdmann testified that the elevator and the contracts are written up in the Memorandum of Adjustment with a requirement, among other things, that the elevator get the contracts signed. He testified the Memorandum of Adjustment is then sent to the elevator and the elevator, including Grabanski, have 30 days to comply or make progress.

Mr. Ermann testified that while the PSC and Grabanski are provided a copy of the Memorandum of Adjustment prepared by the PSC that the Memorandum of Adjustment is not provided to the bonding company, in this case Platte River, despite the risk of the bonding company. So the PSC has knowledge of the unsigned contract issue and Grabanski had knowledge of the unsigned contract issue and a Grabanski has a chance and is "directed" to get it corrected Platte River was not notified of this risk to their bond, as determined by the PSC, and therefore was not given an opportunity during the time that Grabanski was still operating to act.

Mr. Erdmann testified that as part of their duties as Trustee in this matter now before the court the PSC never asked this grower or any of the others with unsigned contracts what type of contract they intended. That could have been done by the PSC in

follow up to their investigation in relation to each of these claims and we would not have these issues. The PSC did not do so. They found the Suda Group's Basis Fixed Contract in the file at Grabanski and never contacted Suda Group to ask them about it.

Suda Group was provided with the Motion before the court by the PSC. It was provided with the Response of Platte River. They did not appear or provide first-hand knowledge or their position on this claim.

Louis Slominski Jr.

Louis Slominski Jr. is presented under the PSC Motion as an Invalid Cash-sale claim. The basis of the denial by the PSC as stated in Exhibit 15 was that while it appeared that Louis Slominski Jr. delivered 40,082 bushels of grain to Grabanski in the Fall of 2010 for drying and redelivery the PSC found no evidence that the drying costs of \$18,713 were ever paid. The net amount claimed by Louis Slominski Jr. was \$5,619.80. Even if the amount claimed is valid it is offset over three times by unpaid drying charges.

The PSC found Basis Fixed Contract #9279 at the elevator signed. Should the court go beyond denial on the basis of unpaid grain drying charges and consider the amount due Platte River would argue that the existence of the Basis Fixed Contract should be considered and this determined to be a Credit-sale contract. Platte River would also refer to court in this case to the arguments made for their being a determination of a Basis Fixed Contract set out above for Knudson, Louis Slominski Sr. and Suda Group.

Merlin and Delores Grabanski

This has been treated by the PSC as an Invalid Credit-sale contract. The PSC has acknowledged that Merlin and Delores Grabanski's invalid claim is a Credit-sale claim and were it to be a valid claim it would be a Valid Credit-sale claim. Merlin Grabanski testified on June 21, 2012 at about 2:30 p.m. that Respondent's Exhibit M, which was received into evidence by the court, was a Basis Fixed Grain Purchase Contract and that the contract contained his signature. As stated earlier as the PSC has listed this claim as a invalid Credit-sale. As such Platte River takes no position on this particular claim.

Conclusion

1. Grower Claims set forth in Motion of the PSC.

Platte River would ask that the Court grant the PSC's Motion based subject to finding for Platte River's positions set forth above. The PSC claims the total sum of \$184,964.03 against the Platte River bond as it relates to grower claims amounts without interest. As indicated above Platte River does not contest certain grower claims listed above in the amount of \$78,639.89, without interest. Platte River's issues are with the 5 claims, four of which were determined to be valid Cash-sale claims in whole or in part (Grzadielewski, Knudson, Louis Slominski Sr. and Suda Group) and one invalid (

Louis Slominski Jr) where there was received into evidence Basis Fixed contracts and where information could have obtained, but was not, concerning the intent of the grower and Grabanski, all of which works to the detriment of Platte River.

2. Deposit to be Ordered by the Court to the Bank of North Dakota by Platte River

The PSC has alleged that Platte River Insurance Company is obligated to pay interest at a rate of 3.25% from July 23, 2010 on each of the individual valid Cash-sale claims. Using the \$184,964.03 amount alleged by the PSC to calculate interest as of June 20, 2012 that amount was \$11,498.97. Using 3.25% for the period July 23, 2010 to June 20, 2012 on \$78,639.89 interest would be \$4,880.52. Platte River is aware that North Dakota Century Code 60-04-09 (5) provides for interest at the weighted average prime rate charged by the Bank of North Dakota since July 23, 2010. As stated above Platte River would ask that the court consider a more current and reasonable interest return on the money.

Using the fee amount claimed by the PSC divided by 2, as has been agreed, \$5,898.60 divided by 2 = \$2,949.30.

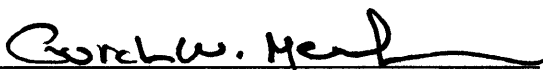
Using all of the PSC's amounts presented in their Motion to the date of June 20, 2012 Platte River has a total possible obligation of \$199,412.30. If the court approved all of the claims in the Motion of the PSC related to claim a deposit in the Bank of North Dakota the sum of \$205,000 would more than cover all claims, interest and costs to June 20, 2012. Only a small amount of interest and a limited amount of costs can have been added since then. The \$230,000 deposit requested by the PSC is unnecessarily large.

3. Other Matters

The Credit Sale Contract Indemnity Fund was created in the 2003 legislative session. None of the existing case law takes into consideration the existence of this fund.

Collection under the Indemnity Fund is currently suspended, as provided for by North Dakota Century Code 60-10-03 when the indemnity fund reaches the level of six million dollars. The PSC has stopped collecting that assessment because the fund has reached six million dollars.

DATED this 20th day of July, 2012.


GORDON W. MYERCHIN, ND ID # 03264
FOR: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206-5849

Attorneys for Respondent Platte River Insurance Company