

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. )  
 )  
 \_\_\_\_\_ )  
 PSC Case No. GE-10-498 )  
 \_\_\_\_\_ )

CIVIL NO. 50-2011-CV-00029

**AFFIDAVIT OF SERVICE  
BY REGULAR MAIL**

STATE OF NORTH DAKOTA )  
 )ss  
 COUNTY OF BURLEIGH )

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **10<sup>th</sup> day of August, 2012**, she deposited in the United States Mail, Bismarck, North Dakota, **5 envelopes** with postage fully prepaid, securely sealed and containing a photocopy of:

1. Public Service Commission Response to Post-Hearing Brief of Platte River Insurance Company;
2. Affidavit of Service by Regular Mail.

The envelopes were addressed as follows:

DeWayne Johnston  
 Johnston Law Office  
 Attorney for Grabanski Grain LLC  
 221 South 4<sup>th</sup> Street  
 Grand Forks ND 58201

DeWayne Johnston  
 Johnston Law Office  
 Attorney for Claimant Objector  
 Louis Slominski, Jr.  
 221 South 4<sup>th</sup> Street  
 Grand Forks, ND 58201

DeWayne Johnston  
Johnston Law Office  
Attorney for Claimant Objectors Merlyn &  
Dolores Grabanski  
221 South 4<sup>th</sup> Street  
Grand Forks, ND 58201

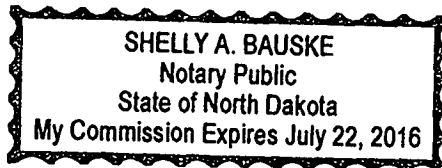
Gordon W. Myerchin  
Attorney for Platte River Insurance Company  
Camrud, Maddock, Olson & Larson, Ltd.  
PO Box 5849  
Grand Forks, ND 58201

R. Scott Stewart  
Attorney for Claimant Objector  
John Schumacher  
R. Scott Stewart, PC  
306 – 9<sup>th</sup> Avenue, PO Box 151  
Langdon, ND 58249-0151

The post office addresses shown are the addressees' last reasonably ascertainable post office addresses.

Subscribed and sworn to before me  
this 10<sup>th</sup> day of August, 2012.

SEAL



A handwritten signature in cursive script, appearing to read "Gordon W. Myerchin", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Shelly A. Bauske", written over a horizontal line.

Notary Public

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WALSH

NORTHEAST JUDICIAL DISTRICT

_____	)	
Public Service Commission	)	CIVIL NO. 50-2011-CV-00029
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Grabanski Grain LLC	)	PUBLIC SERVICE COMMISSION
	)	RESPONSE TO POST-HEARING
	)	BRIEF OF PLATTE RIVER
	)	INSURANCE COMPANY
	)	
and	)	
	)	
Platte River Insurance Company	)	
	)	
	)	
Respondents.	)	
_____	)	
PSC Case No. GE-10-498	)	
	)	
_____	)	

**PUBLIC SERVICE COMMISSION RESPONSE TO POST-HEARING BRIEF OF  
PLATTE RIVER INSURANCE COMPANY**

The Public Service Commission, as Trustee in the captioned insolvency proceeding, thanks the Court for an opportunity to address issues raised by Platte River Insurance Company's Post-Hearing Brief served 20 July 2012.

As noted in the Public Service Commission's Post-Hearing Brief, at the conclusion of the two-day hearing, the Public Service Commission (Commission) identified four issues on which the parties continued to have differences. These issues were set forth in the brief and one of

these was an issue raised by Platte River. Platte River now disputes four cash claims, and raises an issue regarding interest to be paid on cash claims. Basically, Platte River raises five objections in its brief, and only one of them is an issue Platte River raised in the objection it filed and during the two-day hearing!

### **Statement of the Issues**

As the Commission understands Platte River's post-hearing filing, and taking into consideration the evidence presented at the hearing, the issues are:

1. Whether Platte River is liable to pay interest on valid cash claims at the rate and in the amount recommended by the Commission?
2. Whether unpaid grain sales based on unsigned documents purporting to be credit-sale contracts should be treated, for insolvency claim purposes, as credit-sale contract claims or cash claims? This issue now concerns the claims of:
  - a. Paul Grzadzielewski - \$37,634.41
  - b. Wayne Knudsen - \$25,254.82
  - c. Louis Slominski, Sr. - \$34,023.45
  - d. Suda Group - \$9,411.54
3. Whether Platte River or the previous surety is responsible for the claim of Paul Grzadzielewski?

### **Analysis of Issues**

#### **1. Interest on Cash Claims**

The Public Service Commission followed North Dakota law in making its report and recommendation to the court that cash claimants receive interest at a rate of 3.25%. Relevant

law requires the Commission to recommend interest be paid on cash claims at the weighted average prime rate charged by the Bank of North Dakota. The law provides:

**60-04-09. Report of trustee to court - Approval - Distribution.**

Upon the receipt and evaluation of claims filed with it, the commission shall file with the court a report showing the amount and validity of each claim after recognizing:

1. Any proper liens or pledges thereon.
2. Assignments thereof.
3. Deductions therefrom by reason of advances or offsets accrued in favor of the warehouseman.
4. *In case of cash claims or checks, the amount thereof, with interest at the weighted average prime rate charged by the Bank of North Dakota since the date of the insolvency.*
5. In the case of scale tickets or warehouse receipts, the amount thereof based upon the market price prevailing on the date of the insolvency, with interest at the weighted average prime rate charged by the Bank of North Dakota since the date of the insolvency.

The report must also contain a proposed distribution of the trust fund assets, less expenses incurred by the commission in the administration of this chapter, to claimants as their interests are determined. If the trust fund is insufficient to redeem all claims in full, the fund must be shown prorated in the report in the manner the commission deems fair and equitable.

The court shall set a hearing and the appropriate notice for interested persons to show cause why the commission's report should not be approved and distribution of the fund be made as proposed. Copies of the report and notice of hearing must be served by the commission by certified mail upon the warehouseman and the surety and by ordinary mail upon all persons having claims filed with the commission.

Any aggrieved person having an objection to the commission's report shall file the objection with the court and serve copies on the commission, the warehouseman, and the surety at least ten days before the hearing. Failure to file and serve objections in the time set is a waiver of the objection.

Following hearing, the court shall approve or modify the report and issue an order directing payment of the necessary bond proceeds, distribution of the trust fund, and discharge of the commission from its trust. N.D.C.C. § 60-04-09, *emphasis supplied*.

Platte River made no mention of an objection to paying interest in the objection it served on 8 June 2012. This alone is reason to bar Platte River from raising any such objection now.

Further, Platte River attended two full days of hearing and never once raised an objection to the payment of interest. This is further basis to bar any such objection now.

Finally, the law is clear, plain and simple. It requires interest at the weighted average prime rate charge by the Bank of North Dakota from the date of insolvency. The date of insolvency is declared, at the Commission's request, by Court Order. In this case the date of insolvency was established as 23 July 2010 by the Court's Order Approving Stipulation and Staying Request dated 19 July 2011 (copy attached as attachment A). Further, The Bank of North Dakota's weighted average prime rate can be easily found on the bank's web site at [http://banknd.nd.gov/lending\\_services/rates/prime\\_rates.html](http://banknd.nd.gov/lending_services/rates/prime_rates.html). See copy of web site page printed 1 August 2012, attachment B.

There is no merit to the argument of Platte River regarding payment of interest, or the amount of interest, on cash claims. If Platte River wishes to have its interest issues addressed, Platte River's recourse is to the legislature.

**2. Should unsigned documents purporting to be credit-sale contracts, filed or produced in support of a claim for unpaid grain sold to an insolvent licensee, be considered cash claims or credit-sale claims for purposes of insolvency?**

The Commission has consistently concluded when processing its insolvency case that if documents otherwise purporting to be credit-sale contract documents do not meet the specific requirements of N.D.C.C. § 60-02-19.1, those documents are to be treated as evidence of cash sales claims, not credit-sale claims. The Commission's conclusions on this issue are included in its recommendations, and the Commission's recommendations have been approved by the respective court handling each insolvency. The Commission makes no secret of its interpretation of the law and has shared it throughout this case with Platte River.

Despite this history, it is only now that Platte River makes objections to three additional claims. In its June filing, Platte River did not specifically object to any of the four claims at issue now except for the Grzadzielewski claim. For the other claims, Platte River stipulated “to bond payment of . . . recommended by the PSC but reserve the right to inquire about the Basis Fixed Grain Purchase Contract.” Response of Platte River to the Commission’s Motion to approve the Report and Recommendation, 3, 4. Platte River did not stipulate “subject to” as it did in the same response to the claim of Mark and Lori Martinson, *Id.* 3. Rather, Platte River only said it planned to ask some questions about these types of documents.

Frankly, counsel reviewed Platte River’s filed objection several times to try and determine if Platte River was objecting to payment of the claims of Wayne Knudson, Louis Slominski, Sr. and the Suda Group. After such review, counsel concluded that while Platte River had questions about the Licensing Division staff’s analysis of contract and cash claims, those questions were for the purpose of Platte River fleshing out its stated objection to the Grzadzielewski claim, not any other claim. I would venture to guess that this might also be what Wayne Knudson, Louis Slominski, Sr. and the Suda Group thought when they read the Platte River response to the Commission’s Report and Recommendation. State law requires that objections be filed prior to hearing on the report and recommendation. N.D.C.C. § 60-04-09. It is inappropriate and unfair for Platte River to now object to payment of these three claims.

This position is supported by the two days of hearing, during which Platte River presented no direct evidence, and only the staff analysis of the Grzadzielewski claim and the Commission’s general approach to unsigned credit-sale documents in insolvency proceedings was examined. Nothing at the hearing would lead one to conclude that Platte River was objecting to payment of the Knudson, Slominski, Sr. and Suda claims.

The Public Service Commission had exhibits available to introduce and a witness available to testify at the hearing concerning the claims of the Suda Group, Louis Slominski, Sr. and Wayne Knudson, but did not proceed to introduce that evidence because no specific objection had been raised on those three claims. On the other hand, Platte River, who has the burden to show cause why the four claims should not be covered by the bond, presented no direct evidence whatsoever to support the assertion Platte River now makes *for the first time*.

Platte River emphasizes that the intent of the parties should be discerned when determining whether a claim falls into the cash or credit-sale contract basket in an insolvency. In emphasizing this, Platte River seems to argue that the Commission is obligated to bring the claimants to the witness stand to testify about their intent when delivering grain to the insolvent licensee. This not the Commission's obligation, but rather Platte River's, if Platte River bases an objection on evidence that only a claimant can provide.

The Commission does not base its determination of whether a claim is a cash claim or a credit-sale claim on any finding of intent. If the Commission did reach its conclusions in this way, the Commission would inquire further into intent in the investigation stage of an insolvency, and subpoena claimants to the witness stand if necessary. However, the question of intent, a question of fact requiring evidentiary support, is not relevant to whether or not a claim is a cash claim or a credit-sale claim.

As stated in N.D.C.C. § 60-02-19.1, and discussed in the Commission's post-hearing brief, a licensee is prohibited from entering into any credit-sale contract that does not comply with that section. *A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section. . . . The contract must be signed by both parties and executed in duplicate.* N.D.C.C. § 60-02-19.1, *emphasis supplied*. The only facts necessary to a

determination of whether a document is or is not a credit-sale contract are the facts stated in the law as necessary in order for a credit-sale contract to exist. They include that it be in writing, include the required notice, and the date of payment and price per unit, etc. One of the requirements is that the contract be signed by both parties. If this requirement, or any other requirement stated in the section, is not met, the grain sale evidenced by the document is not a credit-sale contract. It cannot be, as the law specifically states. *Id.*

Finally, Platte River asserts that the Commission neglected to keep Platte River informed of the results of the Commission's regular licensee inspections and consequently, Platte River was unaware of the fact that Grabanski Grain, LLC, had unsigned documents purporting to be credit-sale contracts on the books, representing potential claims against Platte River's bond. The Commission has no obligation to inform Platte River or any other bonding company of the results of licensee investigations in the normal course of business. Rather, Platte River and other sureties have a responsibility to require their principals to keep them informed regarding the principals' compliance with the licensing laws. This is part of Platte River's due diligence. However, information on licensee inspections and other licensee activity also is always available from the Commission, much of it on the Commission's web site. Platte River had every opportunity to stay well informed regarding Grabanski Grain, LLC's compliance with North Dakota law.

As an "other matter" Platte River notes that the existing case law all pre-dates the creation of the Credit-Sale Contract Indemnity Fund. *See generally* N.D.C.C. Chapter 60-10. The Commission assumes the purpose of this comment is to recognize that before the creation of the indemnity fund, unpaid claimants who delivered grain to a licensee via credit-sales had no protection at all in an insolvency. The Commission agrees, but wishes to draw the Court's

attention to the fact that even under the indemnity fund, claimants do not receive full payment, or interest, as they would if they were cash claimants with sufficient bond coverage. Claimants receive only 80% of their claim, up to a specific maximum. N.D.C.C. § 60-10-06. The Commission also wants to point out that in cases where there is insufficient bond, cash claimants could receive substantially less than the full amount of their claims, and no interest.

For all of these reasons, and those more fully discussed in the Commission's Post-Hearing Brief, Platte River's assertion that the claims of insert names are credit-sale claims fails.

**3 . Platte River is the surety responsible for the claim of Paul Grzadzielewski. The previous surety is not responsible for claims filed during a period in which the new bond is in place.**

Platt River asserts that because grain was delivered prior to the effective date of Platte River's bond, Platt River is not liable. As discussed in the Commission's 20 July Post-Hearing Brief, based on statute and Commission and court precedent in previous insolvencies, the applicable bond is the bond in effect at the time of the breach, not the bond in effect at the time of delivery.

Platte River asserts that its bond was "intended to cover only 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." Post Motion Hearing Brief of Platte River Insurance Company, 3. First of all, this assertion is an assertion of unsupported fact on which there is no evidence of record. More importantly, what Platte River intended or did not intend is irrelevant. The bond is statutory, for the ". . .specific purpose of: Protecting the holders of outstanding receipts. . ." N.D.C.C. section 60-02-09(6)(a). Further, subsection four of N.D.C.C. section 60-02-09 provides that the bond be conditioned:

- a. For the faithful performance of the licensee's duties as a public warehouseman.
- b. For compliance with the provisions of law and the rules of the commission relating to the storage and purchase of grain by such warehouseman.

The relevant statutes and case law, all of which are more fully discussed in the Commission's Post-Hearing Brief, clearly support the Commission's position that the bond in effect at the time of the breach is the bond that applies. As stated in *Zagar v. Columbia Cas. Co.*, 43 P.2d 949, 951 (1935), "The obligation to pay arises when the principal commits a breach of duty."

### Conclusion

The claims of Mr. Grzadzielewski, Mr. Knudson, Mr. Slominski, Sr. and Suda Group should be treated as cash claims. The bond in effect at the time of Grabanski Grain's breach is the bond that protects these claimants and Platte River Insurance Company is responsible for payment of their claims. Platte River Insurance Company is also responsible for payment of interest at the statutory rate.

Respectfully submitted this 3<sup>rd</sup> day of August, 2012.



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FILED IN THE OFFICE OF  
CLERK OF DISTRICT COURT  
WALSH COUNTY, ND ON

JUL 19 2011

STATE OF NORTH DAKOTA  
COUNTY OF WALSH

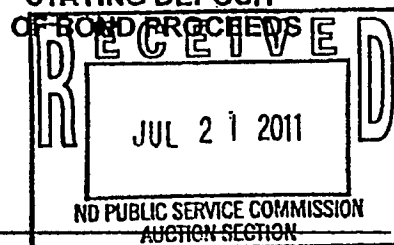
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IN DISTRICT COURT  
NORTHEAST JUDICIAL DISTRICT

Public Service Commission,  
Petitioner,  
vs.  
Grabanski Grain LLC,  
and  
Platte River Insurance Company,  
Respondents.

Civil No. 50-2011-CV-00029

ORDER APPROVING  
STIPULATION  
AND  
STAYING DEPOSIT




Upon consideration of the Stipulation agreeing to stay the hearing on the motion for Deposit of Bond Proceeds, which is executed by petitioner North Dakota Public Service Commission, respondent Platte River Insurance Company, and respondent Grabanski Grain LLC.; IT IS HEREBY ORDERED:

1. Subject to the receipt of further evidence in this matter it appears to the Court that Grabanski Grain LLC is insolvent within the meaning of North Dakota Century Code Chapter 60-04 and establishes the date of insolvency as July 23, 2010, the date that the first claim for collection of outstanding funds owed was filed.
2. The Court stays consideration of that portion of Public Service Commission's "Application for Appointment as Trustee and Motion to Join Surety as Party and for Deposit of Bond Proceeds" that requests "the Court order Platte River Insurance Company, as surety, to deposit the penal sum of the bond in the amount of \$340,000 in the trustee's trust account for payment of valid cash claims."
3. The Public Service Commission may renew its request by motion that Platte River Insurance be ordered to deposit the penal sum of its penal bond, or so much thereof as may be deemed necessary, into the trust account, through motion and notice of the motion to Platte River Insurance and Grabanski Grain LLC.

4. The Court's stay of its consideration of the Public Service Commission's request for deposit of the penal sum of the bond shall not be construed as a waiver of the rights of any of the parties with respect to the determination of the matter.
5. The hearing scheduled for July 20, 2011, is cancelled.

Dated this 19<sup>th</sup> day of July, 2011.

  
\_\_\_\_\_  
Honorable M. Richard Geiger  
Judge of the District Court

# BND

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Provider	Prime Rate	Effective Date
Bank of North Dakota	3.25%	12-17-08
Wallstreet New York	3.25%	12-16-08
Wells Fargo - Minneapolis	3.25%	12-16-08
US Bank National Association	3.25%	12-16-08
Citibank New York	3.25%	12-16-08
Bank of America	3.25%	12-16-08

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