



Bremer Financial Center -- Suite 200
3100 South Columbia Road
PO Box 13417
Grand Forks, ND 58208-3417

Telephone: (701) 772-8111
Facsimile: (701) 772-7328

E-mail Address:
firm@northdakotalaw.net

Website: www.northdakotalaw.net

John S. Foster
Carol E. Johnson*
Sandra B. Dittus*
Allen J. Flaten*
Scott J. Landa
Tracy A. Kennedy*
Warren J. Roehl*
Sara R. Behrens*
Jill M. Hebl*

* Also licensed in Minnesota

Thomas L. Zimney - Retired

May 11, 2012

RECEIVED

MAY 14 2012

Clerk of the District Court
Burleigh County District Court
PO Box 1055
Bismarck, ND 58502

PUBLIC SERVICE COMMISSION

Re: PSC vs. Mitchell Feeds, Inc. and Western Surety Company --
Michael Aasen et al and American Federal Bank Intervenors
Civil No. 08-2011-CV-917

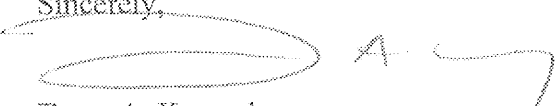
Good Morning:

Enclosed please find for filing with the court the following documents:

1. American Federal Bank's Notice Of Motion And Motion For Summary Judgment For Dismissal With Prejudice Of Intervenor Farmers Complaint In Intervention;
2. American Federal Bank's Brief In Support Of Motion For Summary Judgment For Dismissal With Prejudice Of Intervenor Farmers Complaint In Intervention;
3. Affidavit of Service by Mail.

Thank you.

Sincerely,


Tracy A. Kennedy
TAK:brdp
Encls.

Cc: Ilona A. Jeffcoat-Sacco (w/encls)
Mark Gruman (w/encls)
David L. Johnson (w/encls)
Sharon Sergeant (w/encls)
Gene Allen (w/encls)
Derrick Braaten (w/encls)

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc.

and

Western Surety Company

Respondents.

Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, Kelly Wurgler,

and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-51

**AMERICAN FEDERAL BANK'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT FOR
DISMISSAL WITH PREJUDICE OF
INTERVENOR FARMERS
COMPLAINT IN INTERVENTION**

TO: THE ABOVE NAMED PARTIES AND THEIR ATTORNEYS OF RECORD:


Please take notice that Intervenor, American Federal Bank, will bring on for hearing its Motion for Summary Judgment dated May 11, 2012, before the Court, the Honorable Donald Jorgensen presiding, on the 9th day of July, 2012 at 1:30 o'clock p.m. at the Morton County

Courthouse in Mandan, ND, or as soon thereafter as the matter may be heard.

American Federal Bank, by and through its undersigned counsel, hereby moves the Court for judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure, on the grounds that there is no genuine issue as to any material fact and that Intervenor American Federal Bank is entitled to a judgment against the Intervenor Farmers as a matter of law. This Motion is based upon a Brief in Support of Motion for Summary Judgment filed herewith and upon all other papers filed herein.

Dated this 11 day of May, 2012.

For:



TRACY A. KENNEDY, ND #05704
ZIMNEY FOSTER, P.C.
Bremer Financial Center, Suite 200
3100 South Columbia Road
P.O. Box 13417
Grand Forks, ND 58208-3417
tracykennedy@northdakotalaw.net
T: 701-772-8111/F: 701-772-7328
Attorneys for American Federal Bank

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

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Public Service Commission,

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and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-51

**AMERICAN FEDERAL BANK'S
BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT FOR
DISMISSAL WITH PREJUDICE OF
INTERVENOR FARMERS
COMPLAINT IN INTERVENTION**

INTRODUCTION

Intervenor American Federal Bank's Motion for Summary Judgment must be granted because (1) Farmers (as defined below) lack standing to bring their declaratory judgment claim; (2) Farmers action is barred by the doctrines of res judicata and collateral estoppel; (3) The

sunflowers and/or proceeds thereof of Mitchell Feeds, Inc. ("Mitchell Feeds") located in Minnesota are not part of the trust established in North Dakota; (4) Farmers have failed to exhaust their administrative remedies in North Dakota; and (5) Farmers have no interest in the inventory of Mitchell Feeds, a roving grain buyer under N.D.C.C. Chapter 60-02.1.

BACKGROUND

On April 14, 2011, the North Dakota Public Service Commission ("PSC") initiated this action seeking to be appointed the trustee of Defendant Mitchell Feeds' trust fund pursuant to N.D.C.C. Chapter 60-02.1. Mitchell Feeds is a roving grain buyer, who was licensed under N.D.C.C. Chapter 60-02.1. This Court found Mitchell Feeds insolvent and appointed the PSC trustee of the trust. Western Surety, Mitchell Feeds' surety, was also joined as a party.

In order to protect its first priority security interest in the inventory of Mitchell Feeds, American Federal intervened in the action and filed a claim with the PSC. In addition, Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms and Kelly Wurgler (collectively referred to as "Farmers") intervened in this action and filed claims with the PSC claiming that they sold sunflowers to Mitchell Feeds in 2008 and/or 2009 pursuant to contracts which had not been paid.

Just prior to the PSC initiating this action, on April 6, 2006, the same Intervenor Farmers filed suit in Norman County, Minnesota, against Mitchell Feeds claiming breach of contract and replevy of the sunflowers held by Mitchell Feeds at its Hendrum, MN facility. American Federal intervened in that suit, seeking judgment against Mitchell Feeds pursuant to the security

agreement between American Federal and Mitchell Feeds. It also sought declaratory judgment that its first priority security interest was superior to any claim the Farmers made to the sunflowers.

American Federal motioned for summary judgment in the Minnesota case. The Farmers responded and simultaneously made a Motion for Declaratory Judgment, Docket # 40, in this North Dakota action. The Farmers eventually moved to withdraw their Motion for Declaratory Judgment, which was granted April 30, 2012. In the meantime, a hearing was held on American Federal's motion for summary judgment in the Minnesota case.

Farmers served their Complaint in Intervention seeking declaratory judgment in this action on April 6, 2012. That Complaint in Intervention is the subject matter of this Motion for Summary Judgment.

On May 2, 2012, judgment was entered in the Minnesota case granting American Federal's motion for summary judgment and declaring that American Federal's first priority security interest was superior to any of Farmers' claims to Mitchell Feeds' sunflower inventory and/or proceeds thereof located in Minnesota.

UNDISPUTED MATERIAL FACTS

1. On April 14, 2011, the PSC initiated this action seeking to be appointed trustee of the trust fund under Section 60-02.1-29 of the North Dakota Century Code due to the insolvency of Mitchell Feeds, Inc., a roving grain buyer, licensed under Chapter 60-02.1 of the North Dakota Century Code. *See* Docket # 1- # 7.

2. On May 10, 2011, this Court established February 1, 2011 as the date of insolvency of Mitchell, appointed the PSC trustee of the trust fund, and joined Western Surety Company, Mitchell Feeds' surety, as a party. Docket # 12.

3. Farmers intervened and submitted claims for unpaid grain contracts to the PSC. Docket # 26.

4. American Federal Bank also intervened to protect its first priority lien in certain assets of Mitchell Feeds located in Minnesota. Docket # 25.

5. On April 6, 2012, nearly one year after they intervened, the Farmers filed a Complaint seeking declaratory judgment. Docket # 60.

6. American Federal Answered the Farmers' Complaint on April 25, 2012. Docket # 66. The PSC did not answer the Farmers' Complaint.

7. On April 6, 2011, eight days prior to initiation of this action, Farmers filed a suit in the State of Minnesota against Mitchell Feeds, Inc. and Mitchell Farms, Inc. (hereafter referred to as the "Minnesota case"). *See* Norman County, MN Case 54-CV-11-112. A copy of the Complaint is attached hereto as "*Exhibit A*." The Farmers sought two causes of action, breach of contract and replevin. They sought possession of the sunflowers located in Hendrum, MN and/or the proceeds thereof be returned to the Farmers.

8. American Federal intervened and filed a Complaint in Intervention in the Minnesota case seeking a determination that its first priority security interest in the sunflower inventory and/or proceeds thereof located in Norman County, Minnesota was superior to any claim Farmers made. A copy of American Federal's Complaint in Intervention in the Minnesota case is attached hereto as "*Exhibit B*."

9. American Federal made a motion for summary judgment in the Minnesota case, and on May 1, 2012, an Order Granting Summary Judgment and Judgment in Favor of Intervenor American Federal Bank was entered, with Judgment entered on May 2, 2012. A copy of the

Judgment and Order Granting Summary Judgment and Judgment in Favor of Intervenor American Federal Bank is attached hereto as "*Exhibit C.*"

10. The Judgment and Order in the Minnesota case made several findings that are relevant to this case: (1) there is no genuine issue of material fact; (2) that the Farmers transferred title and ownership in the sunflowers to Mitchell Feeds and are barred from bringing an action for possession of the sunflowers and/or proceeds; (3) that the Farmers have no lien, consensual, statutory, or otherwise, in the sunflowers or the proceeds thereof; (4) that American Federal has a perfected first priority security interest in the sunflowers and proceeds thereof of Mitchell Feeds; and (5) that American Federal's first priority security interest is superior to any interest the Farmers' claim.

LAW AND ARGUMENT

The Farmers seek declaratory judgment from this Court declaring that the sunflowers and proceeds are part of the statutory trust fund and that the trust fund cannot be defeated or diminished by American Federal's first priority lien. Chapter 32-23 of the North Dakota Century Code provides for declaratory judgment in certain situations, however, this is not one of them. The Farmers are not entitled to the relief they seek for several reasons, including that (1) Farmers lack standing to bring their declaratory judgment claim; (2) Farmers action is barred by the doctrines of res judicata and collateral estoppel; (3) The sunflowers and/or proceeds thereof of Mitchell Feeds located in Minnesota are not part of the trust established in North Dakota; (4) Farmers have failed to exhaust their administrative remedies in North Dakota; and (5) The Farmers have no interest in the inventory of Mitchell Feeds, a roving grain buyer under N.D.C.C. Chapter 60-02.1.

I. THE FARMERS ARE PROHIBITED FROM BRINGING AN ACTION FOR DECLARATORY JUDGMENT BECAUSE THEY LACK STANDING

Farmers allege they are beneficiaries of the trust established by this Court over the assets of Mitchell Feeds. *See* Complaint, ¶ 48. The PSC has failed to Answer Farmers' Complaint or attempt to exercise any rights or interest in the grain or the proceeds thereof.

As set forth below, as beneficiaries of the trust, the Farmers lack standing to bring their claim for declaratory judgment, as only the trustee can bring such a claim. In addition, the statutes governing the trust do not grant Farmers a private right of action.

Ensuring that a party has the requisite standing to make a claim is a question that must be satisfied from the very beginning of litigation. It is only when a party demonstrates they have standing in a dispute that a court may decide the merits of a dispute. *Ackre v. Chapman & Chapman, P.C.*, 2010 ND 167, ¶ 11, 788 N.W.2d 344. “[W]ithout proper standing limitations, courts would be called upon to decide purely abstract questions, and as an aspect of justiciability, the standing requirement focuses on whether plaintiffs have alleged such a personal stake in the outcome of a controversy to justify a court’s exercise of remedial powers on their behalf.” *Kjolsrud v. MKB Management Corp.*, 2003 ND 144, ¶ 13, 669 N.W.2d 82.

The North Dakota Supreme Court established a two-prong test in order to determine whether a litigant has demonstrated such a personal stake in the dispute to justify the court’s powers to decide its merits. *Ackre* at 2010 ND 167, ¶ 11. First, the litigant must demonstrate that they have suffered an injury, or have been threatened of such, which was the result of putatively illegal action. *Id.* Second, the court must find that the asserted harm cannot be a general grievance shared by a large class of citizens. *Id.* Instead, the litigant *must assert his own legal rights and interests*, and not those of third parties. *Id.* (emphasis added).

A. Farmers May Have Suffered An Injury

If the allegations made in their Complaint in Intervention - that Farmers were not paid for valid sunflower sale contracts with Mitchell Feeds - are true, for purposes of this motion only, American Federal concedes that Farmers suffered an injury. *See* Docket # 40, ¶¶ 25-26, 28-30. However, they lack standing to bring their declaratory judgment action because they cannot meet the second prong required for standing.

B. Farmers Do Not Have a Private Right of Action and Cannot Assert Legal Rights and Interests on Behalf of the PSC

The second prong of “the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the court’s remedial powers on his behalf.” *State v. Carpenter*, 301 N.W.2d 106, 107 (N.D. 1980). The Farmers are attempting to marshal assets on behalf of the trust established by this Court. That is the function of the PSC as trustee, *see* N.D.C.C. § 60-02.1-34, and Farmers do not have standing to bring such an action on behalf of the PSC.

1. As beneficiaries, Farmers do not have a right to bring action on behalf of the trust

As beneficiaries of the trust, Farmers lack standing to bring a suit on behalf of the trust. Where North Dakota law is silent on issues involving trusts, it has looked to the Restatement of Trusts. *See North Dakota Public Service Comm’n v. Valley Farmers Bean Ass’n*, 365 N.W.2d 528, 536 (N.D. 1985). In general, beneficiaries to a trust are not allowed to bring an action against a third party on behalf of the trust. Restatement (Second) of Trusts § 281(1) (1959).

In *International Assn. of Fire Fighters, Local 2665 v. City of Clayton*, certain firefighters and police officers, acting as beneficiaries of a pension plan, brought an action against the City of Clayton for an accounting of contributions following a tax levy. 320 F.3d

849, 851 (8th Cir. 2003). On appeal, the Eighth Circuit stated that “[o]rdinarily a beneficiary cannot even assert a claim of the trust in equity.” *Id.* That court ultimately held that “[t]he trustees of the pension plan could possibly bring an action against the City for failing to levy taxes for contribution to the plan, but *the fire fighters, as beneficiaries, cannot bring the suit.*” *Id.* (emphasis added).

The court held that “the fire fighters have no standing to bring this action for damages because only the pension plan if anyone, has possibly suffered *actionable injury.*” *Id.* (emphasis added). In determining that the Restatement of Trusts permits only the trustee to bring an action on behalf of a trust, the court stated, “[i]t follows from these general principles that a beneficiary has only a limited ability to release a trust’s claims against third parties.” *Ricke v. Armco*, 92 F.3d 720, 724 (8th Cir. 1996).

The Eighth Circuit elaborated on the issue in *Witzman v. Gross*, which involved a trust beneficiary who filed a lawsuit against the trustee’s law firm, alleging breach of trust, malpractice, and various other claims. *Witzman v. Gross*, 148 F.3d 988, 989 (8th Cir. 1998). The trustee had hired the law firm to counsel him in his capacity as trustee. *Id.* at 990. The appellants argued that the law firm aided and abetted the appellee’s breach of trust. *Id.* However the court noted that “[i]t is a well established rule in Minnesota that an attorney is liable for professional malpractice ‘only to a person with whom the attorney has an attorney-client relationship.’” *Id.* (citing *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995)). Similarly, the court noted that “a beneficiary cannot bring an action at law in a trust’s stead against a third party for torts or other wrongs.” *Id.* The Farmers are attempting to bring their declaratory judgment claim on behalf of the trust, thus, they do not have standing, and their declaratory judgment action should be dismissed.

2. The Farmers have no private right of action under N.D.C.C. Chapter 60-02.1

Because of the statutory procedures set forth in N.D.C.C. Chapter 60-02.1, the Farmers only avenue of relief regarding the trust is through the PSC. As trustee of the North Dakota trust, the commission has power to prosecute or compromise claims:

Upon its appointment, the commission shall marshal all of the trust fund assets. The commission may maintain suits in the name of the state of North Dakota for the benefit of all receiptholders against the licensee's bonds, insurers of grain, any person who may have converted any grain, and any person who may have received preferential treatment by being paid by the insolvent licensee after the first default.

N.D.C.C. § 60-02.1-34. The declaratory judgment claim against American Federal does not meet the definition of any of the suits which the PSC is given authority to maintain in order to marshal assets. Moreover, the PSC has not shown any interest in the matter of priority in the sunflower inventory or proceeds thereof of Mitchell Feeds and failed to even answer the Farmers' Complaint in Intervention.

The Farmers are seeking to have the Court make declarations pursuant to Chapter 60-02.1 of the North Dakota Century Code. However, Chapter 60-02.1 provides for a statutory procedure to be followed by the PSC. It provides no private right of action to the Farmers:

No receiptholder has a separate claim for relief upon any insolvent licensee's bond, nor for insurance, nor against any person converting grain, nor against any other receiptholder, except through the trustee, unless, upon demand of five or more receiptholders, the commission fails or refuses to apply for its own appointment or unless the district court denies the application. This chapter does not prohibit any receiptholder, either individually or in conjunction with other receiptholders, from pursuing concurrently any other remedy against the person or property of the licensee.

N.D.C.C. § 60-02.1-33; *see also* N.D.C.C. § 60-02.1-03 ("The duties imposed and the powers conferred by this chapter devolve upon the commission). The Farmers must wait for the PSC to

complete the statutory procedure prescribed in N.D.C.C. Chapter 60-02.1. The PSC has not even determined which Farmers, if any, are valid “claimants” under North Dakota law, as is required in its report. *Sze* N.D.C.C. § 60-02.1-37(1) (“commission shall file with the court a report showing the amount and validity of each claim”). Nor can the PSC pursue American Federal because it is not one of the parties which Chapter 60-02.1 allows the PSC to pursue claims against. As such, the Farmers have no private right of action to seek a declaratory judgment.

3. The Farmers have no private right of action under Minnesota law

Minnesota law provides the statutory procedure governing claims against grain buyers in Minnesota, the “Minnesota Grain Buyers Act” (“Act”) codified at M.S.A. §§ 223.15 to 223.19. M.S.A. § 223.15. Under the Act, a “grain buyer” is defined as “a person who purchases grain for the purpose of reselling the grain or products made from the grain, with the exception of a person who purchases seed grain for crop production or who purchases grain as feed for the person’s own livestock.” M.S.A. § 223.16(5). “Grain” includes “oilseed in an unprocessed form,” which would include sunflowers such as those sold to Mitchell Feeds by the Farmers in this case. M.S.A. § 223.16(4). The Intervenor Farmers in this case are “producers” as defined by the Act because they are the “person[s] who grow grain on land [they] owned or leased.” M.S.A. § 223.16(11).

The Act is enforced by the Minnesota Commissioner of Agriculture (“commissioner”), with the assistance of the Minnesota Attorney General. M.S.A. § 223.21. There is no private right of action in Minnesota by a producer such as Farmers against a grain buyer, except by making a claim with the commissioner:

A producer claiming to be damaged by a breach of a contract for the purchase of grain by a licensed grain buyer may file a written claim with the commissioner.

The claim must state the facts constituting the claim. The claim must be filed with the commissioner within 180 days of the breach.

M.S.A. § 223.17(7) (governing producer bond and contract claims).

The Farmers in this case are attempting to sidestep Minnesota's statutory procedure governing claims against a grain buyer in Minnesota by asking this Court to exercise its jurisdiction over the sunflowers/proceeds of Mitchell Feeds at its facility in Hendrum, MN. Farmers are doing so simply because they failed to make claims in Minnesota within 180 days of an alleged breach. Farmers themselves admit that they contracted with Mitchell Feeds for the purchase of their 2008 and/or 2009 sunflower crops. *See* Complaint, ¶ 25, Docket # 40. Thus, in order for them to have timely made claims in Minnesota, they would have had to have been filed with the Minnesota commissioner within 180 days of the delivery of the grain, a time long expired before the commencement of the suits against Mitchell Feeds in 2011.

II. THE FARMERS ARE PROHIBITED FROM BRINGING AN ACTION FOR DECLARATORY JUDGMENT BECAUSE THEY ARE BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL

Farmers are barred under the doctrines of res judicata (a/k/a "claim preclusion") and collateral estoppel (a/k/a "issue preclusion) from bringing this declaratory judgment action because the claim and issues they are alleging were already litigated in the Minnesota case.

The doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues in order to promote the finality of judgments, which increases certainty, **avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.**

Riverwood Commercial Park, L.L.C. v. Standard Oil Company, 2007 ND 36, ¶ 13, 729 N.W.2d 101 (emphasis added).

The basic difference between claim preclusion and issue preclusion is simply put: claim preclusion applies to whole claims, whether litigated or not, whereas issue preclusion applies to particular issues that have been

contested and resolved. Claim preclusion is broader in scope than issue preclusion as to the claims that come within its purview, but narrower in scope as to the parties to whom the doctrine can be applied. While claim preclusion and issue preclusion advance the same basic principle—the need for finality in judicial proceedings—they do so in substantially different ways. Claim preclusion prevents parties and those in privity with them from raising legal theories, claims for relief, or defenses which could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case. Issue preclusion, on the other hand, precludes litigation of issues actually litigated and necessary to the outcome of the prior case, even if such issues are subsequently presented as part of a different “claim.”

In analyzing these issues, we keep in mind the admonition that the doctrines should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice or to work an injustice.

Id. at ¶ 14 (internal citations omitted). As explained below, both doctrines apply to preclude relitigation of this case.

A. The Farmers Are Barred From Bringing This Action for Declaratory Judgment Pursuant to the Doctrine of Res Judicata

The Farmers are barred from bringing their declaratory judgment claim in this case through the doctrine of res judicata. The district court applies the following elements to determine if a claim is barred by res judicata:

1. A final decision on the merits in the first action by a court of competent jurisdiction;
2. The second action involves the same parties, or their privies, as the first;
3. The second action raises an issue actually litigated or which should have been litigated in the first action;
4. An identity of the causes of action[.]

Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 12, 791 N.W.2d 33. All of the elements of res judicata have been met in this case, barring the Farmers from bringing a declaratory judgment claim.

1. A final decision on the merits was issued in the Minnesota case by a court of competent jurisdiction

The Minnesota court entered judgment declaring that American Federal has a first priority security interest in Mitchell Feeds' sunflowers and/or the proceeds thereof located in Minnesota on May 2, 2012. In addition, it determined that American Federal's first priority interest is superior to any of Farmers' claims.

The doctrine of res judicata requires that a "final judgment" be entered in order to bar the subsequent claim or issues. In this case, a final judgment for purposes of res judicata was entered in the Minnesota case on May 2, 2012. It must be noted that for purposes of res judicata a "final judgment" is not the same as a final judgment required under N.D.R.Civ.P. 54(b) or its Minnesota counterpart, Minn.R.Civ.P. 54.02. In *Roberts v. Flanagan*, the lower court entered default judgment against the respondent while preserving a claim for punitive damages. 410 N.W.2d 884, 885 (Minn.Ct.App. 1987). The appellant then commenced a suit asserting additional claims arising from the same transaction. *Id.* at 886.

The court applied the doctrine of res judicata to the claims in the second case, and respondent was granted judgment dismissing the second case. *Id.* On appeal, the appellant argued that the second suit was not barred by res judicata because the first suit was not a "final judgment" pursuant to Minn.R.Civ.P. 54.02. *Id.* at 887. The court disagreed with the appellant's assertion, stating:

Appellant argues because the trial court in *Roberts I* did not expressly determine "there is no just reason for delay," the resulting default judgment is subject to revision and therefore not final for purposes of res judicata.

Cases interpreting rule 54.02, however, usually arise where the trial court grants a partial summary judgment or otherwise dismisses a portion of the claims of a party or parties and the reviewing court is asked to address the appealability of the order.

Appellant cites no authority for extending the rule to determine the finality of a judgment for res judicata purposes. We conclude *rule 54.02 does not apply to prevent application of res judicata* in this case and thereby allow appellant to bring successive lawsuits involving the same set of factual circumstances.

Id. at 887-88 (emphasis added).

The Minnesota court has already entered judgment in the Minnesota case. The case was argued and decided on the merits. *See David v. Enget*, 2010 ND 34, ¶ 5, 779 N.W.2d 126 (“Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial.”) (quoting *Hasper v. Center Mut. Ins. Co.*, 2006 ND 220, ¶ 5, 723 N.W.2d 409). Because there was a final judgment on the merits entered in Minnesota for purposes of res judicata, the first element of has been met.

2. This case involves the same parties, or their privies, as the Minnesota case

This case concerns four parties: (1) the Plaintiff, PSC; (2) the Respondent, Mitchell Feeds; (3) the Intervenor, Farmers; and (4) the Intervenor, American Federal. The Minnesota case involves three parties: (1) the Plaintiff, Farmers; (2) the Defendant, Mitchell Feeds; and (3) the Intervenor, American Federal. Thus, three of the parties in this case are identical to the parties in the Minnesota case. As explained below, although the PSC was not a named party in the Minnesota case, it is in privity with the Farmers.

The North Dakota Supreme Court “has adopted an ‘expanded’ version of privity for res judicata and collateral estoppel” which “exists if a person is so identified in interest with another that he represents the same legal right.” *Ungar v. North Dakota State Univ.*, 2006 ND 185, ¶ 12, 721 N.W.2d 16. The court outlined this “expanded” version of privity as:

expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and his right to participate therein, at least

where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by parties.

Id.

The Intervenor Farmers in this case are the exact same as the Plaintiff Farmers in the Minnesota case. In addition, the Farmers are in privity with the PSC. The Farmers attorney, Derrick Braaten, admitted at the hearing of American Federal's summary judgment motion held in Norman County on March 16, 2012, that he had been in contact with the PSC and it supported his actions in the Minnesota case. In addition, the PSC visited Mitchell Feeds after it was appointed trustee in North Dakota and failed to take any action whatsoever to sell the sunflower inventory located in Minnesota, or otherwise intervene in the suit that had already been filed by the Farmers in Minnesota. It should also be noted that upon filing the Complaint in the Minnesota case, the Farmers also sought, and were granted an order restraining Mitchell Feeds from selling or otherwise disposing of its sunflower inventory.

North Dakota has applied the doctrine of res judicata when the parties to the second action were not identical to those in the first. For example, in *Mead v. Farmers Union Mutual Ins. Co.*, the North Dakota Supreme Court upheld the lower court's determination that the issue of whether the insured's actions were intentional, and thus not covered by his insurance policy, was res judicata because an earlier criminal judgment found him guilty of Class AA Felony murder in which the murder was found intentional. 2000 ND 139, ¶ 15, 613 N.W.2d 512 (citing *Ohio Casualty Ins. Co. v. Clark*, 1998 ND 153, ¶¶12, 28, 583 N.W.2d 377). The insurance company was not a party, nor in privity with a party, to the criminal case; however, the court applied "res judicata" anyway.

Thus, because the Farmers were representing their interests, and as claimed by Derrick Braaten, the interests of the PSC, in the Minnesota case, the element of privity is met.

3. This case raises issues actually litigated or which should have been litigated in the Minnesota case

In the Minnesota case, the Farmers sought to replevy the sunflowers and/or proceeds thereof. American Federal intervened seeking declaratory judgment and a determination of which party had priority in the sunflowers and/or proceeds located in Minnesota. The Minnesota court found that American Federal has a first priority security interest in the sunflowers and that its lien is senior to any interest the Farmers may have.

In this case, the Farmers seek a determination from this Court that the sunflowers and proceeds therefrom are part of the trust established in this case. The Farmers then seek to have this Court establish that they have a claim to the sunflowers and/or proceeds superior to that of American Federal. However, Farmers should have raised that argument in the Minnesota case.

[R]es judicata applies even though the subsequent claims may be based upon a different legal theory’ “It matters not that the substantive issues were not directly decided in the prior action; the key is that they were *‘capable of being, and should have been, raised as part of the [prior] proceeding.’*”

Missouri Breaks at ¶ 11 (internal citations omitted).

The Farmers were capable of raising the argument that the sunflowers and/or inventory thereof is part of the North Dakota trust in the Minnesota action. In fact, they did assert the issue by attaching a copy of their “Motion for Declaratory Judgment,” Docket # 41, as “Exhibit E” to “Plaintiffs’ Response to Intervenor American Federal Bank’s Motion for Partial Summary Judgment and Memorandum in Support of Plaintiffs’ Motion Pursuant to Minnesota Rule of Civil Procedure 56.06” (“Response”). A copy of Farmers’ Response is attached hereto as “*Exhibit D.*” Farmers’ Motion for Declaratory Judgment in this case has since been withdrawn.

In their Response, the Farmers argued that “North Dakota law related to the grain and proceeds of the grain is clear that Plaintiffs have a priority lien by virtue of being the beneficiaries of the trust created by North Dakota statute.” See Response, pp. 14-15. The Minnesota court rejected that argument in granting American Federal’s motion for summary judgment, yet Farmers still pursue the same claim in this case through their declaratory judgment action.

Farmers may argue that this case involves a different claim because they are the party seeking declaratory judgment rather than American Federal. However, it is irrelevant whether they seek their claim upon a different legal theory than was sought in the Minnesota case, *res judicata* still applies:

The mere fact that plaintiffs have conceived some new legal theories in which to clothe the *same facts and events* that gave rise to the first two actions will not affect the *res judicata* question. *It is “the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.”*

Simpson v. Chicago Pneumatic Tool Co., 2005 ND 55, ¶ 11, 693 N.W.2d 612 (internal citations omitted) (emphasis added). Thus, the addition of parties or a reliance on different legal theories does not make the doctrines of *res judicata* inapplicable. *Id.* Thus, the second element of *res judicata* is met because the same claim was already litigated or could have been sought in the Minnesota case.

4. The causes of action in both the Minnesota and North Dakota cases have been identified

The fourth requirement, that there be an identity of the causes of action, is also met. In the Minnesota case, American Federal sought declaratory judgment seeking to establish who had priority in the sunflowers and/or proceeds of Mitchell Feeds located in Minnesota. In the present

action, Farmers seek declaratory judgment to determine whether the sunflowers and/or proceeds thereof located in Minnesota are part of the North Dakota trust and to declare that Farmers have an interest in them superior to American Federal. By pursuing their claim in North Dakota, Farmers are seeking to recover the same sunflowers and/or proceeds of Mitchell Feeds which were the subject of the Minnesota case. *See Missouri Breaks*, 2010 ND 221, ¶ 15. Thus, the causes of action in both cases have been identified, and the last element of res judicata is also met.

Because all four elements of res judicata, as defined by North Dakota law, have been met in this case, Farmers declaratory judgment action is barred by the doctrine of res judicata and should be dismissed.

B. The Farmers Are Barred From Bringing This Action for Declaratory Judgment Pursuant to the Doctrine of Collateral Estoppel

Not only is the Farmers' declaratory judgment action barred by the doctrine of res judicata, it is also barred under the doctrine of collateral estoppel. In *Gratech Co., Ltd. V. Wold Engineering, P.C.*, the court explained collateral estoppel in more detail and outlined the tests to determine when it applies:

“Historically, collateral estoppel was limited by the principle of mutuality, which means that a judgment can operate as collateral estoppel only where all the parties to the proceeding in which the judgment is relied upon were bound by the judgment.” *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992)

Four tests must be met before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

2007 ND 46, ¶ 14, 729 N.W.2d 326.

As explained below, all elements of collateral estoppel are met in this case, thereby precluding Farmers from seeking a determination in this action of which party has a priority interest in the sunflowers and/or or proceeds thereof of Mitchell Feeds located in Minnesota.

1. The issue of who has priority to the sunflowers and/or proceeds thereof is identical to the one presented in the Minnesota case

The Minnesota court ordered and entered judgment declaring “that Intervenor American Federal Bank has a first priority interest in Defendant Mitchell Feeds, Inc.’s sunflower inventory and the proceeds thereof superior to any of the Plaintiffs’ claims.” *See* May 2, 2012 Judgment and Order, Norman County, MN Case 54-CV-11-112. In this case, the Farmers ask this court to declare that the “Intervenor farmers, as beneficiaries of the trust, are entitled to the sunflowers or proceeds therefrom.” *See* Complaint, ¶ 48, Docket # 60. However, the exact same issue of who has priority in Mitchell Feeds’ sunflowers and/or the proceeds thereof was already decided in the Minnesota case. Thus, the first element of collateral estoppel has been met.

2. There was a final judgment entered on the merits in the Minnesota case

As explained above in the argument regarding res judicata, a final judgment was already entered on the merits.

3. The Farmers are the party against whom collateral estoppel is being asserted

As explained above in the argument regarding res judicata, the Farmers are in privity with the PSC. Moreover, for purposes of collateral estoppel, privity of all parties is not even required because the Farmers are the party against whom collateral estoppel is being asserted, and the Farmers are a party in the Minnesota case.

Although North Dakota claims that the requirement for mutuality still exists in order for collateral estoppel to apply, *see Ungar* at 2006 ND 185, ¶ 12, it has not consistently applied that

rule. For example, in *Riemers v. Anderson*, the court applied collateral estoppel to a plaintiff in a civil suit to keep the plaintiff from relitigating the issue of whether he was falsely arrested for domestic assault. 2004 ND 109, ¶ 13, 680 N.W.2d 280. In that case, the plaintiff brought suit against the Traill County Deputy Sheriff, Sheriff, State’s Attorney, and the City of Mayville and two of its police officers alleging he was falsely arrested for domestic assault. *Id.* at ¶ 1-3. The North Dakota Supreme Court affirmed the trial court’s summary judgment in favor of defendants based on collateral estoppel. *Id.* at ¶ 13. In doing so, the court relied upon its earlier decision in *Peters-Riemers v. Riemers*, 2002 ND 72, 644 N.W.2d 197, in which it “affirmed a judgment dissolving the marriage of Riemers and Peterson-Riemers,” in which opinion the issue of “Riemers’ domestic violence and Peters-Riemers’ alleged domestic violence were addressed at length.” *Id.* The court affirmed the trial court’s findings that Riemers committed domestic violence in connection with the same incident in question in the current *Riemers* case. *Id.* Applying collateral estoppel, the court held:

Thus, the basis for Riemers’ suit—that he was falsely arrested for assault and his former wife should have been, but was not, arrested—was previously litigated and determined, precluding Riemers from relitigating those issues. Because Riemers was collaterally estopped from relitigating those issues, we need not address the issues he has raised in his action based upon the decision to arrest and prosecute him, but not Peters-Riemers.

Id.

Thus, since the Farmers are a party to the Minnesota case, and they are the party against whom collateral estoppel is asserted, the third element of collateral estoppel is clearly met. As such, Farmers should be collaterally estopped from relitigating the issue of which party has priority to Mitchell Feeds sunflowers and/or the proceeds thereof.

4. The Farmers were given a fair opportunity in the Minnesota case to be heard on the issue of priority in Mitchell Feeds sunflowers inventory and/or the proceeds thereof

The Farmers were given a fair opportunity in the Minnesota case to be heard on the issue of priority. The Minnesota case was initiated by Farmers on April 6, 2011. American Federal filed its motion for summary judgment on February 14, 2012. The Farmers were given an opportunity, and did, respond to the American Federal's motion for summary judgment. In addition, through their attorney, Derrick Braaten, Farmers appeared and argued against American Federal's motion for summary judgment at a hearing on March 16, 2012. Thus, Farmers were given a full and fair opportunity to be heard in the Minnesota case on the issue of priority in Mitchell Feeds sunflowers and/or proceeds thereof.

As explained above, all of the elements of res judicata, and the tests required for collateral estoppel, are met in this case. Because the Minnesota case already determined the claims and issues the Farmers are attempting to relitigate in this case, their declaratory judgment claim should be dismissed pursuant to the doctrines of both res judicata and collateral estoppel.

III. THE FARMERS ARE PROHIBITED FROM BRINGING AN ACTION FOR DECLARATORY JUDGMENT BECAUSE THE GRAIN HELD IN STORAGE BY MITCHELL FEEDS AND/OR THE PROCEEDS THEREOF ARE NOT PART OF THE TRUST FUND ESTABLISHED IN NORTH DAKOTA

Farmers seek to have the sunflowers held in storage by Mitchell Feeds in Hendum, MN and/or the proceeds thereof made part of the trust fund in North Dakota. However, the PSC does not have jurisdiction over those sunflowers and/or their proceeds. As such, they cannot become part of the North Dakota trust.

In *Public Service Commission v. Sustainable Systems, LLC dba Montla*, the North Dakota Public Service Commission faced the exact same situation it is dealing with in this case.

Civil No. 08-09-C-1034 (Burleigh Cty., N.D. 2009). Sustainable Systems, LLC dba Montla (“Sustainable Systems”) was a roving grain buyer licensed under N.D.C.C. Chapter 60-02.1. *See Id., Report and Recommendation of Trustee*, Doc. #12, ¶ 2. Sustainable Systems also “operated a crushing facility in Culbertson, Montana that was licensed by the Montana Department of Agriculture and had been receiving safflower from North Dakota producers for crushing into oil. *Id.*, Doc. #12, ¶ 3. In May 2009, the PSC applied to this Court and was granted an order finding Sustainable Systems insolvent and appointing the PSC as trustee of the trust fund provided for in N.D.C.C. § 60-02.1-29. *Id.*, Doc. #12, ¶ 4-5.

The PSC received the proceeds of Sustainable Systems bond, which was made part of the trust. *Id.*, Doc. #12, ¶ 8. The Montana Department of Agriculture liquidated the grain related assets on hand at Sustainable System’s warehouse in Culberston, Montana, and distributed the proceeds to all claimants with a valid claim. *Id.*, Doc. #12, ¶ 12. In its report, the PSC found that “[t]he \$130,000 North Dakota bond proceeds *are the only assets available in the North Dakota trust fund and are needed to pay North Dakota claimants.*” *Id.*, Doc. #12, ¶ 13 (emphasis added). This Court approved the PSC’s report and authorized it to distribute the proceeds of the bond to the valid North Dakota claimants. *Id., Order Approving Trustee’s Report, Approving Payment, and Discharging Trustee*, Doc. #16.

The same is true in this case – the sunflowers transported by Respondent Mitchell Feeds and stored in its warehouse in Minnesota *are not part of the North Dakota trust*. The sunflowers were transported to Minnesota and the Minnesota court has already determined who has priority in them. Consequently, Farmers declaratory judgment action should be dismissed.

IV. THE FARMERS ARE PROHIBITED FROM BRINGING AN ACTION FOR DECLARATORY JUDGMENT PURSUANT TO NORTH DAKOTA CENTURY CODE CHAPTER 60-02.1 BECAUSE THEY HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

Because the Farmers have not exhausted their administrative remedies, a declaratory judgment action is improper and should be denied. Farmers seek a declaratory judgment from the Court to determine that (1) the sunflower inventory of Mitchell Feeds and proceeds thereof are part of the trust fund established by the North Dakota Public Service Commission; and (2) that Intervenor American Federal Bank's first priority security interest in the sunflower inventory does not defeat the Farmers' rights as beneficiaries of the trust. Declaratory judgment is not proper in this case because "[t]he Declaratory Judgment Act does not authorize advisory opinions." *Park District City of Fargo v. City of Fargo*, 129 N.W.2d 828, 831 (N.D. 1964) (citing *Ginakes v. Johnson*, 75 N.D. 164, 26 N.W.2d 368 (N.D. 1947)).

In *West Fargo Public School District No. 6 of Cass County v. West Fargo Education Assoc.*, the North Dakota Supreme Court expanded on this Rule, stating:

While a declaratory judgment action is intended to provide a method whereby parties to a justiciable controversy may have it determined by a court in advance of any invasion of right or breach of obligation, it nevertheless must involve an actual controversy of a justiciable character between parties having adverse interests. No action or proceedings lie under a declaratory judgment Act [sic] to obtain a decision which is merely advisory or which merely determines abstract questions.

259 N.W.2d 612, 617 (N.D. 1977) (citing *Park District City of Fargo*, 129 N.W.2d at 831; *Asbury Hospital v. Cass County*, 72 N.D. 359, 7 N.W.2d 438 (1943); and *Langer v. State*, 69 N.D. 129, 284 N.W. 238 (1939)).

The PSC was appointed trustee of the Mitchell Feeds trust fund by Order of this Court on May 10, 2011. *See* Docket #12. Farmers filed claims with the PSC stating that they were not

paid for sunflowers sold to Mitchell Feeds. *See* Complaint, Docket # 60, ¶¶ 28-30. Intervenor American Federal Bank intervened in this matter in order to establish its first priority security interest in the inventory of Mitchell Feeds. *See* Motion for Rule 24 Intervention, Docket # 25; Order Granting Rule 24 Intervention, Docket # 36.

The PSC is currently in the process of determining which Farmers have proper claims under North Dakota law and has not yet filed its report to the Court as required under N.D.C.C. § 60-02.1-37. That section states:

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

- a. **Relevant liens** or pledges.
- b. Relevant assignments.
- c. Relevant deductions due to advances or offsets accrued in favor of the licensee.
- d. In case of relevant cash claims or checks, the amount of the claim with interest from the date of default at the weighted average prime rate charged by the Bank of North Dakota.

2. The report must also contain the proposed distribution of the trust fund assets, less expenses incurred by the commission in the administration of the insolvency. If the trust fund is insufficient to redeem all claims in full, the report should list the funds as prorated.

3. **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 licensee and the surety and by ordinary mail upon all persons having claims filed with the commission.

4. **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 licensee, 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.

5. **Following the 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.

(emphasis added).

The PSC has marshaled the bond as part of the trust in this matter. The grain and/or proceeds the Farmers seek to have marshaled are located in Minnesota and subject to Minnesota laws. The PSC cannot marshal the grain and/or proceeds which are located in Minnesota. *See PSC v. Minnesota Grain, Inc.*, 2008 ND 184, ¶ 21, 756 N.W.2d 763 (“PSC recognized it could not marshal assets from Minnesota Grain’s East Grand Forks warehouse for the benefit of the receipt holders); *PSC v. Sustainable Systems, LLC*, Civil No. 09-C-1034, PSC Case No. GE-09-112 (case dealing with insolvent roving grain buyer licensed in North Dakota who purchased grain from North Dakota farmers and stored the grain in its Montana facility. Montana Department of Agriculture handled claims related the grain located in Montana and only bond was part of North Dakota trust). The PSC will make a determination whether it has the ability to marshal the grain and/or proceeds.

The PSC has not yet determined which parties who filed claims are true “claimants” with valid claims against the trust proceeds. The PSC, pursuant to Section 60-02.1-37, will evaluate the claims submitted and submit a report, recognizing any relevant liens.

The Farmers are attempting to circumvent the statutory procedure governing the PSC’s administration of the trust and attempting to place the initial factual determination of who has valid claims in the hands of the Court. In doing so, they are attempting to avoid determination by the PSC, the administrative agency which has expertise in this area. The North Dakota Supreme Court has stated that “Rule 57 does not authorize the employment of two procedures at the same time on the same question.” *Shark Brothers, Inc. v. Cass County*, 256 N.W.2d 701, 706 (N.D. 1977) (referring to N.D.R.Civ.P. 57).

If such bifurcated procedures were encouraged or sustained, it would create duplication, and uncertainty, and waste manpower and money, with no appreciable result, and all without improving the administration of justice. If one

side of a proceeding were permitted to proceed both in the administrative channels and the judicial channels at the same time the other side could also resort to the same procedure. The result would be endless confusion, which we can ill afford.

Id. at 705-06.

Since the PSC is still in the process of marshaling assets and administering the trust, as provided under N.D.C.C. Ch. 60-02.1, the Farmers cannot start a declaratory judgment action which would amount to an advisory opinion for a determination of what should be contained within the trust, and which claimants, creditors, and/or lienholders should be given priority to the trust proceeds. "The Declaratory Judgment Act does not authorize advisory opinions." *Park District City of Fargo v. City of Fargo*, 129 N.W.2d 828, 831 (N.D. 1964) (citing *Ginakes v. Johnson*, 75 N.D. 164, 26 N.W.2d 368 (N.D. 1947)).

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259 N.W.2d 612, 617 (N.D. 1977) (citing *Park District City of Fargo*, 129 N.W.2d at 831; *Asbury Hospital v. Cass County*, 72 N.D. 359, 7 N.W.2d 438 (1943); and *Langer v. State*, 69 N.D. 129, 284 N.W. 238 (1939)).

The Farmers cannot side-step the statutory process through this motion, but must wait until the PSC files its report under N.D.C.C. § 60-02.1-37. Only then can it properly object to the report and be heard by this Court.

V. THE FARMERS HAVE NO INTEREST IN THE INVENTORY OF MITCHELL FEEDS, A ROVING GRAIN BUYER UNDER N.D.C.C. CHAPTER 60-02.1

Farmers seem to believe that they have a priority interest in the sunflower inventory of Mitchell Feeds similar to that given to persons storing grain in an insolvent elevator pursuant to N.D.C.C. Ch. 60-02. They are requesting this Court grant them a lien pursuant to the chapter governing warehouses. However, Mitchell Feeds was licensed in North Dakota as a *roving grain buyer*, not a warehouse. Roving grain buyers are governed by a different chapter of the Code, N.D.C.C. Chapter 60-02.1.

The case of *N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n*, to which Farmers alluded in their Motion for Declaratory Judgment, involved an insolvent grain warehouse governed by N.D.C.C. Chapters 60-02 and 60-04. 365 N.W.2d 528 (N.D. 1985). That case also specifically addressed the difference between a grain buyer and a warehouse:

When a public warehouseman accepts grain for storage, "such delivery shall be a *bailment and not a sale* of the grain so delivered," and "[i]n no case shall the grain so stored be liable to seizure upon process of any court in any action against such bailee, except in an action by the owner of such warehouse receipt to enforce the terms thereof."

365 N.W.2d at 539 (quoting N.D.C.C. § 60-02-25). The Farmers in this case *SOLD* the grain to Mitchell Feeds, there was no bailment relationship created, and after delivery the grain was owned by Mitchell Feeds, and Farmers could not reclaim it as in a bailment relationship. As explained above, that issue has already been determined in the Minnesota case.

Farmers have argued that because N.D.C.C. § 60-02-25.1, which creates a first priority lien in favor of outstanding receiptholders of a *warehouse*, there must be a similar first priority lien recognized in favor of receiptholders of an insolvent roving grain buyer. That argument is completely misplaced.

There is no similar lien created in the statutes governing roving grain buyers such as Mitchell Feeds. In fact, N.D.C.C. Chapter 60-02.1 governing grain buyers and grain buyer insolvency proceedings was created and enacted in 1999, after the lien was created in N.D.C.C. Chapter 60-02. *See* S.L. 1999, ch. 534. Thus, if the legislature had wanted a similar first priority lien created in favor of noncredit-sale receiptholders of roving grain buyers, the legislature would have enacted a statute similar to that in N.D.C.C. § 60-02-25.1. The legislature *did not adopt such a section*, thus there cannot be an implied first priority lien in favor of receiptholders of roving grain buyers just because there are insolvency procedures governing roving grain buyers similar to those governing grain warehouses. The Farmers' argument is illogical and the Minnesota court has already found that the Farmers have no interest in the sunflowers and/or proceeds thereof located in Minnesota. Farmers are restating their argument in a different way in a desperate attempt to find a court that will grant them a lien.

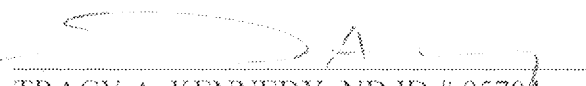
CONCLUSION

FOR DISMISSAL WITH PREJUDICE OF INTERVENOR FARMERS COMPLAINT IN INTERVENTION

Intervenor American Federal's Motion for Summary Judgment for Dismissal with Prejudice of Intervenor Farmers' Complaint in Intervention should be granted, and the Intervenor Farmers cause of action for declaratory judgment should be dismissed with prejudice. First, the Farmers cannot initiate such an action because they lack standing to bring their declaratory judgment claim. Second, the Farmers action is barred by the doctrines of res judicata and collateral estoppel. Third, the sunflowers and/or proceeds thereof of Mitchell Feeds, located in Minnesota, are not part of the trust established in North Dakota. Fourth, Farmers have failed to exhaust their administrative remedies in North Dakota. Lastly, Farmers have no interest in the

inventory of Mitchell Feeds, a roving grain buyer under N.D.C.C. Chapter 60-02.1. Therefore, American Federal Bank respectfully requests that this Court grant its Motion for Summary Judgment in its entirety.

Dated this 11 day of May, 2012.



TRACY A. KENNEDY, ND ID # 05704
Zimney Foster P.C.
3100 South Columbia Road, Suite 200
PO Box 13417
Grand Forks ND 58208-3417
tracykennedy@northdakotalaw.net
Telephone: (701) 772-8111/Fax: (701) 772-7328
Attorneys for American Federal Bank

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc.

and

Western Surety Company

Respondents.

Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauniers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, Kelly Wurgler, and American Federal Bank

and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-51

**AFFIDAVIT OF SERVICE
BY MAIL**

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF GRAND FORKS)

BRENDA R. DIPERSIO, being first duly sworn on oath deposes and says that she is a secretary in the office of Zimney Foster P.C., 3100 South Columbia Road, Ste. 200, PO Box 13417, Grand Forks, ND 58208-3417; that on the 11th day of May, 2012, she served:

1. AMERICAN FEDERAL BANK'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT FOR DISMISSAL WITH PREJUDICE OF INTERVENOR FARMERS COMPLAINT IN INTERVENTION
2. AMERICAN FEDERAL BANK'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR DISMISSAL WITH PREJUDICE OF INTERVENOR FARMERS COMPLAINT IN INTERVENTION

by placing a true copy in a postage paid envelope addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Grand Forks, North Dakota.

Ilona A. Jeffcoat-Sacco
Special Assistant Attorney General
State Capitol – 12th Floor
600 East Boulevard Avenue, Dept 408
Bismarck, ND 58505-0480

Mark Gruman
Special Assistant Attorney General
State Capitol – 12th Floor
600 East Boulevard Avenue, Dept 408
Bismarck, ND 58505-0480

David L. Johnson
McNair, Larson & Carlson, Ltd
51 Broad Way, Ste 600
PO Box 2189
Fargo, ND 58108

Sharon Sergeant, Claims Manager
Senior Claims Counsel, Claim Dept.
Western Surety Company
101 South Phillips Avenue
Sioux Falls, SD 57104-6703

Gene Allen
McGee, Hankla, Backes & Dobrovolny
Wells Fargo Bank Center
PO Box 998
Minot, ND 58702-0998

Derrick Braaten
Lindsey Nieuwsma
222 North 4th Street
Bismarck, ND 58501-4004


BRENDA R. DIPERSIO

Subscribed and sworn to before me this 17th day of May, 2012, by Brenda R. DiPersio.

JILL BISHOP
Notary Public
State of North Dakota
My Commission Expires Aug. 20, 2016


NOTARY PUBLIC, NORTH DAKOTA
My commission expires:

EXHIBIT **A**

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF NORMAN

NINTH JUDICIAL DISTRICT

Court File No.: _____

 Don Ackerson, Lana Anderson d/b/a)
 Northland Farms, Mike Aasen, David)
 Deslauriers, Jeff Kling, Scott Lazorenko,)
 Nathan Neameyer, Steven Neameyer, Ron)
 Pelton, Mitch Preskey, James Routledge, Bart)
 Savelkoul, Mike Schollmeyer, Shane Sickler,)
 David Steeves, Paul Trout, Wurgler Farms,)
 and Kelly Wurgler.)

Plaintiffs.)

v.)

Mitchell Feeds, Inc. and Mitchell Farms, Inc.,)

Defendants.)

COMPLAINT

I. PARTIES

1. Plaintiff Don Ackerson is a farmer and resident of North Dakota, and his address is 5175 106th St NW Sherwood, ND 58782.
2. Plaintiff Lana Anderson, d/b/a Northland Farms, is a farmer and resident of North Dakota, and her address is 10845 53rd Ave NW Sherwood, ND 58782.
3. Plaintiff Mike Aasen is a farmer and resident of North Dakota, and his address is 4465 Co Rd 2 Sherwood, ND 58782.
4. Plaintiff David Deslauriers is a farmer and resident of North Dakota, and his address is 4915 Co Rd 2 Sherwood, ND 58782.
5. Plaintiff Jeff Kling is a farmer and resident of North Dakota, and his address is 9440 7th St SW Halliday, ND 58636.

6. Plaintiff Scott Lazorenko is a farmer and resident of North Dakota, and his address is 899 Brew St. Killdeer, ND 58640.
7. Plaintiff Nathan Neameyer is a farmer and resident of North Dakota, and his address is 614 9th Ave NE Rolla, ND 58367.
8. Plaintiff Steven Neameyer is a farmer and resident of North Dakota, and his address is HC1 Box 44 Mylo, ND 58353.
9. Plaintiff Ron Pelton is a farmer and resident of North Dakota, and his address is 140th 92nd Ave NW Halliday, ND 58636.
10. Plaintiff Mitch Preskey is a farmer and resident of North Dakota, and his address is 2485 Glenburn Rd Glenburn, ND 58740.
11. Plaintiff James Routledge is a farmer and resident of North Dakota, and his address is 603 Bavaria Dr Minot, ND 58703.
12. Plaintiff Bart Savelkoul is a farmer and resident of North Dakota, and his address is 8221 30th Ave NW Lansford, ND 58750.
13. Plaintiff Mike Schollmeyer is a farmer and resident of North Dakota, and his address is 549 101st Ave SW Dunn Center, ND 58626.
14. Plaintiff Shane Sickler is a farmer and resident of North Dakota, and his address is 2410 98th Ave SW Gladstone, ND 58630.
15. Plaintiff David Steeves is a farmer and resident of North Dakota, and his address is 4690 Cty Rd 2 Sherwood, ND 58782.
16. Plaintiff Paul Trout is a farmer and resident of North Dakota, and his address is 10285 Hwy 28 Sherwood, ND 58782.

17. Plaintiff Wurgler Farms is a farming partnership and its address is 1600 Parkside Drive Minot, ND 58701.
18. Plaintiff Kelly Wurgler is a farmer and resident of North Dakota, and his address is 1600 Parkside Dr. Minot, ND 58701.
19. Defendant Mitchell Feeds, Inc. is a Minnesota corporation created on January 10, 2006 and with an address of 154 Hwy 75 S Hendrum, MN 56550. Robert Mitchell is the registered agent.
20. Defendant Mitchell Feeds, Inc. was also registered as a foreign corporation in North Dakota on September 21, 2009. Defendant Mitchell Feeds, Inc. is a buyer of sunflowers and grain products with its principal office located at 154 Hwy 75 S Hendrum, MN 56550. Its registered agent for North Dakota is Jackie Mitchell with an address of 4905 County 81 S Horace, ND 58047.
21. Defendant Mitchell Farms, Inc. is a Minnesota corporation created on January 10, 2006 and with an address of 154 Hwy 75 S Hendrum, MN 56550. Robert Mitchell is the registered agent.
22. Defendant Mitchell Farms, Inc was also registered as a domestic farm corporation in North Dakota on February 15, 1995. Defendant Mitchell Farms, Inc. is named as a farming operation. Its registered agent for North Dakota is Scott Mitchell with an address of 1920 146 R Ave SE Erie, ND 58029, which is also the location of its principal office.

II. BACKGROUND

23. Plaintiffs are farmers who produce sunflowers.

24. Plaintiffs, individually, contracted with Defendant Mitchell Feeds, Inc. for the purchase of their sunflower crop in 2008 and/or 2009.

25. Upon information and belief, Plaintiffs' contract prices ranged from \$26 to \$33 per pound.

26. Defendant Mitchell Feeds, Inc. entered into the contracts through Robert Mitchell.
27. Robert Mitchell indicated to Plaintiffs on multiple occasions, both in groups and individually, that he intended to pay their contracts in full, but was unable to do so.
28. On approximately March 26, 2011, Robert Mitchell indicated to Plaintiff David Steeves that he was not able to make any payments.

29. Plaintiffs received no payment or partial payment on their contracts to sell their sunflower crops to Defendant Mitchell Feeds, Inc.

30. Plaintiffs did not agree to accept partial payment on their sunflower contracts as full satisfaction for the contract.

31. Plaintiff Don Ackerson has not been paid for approximately 314,778 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

32. Plaintiff Lana Anderson d/b/a Northland Farms has not been paid for approximately 106,359 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

33. Plaintiff Mike Aasen has not been paid for approximately 50,605 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

34. Plaintiff David Deshauners has not been paid for approximately 407,035 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

35. Plaintiff Jeff Kling has not been paid for approximately 39,805 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

36. Plaintiff Scott Lazorenko has not been paid for approximately 43,254 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
37. Plaintiff Ron Pelton has not been paid for approximately 50,726 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
38. Plaintiff Mitch Preskey has not been paid for approximately 49,648 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
39. Plaintiff James Routledge has not been paid for approximately 367,253 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
40. Plaintiff Bart Savelkoul has not been paid for approximately 257,301 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
41. Plaintiff Mike Schollmeyer has not been paid for approximately 200,726 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
42. Plaintiff Shane Sickler has not been paid for approximately 95,901 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
43. Plaintiff David Steeves has not been paid for approximately 104,620 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
44. Plaintiff Paul Trout has not been paid for approximately 49,023 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
45. Plaintiff Wurgler Farms has not been paid for approximately 248,874 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.
46. Plaintiff Kelly Wurgler has not been paid for approximately 49,761 pounds of sunflowers purchased by Defendant Mitchell Feeds, Inc.

47. Collectively, Defendant Mitchell Feeds, Inc. has failed to pay for approximately 2,872,006 pounds of sunflowers or more, amounting to approximately \$800,000 - \$1 million.
48. Several plaintiffs have received only partial payment on their sunflower contracts. Collectively, the sum of partial payments that remain outstanding on Plaintiffs' contracts is approximately \$1 million.
49. For some Plaintiffs, Defendant Mitchell Feeds, Inc. has failed to pick up or deliver the sunflowers as agreed upon in the contract.
50. Defendant Mitchell Farms, Inc. is designated as the party responsible for paying freight costs on some of Plaintiff's sales tickets.
51. Defendant Mitchell Farms, Inc. has failed to pay the freight costs on several of Plaintiffs' contracts.
52. Defendant Mitchell Farms, Inc. picked up and transported several loads of Plaintiffs' sunflowers to Defendants' storage bins for which neither the freight costs nor contract price was paid.
53. Defendants utilized the elevator in Hendrum, Minnesota to store several, if not all, of Plaintiffs' sunflowers.
54. Plaintiffs believe that many of the sunflowers that have not been paid for are currently stored at the Hendrum elevator.
55. Plaintiffs believe that Robert Mitchell is planning to move and sell the sunflowers based on information provided by a former employee.

56. Upon information and belief, Plaintiffs ability to recover their sunflowers that have not been paid for or the amounts owed to them under their respective contracts will be jeopardized if the sunflowers stored at the Hendrum elevator are moved and/or sold.

III. FIRST CAUSE OF ACTION: BREACH OF CONTRACT

57. For their first cause of action, Plaintiffs reallege each and every prior allegation of this Complaint.

58. Defendant Mitchell Feeds, Inc. breached its obligations under Plaintiffs' contracts by failing to pay in full the stated contract price.

59. Plaintiffs suffered significant damages from Defendant's failure to fulfill its obligations under their respective contracts and are entitled to a remedy.

IV. SECOND CAUSE OF ACTION: REPLEVIN

60. For their second cause of action, Plaintiffs reallege each and every prior allegation of this Complaint.

61. Defendants Mitchell Feeds, Inc. and Mitchell Farms, Inc. picked up and transported Plaintiffs' sunflowers to its storage facilities without paying Plaintiffs for such goods as specified by the contract terms.

62. Defendants Mitchell Feeds, Inc. and Mitchell Farms, Inc. wrongfully detained and withheld Plaintiffs' sunflowers.

63. Plaintiffs suffered significant damages from the wrongful detention of their property and are entitled to the return of the property.

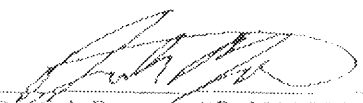
V. PRAYER FOR RELIEF

WHEREFORE, the Court should enter judgment in favor of Plaintiffs and against Defendants and issue an Order:

64. Enjoining Defendants and their agents, employees, and representatives from selling, transferring, bargaining, conveying, encumbering, disposing, or secreting from Plaintiffs any sunflowers in the possession of Defendants or their agents, including the sunflowers stored at the Hendrum elevator;
65. Directing Defendants to return to Plaintiffs any sunflowers in Defendants' possession, and damages for the taking and withholding of Plaintiffs' property;
66. Alternatively, directing Defendants to pay the contract prices in full, and freight costs where applicable, including interest to date on amounts owed and any damages from the wrongful detention of Plaintiffs' property; and
67. Directing that Plaintiffs have such other general relief as may be just, together with costs and disbursements.

Signed this 6th day of April, 2011.

SARAH VOGEL LAW PARTNERS
Attorneys for Plaintiffs
222 North 4th Street
Bismarek, ND 58501-4004
Phone: 701-221-2911
Fax: 701-221-5842


Derrick Braaten (ID 0388372)
Lindsey Nicuwsma (ID 0390964)

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, to the parties against whom the allegations in the Summons and Complaint are asserted.


Derick Braaten (ID 0388372)

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF NORMAN

NINTH JUDICIAL DISTRICT

Court File No.: _____

Don Ackerson, Lana Anderson d/b/a)
 Northland Farms, Mike Aasen, David)
 Deslauriers, Jeff Kling, Scott Lazorenko,)
 Nathan Neameyer, Steven Neameyer, Ron)
 Pelton, Mitch Preskey, James Routledge, Bart)
 Savelkoul, Mike Schollmeyer, Shane Sickler,)
 David Steeves, Paul Trout, Wurgler Farms,)
 and Kelly Wurgler.)

AFFIDAVIT OF DAVID DESLAURIERS

Plaintiffs,

v.

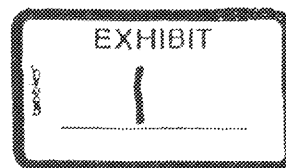
Mitchell Feeds, Inc. and Mitchell Farms, Inc.,)
)

Defendants.)

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

David Deslauriers, being duly sworn, states and attests as follows:

1. I am a farmer and farm land near Sherwood, North Dakota.
2. On April 5, 2008, I entered into a contract with Robert Mitchell of Mitchell Feeds Inc. for the sale of 750 acres of NuSun Sunflowers for a price of \$.30 per pound. See Exhibit A attached hereto.
3. Robert Mitchell also operates Mitchell Farms, Inc, which is indicated as the party responsible for freight costs on some of my sales tickets. See Exhibit B attached hereto.
4. Approximately 745,320 pounds total, were picked up by or delivered to Mitchell Feeds; I was not paid for the full contract price of those sunflowers.
5. Only 109,640 pounds of sunflowers were paid in full. The remaining 635,680 pounds



were only partially paid for, or not at all.

6. The amount owed to me by Mitchell Feeds for the sunflowers that were picked up or delivered under the contract but not paid for is approximately \$157,347.
7. I sold 147,000 pounds that were not picked up by or delivered to Defendants for a price of \$.13 per pound to a third party. I am still owed \$27,048 on those sunflowers for the difference from the contract price of \$.17 per pound and a freight amount of \$2,058.
8. The total unpaid balance owed to me by Mitchell Feeds is approximately \$184,395.
9. I did not agree to accept partial payment as satisfaction for the contract price of \$.30 per pound.
10. As a result of his failure to pay, I have been unable to pay off my operating loan and have had to pay additional interest on the loan.
11. Although I fulfilled my obligations under the contract, Robert Mitchell has indicated on multiple occasions that he is unable to pay the remaining amount due under the contract. Recently, he refuses to answer or return telephone calls and does not respond to demands for payment.
12. My hired hand has hauled my sunflowers to an elevator in Hendrum, Minnesota previously, and I believe that some of the sunflowers that I have not been paid for are stored at the Hendrum elevator.
13. It is my belief that if the sunflowers from the Hendrum elevator are moved and sold, I and others who have not been paid on their contracts with Defendants will be unable to recover the outstanding payments due to us.
14. I verify that Paragraphs 27, 29, 49, 53, 54, 56 of the Complaint are true and correct to the best of my knowledge and belief.

Attachment A

Mitchell Feeds Inc.

April 5, 2008

154 Hwy 75 S
PO Box 118
Hendrum MN ~~56043~~
56550

118-861-6262 (Elevator)
701-261-4115 (Cell)

PURCHASE CONTRACT NUMBER: MFI037

Purchased From:

<p><i>60%</i> David Deslauriers <i>Wife</i> 4915 Co Rd 2 <i>Marsha</i> Sherwood ND 58782</p>
--

Commodity and Grade: Neuson Sunflowers Moisture 10% / Test Weight 27 lbs bu

Quantity: 750 Acres Full Production / Price Protection

Price: \$0.30 /lb

Premium/Deduction Basis: Moisture 2% dockage per 1% Moisture

Payment Terms: Payments Due 10 days after Delivery & Grading

Delivery Basis: Per Agreement with Farmer

Shipment Period: Fall 08 thru Spring 09

Weights to Govern: Destination

Inspection to Govern: NDGI Grades

Remarks:

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS

In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules.
Receipt of this contract by the buyer, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

Price: _____
Class: _____

By _____
Customer Signature Date

Mitchell Feeds Inc.
By *[Signature]*
Date



Attachment A

PURCHASE TERMS

1. **RULES:** The Rules of the Association listed on the face of this Contract shall govern. All disputes arising out of this transaction, including any issues relating to contract formation, shall be resolved by arbitration in accordance with the rules of such Association. The decision and award determined by such arbitration shall be final and binding upon both parties. Seller warrants to Buyer that Seller is a MERCHANT (as that term is used in the Uniform Commercial Code) with respect to the goods sold under this Contract.

2. **QUALITY:** Seller warrants to Buyer that all commodities sold and delivered hereunder will be of good, sound, dry and MERCHANTABLE quality in accordance with the specified grade and will comply with all applicable federal, state, and local laws and regulations and will not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, nor be a commodity which may not, under the provisions of Section 404 or 405 of the Act, be introduced into interstate commerce. SELLER ALSO WARRANTS THAT NO WATER HAS BEEN ADDED TO THE COMMODITIES TO BE DELIVERED HEREUNDER, AT ANY TIME OR FOR ANY PURPOSE, EXCEPT AS A CARRIER FOR INSECTICIDES APPLIED BY MANUFACTURERS RECOMMENDED LEVELS. THIS GUARANTEE MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES.

3. **WEIGHTS/GRADES TO GOVERN:** Unofficial unfounded weights and grades at place of delivery to govern, unless official weights and grades are specified on the face hereof.

4. **TITLE/RISK OF LOSS:** Title and risk of loss shall pass to Buyer only as said commodities or any part thereof is delivered to and accepted by Buyer, and then only as to so much of said commodities as is so delivered and accepted. Seller warrants that Seller has good and marketable title to the commodities and that the commodities will be delivered free and clear of all liens or other encumbrances.

5. **EXTENSIONS:** If Buyer's elevator or other storage facilities at delivery point are for any reason unable to receive said commodities on the delivery date or if Seller is unable to make delivery of said commodities for any reason on the delivery date, said date may be extended, either orally or in writing, at Buyer's option.

6. **CONTRACT ADVANCES:** If the cash value of this Contract falls below the level of any cash advances received by the Seller, at any time during the pricing period, the Buyer at its discretion may request a portion of the advance to be returned.

7. **DEFAULT:** Seller agrees to pay to Buyer as minimum damages for default in delivery hereunder the difference between the specified Contract price and the highest market price, at the time of default, for the same kind and grade of the commodity on the day of default. In addition, Seller shall be strictly liable to Buyer for all direct, consequential, incidental and specific damages and all costs and fees incurred by Buyer as a result of Seller's breach of any of Seller's representations or warranties herein or the default by Seller in the performance of any of Seller's obligations hereunder. Acceptance of any delivery of commodities by Buyer after breach of the provisions of this Contract by Seller shall not waive any rights or remedies accruing to Buyer as a result of such prior breach or any subsequent breach.

8. **ALTERATION OF TERMS:** None of the terms and conditions contained in this Contract may be added to, modified, superseded or otherwise altered except with the written consent of an authorized representative of Buyer.

9. **SUCCESSORS:** This contract shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

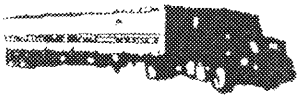
10. **QUANTITY:** Seller warrants that the quantity sold is the bushel quantity specified on the front of the Contract and not the production of any specific acreage.

11. **BUYER IS AN EQUAL OPPORTUNITY EMPLOYER,** and is a government contractor. Therefore this contract is subject to the rules and regulations imposed upon contractors and subcontractors pursuant to 41 C.F.R. Chapter 60 and 61. Unless this contract is exempt by regulations issued by the Secretary of Labor, there is incorporated herein by reference the following: (a) the Equal Employment Opportunity clause contained in 41 C.F.R. Section 60-1.4; (b) the Affirmative Action clauses contained in 41 C.F.R. Sections 60-230.5 and 61-250.10 both relating to the employment of Disabled Veterans and Veterans of the Vietnam Era; and (c) the Affirmative Action clause contained in 41 C.F.R. Section 60-741.5 relating to Equal Opportunity for Workers with Disabilities.

12. **CONTRACT LIQUIDATION:** Buyer expressly reserves the right to cause the liquidation of the Contract because of (a) the insolvency or financial condition of the Seller, (b) the commencement of a case under 11 U.S.C. §§101-13126, (c) the appointment of or taking of possession by a trustee in a case under 11 U.S.C. §§101-13126 or by a custodian before such commencement, (d) any and all other defaults of the terms and conditions specified herein either directly or by reference thereof.

13. **SET-OFF:** It is expressly agreed that this contract is subject to the Buyer's right to set off any mutual claims or debts against Seller, including any claims or credits affiliated with Seller, under or in connection with this Contract or any and all other commodity contracts and forward contracts between the parties as provided in 11 U.S.C. §362.

SHIPPER'S NO.
TRUCK LICENSE NO. FET 600
TRAILER LICENSE NO.
DATE 7-28-09



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58106-9112
 (701) 588-9278 Home * (701) 281-4125 Cell

LAUNCH NO. 6187
PROCKEY BILL
DATE 7-28-09
SCALE TICKET NO.
DETERMINATION WEIGHT 52900
FREIGHT CHARGES

BUYER TO: David Des Lauriers		APPLY OR CONTRACT NO.	SCALE TICKET NO.
		<input type="checkbox"/> BILL ON ARRIVAL	GROSS POUNDS 81,860 TARE POUNDS 28,780 NET POUNDS 52,900 DROSS & BUSHELS NET BUSHELS
		<input type="checkbox"/> STORAGE	
GRAIN Swedish Nodum	GRADE & FACTORS	DELIVER ON OR BEFORE	UNLAWFUL TO WEIGH UNLAWFUL TO WEIGH UNLAWFUL TO WEIGH
DESTINATION ELEVATOR		FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS	
LOCATION (CITY & STATE)		FREIGHT RATE	
COMMENTS: Plus Freight		BU. CWT.	

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER Same

ORIGIN ELEVATOR _____

ADDRESS _____

BY _____

CARRIER David Des Lauriers

ADDRESS Shepherd ND

BY _____

CHAUFFEUR LICENSE NO. _____

EXHIBIT
1-B

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF NORMAN

NINTH JUDICIAL DISTRICT

Court File No.: _____

 Don Ackerson, Luna Anderson d/b/a)
 Northland Farms, Mike Aasen, David)
 Deslauriers, Jeff Kling, Scott Lazorenko,)
 Nathan Neameyer, Steven Neameyer, Ron)
 Pelton, Mitch Preskey, James Routledge, Bart)
 Savelkoul, Mike Schollmeyer, Shane Sickler,)
 David Steeves, Paul Trout, Wurgler Farms,)
 and Kelly Wurgler,)

AFFIDAVIT OF DAVID STEEVES

Plaintiffs,

v.

Mitchell Feeds, Inc. and Mitchell Farms, Inc.,

Defendants.

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

David Steeves, being duly sworn, states and attests as follows:

1. I am a farmer and farm land near Sherwood, North Dakota.
2. On March 24, 2008, I entered into a contract with Robert Mitchell of Mitchell Feeds Inc. for the sale of 300 acres of NuSun Sunflowers for a price of \$.30 per pound. See Exhibit A attached hereto.
3. Robert Mitchell also operates Mitchell Farms, Inc, which is indicated as the party responsible for freight costs on my sales tickets. See Exhibit B attached hereto.



4. Although all of the contracted sunflowers were picked up by or delivered to Mitchell Feeds, I was not paid for the full contract price.
5. A total of 324,940 pounds were partially paid at a price of \$.14 and 104,620 pounds remain completely unpaid.
6. The total amount owed to me by Mitchell Feeds for the 2008 sunflower contract is approximately \$83,376, plus the cost of freight.
7. I did not agree to accept partial payment of \$.14 per pound as satisfaction for the contract price of \$.30 per pound.
8. As a result of his failure to pay, I have been unable to pay off my operating loan and have had to pay additional interest on the loan.
9. Although I fulfilled my obligations under the contract, Robert Mitchell has indicated on multiple occasions that he is unable to pay the remaining amount due under the contract. Recently, he refuses to answer or return telephone calls and does not respond to demands for payment.
10. A former employee of the elevator informed me that approximately 75,000 bushels, or 2.1 million pounds, of sunflowers are located at an elevator in Hendrum, Minnesota.
11. I have hauled my sunflowers to this elevator previously, and I believe that some of the sunflowers that I have not been paid for are stored at the Hendrum elevator.
12. It is my belief based on my conversation with the former employee that Defendants are planning to move the sunflowers that are located at the Hendrum elevator and sell them.
13. An employee of the elevator in Ada, Minnesota informed me that Robert Mitchell moved all of the sunflowers stored at their elevator in August 2010.

14. During a telephone conversation on or about March 26, 2011, Robert Mitchell said that he needed to get grain moved to pay his bills. He has also indicated that he has financial difficulties and that he is selling what he can.

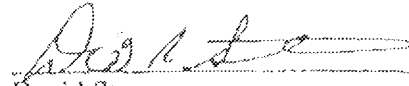
15. I have also been informed by a former employee that a truck owned by Defendants was sent to Hendrum on April 4, 2011 and that it likely moved a load of sunflowers from the Hendrum elevator to be sold.

16. The former employee also stated that there was an auger in one of the bins that was likely being used to fill trucks to move the sunflowers from the elevator to be sold.

17. I have spoken to at least twenty-four people who have done business with Robert Mitchell and Mitchell Feeds who have not been paid in full for their sunflower contracts.

18. It is my belief that if the sunflowers from the Hendrum elevator are moved and sold, I and others who have not been paid on their contracts with Defendants will be unable to recover the outstanding payments due to us.

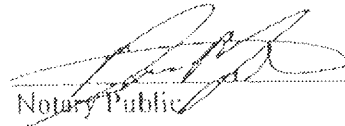
Dated this 5th day of April, 2011.


David Steeves

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

On this 5th day of April, 2011, before me personally appeared David Steeves, known to me to be the same person who is described in and who executed the within document, and acknowledged to me that he executed the same.

DERRICK BRAATEN
Notary Public
State of North Dakota
My Commission Expires July 23, 2014


Notary Public

Mitchell Feeds Inc.

March 24, 2008

144 Hwy 75 S
PO Box 128
Hebron ND 58047

318-861-6262 (Elevator)
701-261-4315 (Cell)

PURCHASE CONTRACT NUMBER: MFI 014

Purchased From:

David Steeves
4690 County Rd 2
Sherwood ND 58782

Commodity and Grade: Nusun Sunflowers Moisture 10% / Test Weight 27 lbs bu

OAS **30***

Quantity: 200 Acres Full Production

Price: 50.30 /lbs Price Protection

Condition/Discussion: Moisture 2% dockage per 1% Moisture

Payment Terms: Payments Due 10 days after Delivery & Grading

Delivery Basis: Per Agreement with Farmer *Picked up 30 Hwy add .015**

Shipment Period: Fall 08 thru Spring 09

Weights to Govern: Destination

Inspection to Govern: NDGI Grades

Remarks:

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS

In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules. Receipt of this contract by the Seller, without written notice in us of objection or time within 10 days, is a release for purposes of the acceptance of all conditions hereof.

Print Name: David C. Steeves

Mitchell Feeds Inc.

By: *[Signature]* 4-2-08
Signature Required Date

By: *[Signature]*
Signature Required

EXHIBIT
2-A

PURCHASE TERMS

1. **RULES:** The Rules of the Association listed on the face of this Contract shall govern. All disputes arising out of this transaction, including any issues relating to contract formation, shall be resolved by arbitration in accordance with the rules of such Association. The decision and award determined by such arbitration shall be final and binding upon both parties. Seller represents and warrants to Buyer that Seller is a MERCHANT (as that term is used in the Uniform Commercial Code) with respect to the goods sold under this Contract.

2. **QUALITY:** Seller warrants to Buyer that all commodities sold and delivered hereunder will be of good, sound, dry and MERCHANTABLE quality in accordance with the specified grade and will comply with all applicable federal, state, and local laws and regulations and will not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, nor be a commodity which may not, under the provisions of Section 404 or 405 of the Act, be introduced into interstate commerce. SELLER ALSO WARRANTS THAT NO WATER HAS BEEN ADDED TO THE COMMODITIES TO BE DELIVERED HEREUNDER, AT ANY TIME OR FOR ANY PURPOSE, EXCEPT AS A CARRIER FOR INSECTICIDES APPLIED AT MANUFACTURERS RECOMMENDED LEVELS. THIS GUARANTEE MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES.

3. **WEIGHTS/GRADES TO GOVERN:** Unofficial unbranded weights and grades at place of delivery to govern, unless official weights and grades are specified on the face hereof.

4. **TITLE/RISK OF LOSS:** Title and risk of loss shall pass to Buyer only as said commodities or any part thereof is delivered to and accepted by Buyer, and then only as to so much of said commodities as is so delivered and accepted. Seller warrants that Seller has good and marketable title to the commodities and that the commodities will be delivered free and clear of all liens or other encumbrances.

5. **EXTENSIONS:** If Buyer's warehouse or other storage facilities at delivery point are for any reason unable to receive said commodities on the delivery date or if Seller is unable to make delivery of said commodities for any reason on the delivery date, said date may be extended, either orally or in writing, at Buyer's option.

6. **CONTRACT ADVANCES:** If the cash value of this Contract falls below the level of any cash advances received by the Seller, at any time during the pricing period, the Buyer at its' discretion may request a portion of the advances to be returned.

7. **DEFAULT:** Seller agrees to pay to Buyer as minimum damages for default in delivery hereunder the difference between the specified Contract price and the highest market price at the place of delivery for the same kind and grade of the commodity on the day of default. In addition, Seller shall be solely liable to Buyer for all direct, consequential, incidental and specific damages and all costs and fees incurred by Buyer as a result of Seller's breach of any of Seller's representations or warranties herein or the default by Seller in the performance of any of Seller's obligations hereunder. Acceptance of any delivery of commodities by Buyer after breach of the provisions of this Contract by Seller shall not waive any rights or remedies according to Buyer as a result of such price breach or any subsequent breach.

8. **ALTERATION OF TERMS:** None of the terms and conditions contained in this Contract may be added to, modified, superseded or otherwise altered except with the written consent of an authorized representative of Buyer.

9. **SUCCESSORS:** This contract shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

10. **QUANTITY:** Seller warrants that the quantity sold is the basic quantity specified on the front of the Contract and not the production of any specific average.

11. **BUYER IS AN EQUAL OPPORTUNITY EMPLOYEE,** and is a governmental contractor. Therefore this contract is subject to the rules and regulations imposed upon contractors and subcontractors pursuant to 41 C.F.R. Chapter 60 and 61. Unless this contract is exempt by regulations issued by the Secretary of Labor, there is incorporated herein by reference the following: (a) the Equal Employment Opportunity clause contained in 41 C.F.R. Section 60-1.4, (b) the Affirmative Action clauses contained in 41 C.F.R. Sections 60-250.3 and 61-250.10 both relating to the employment of Disabled Veterans and Veterans of the Vietnam Era; and (c) the Affirmative Action clause contained in 41 C.F.R. Section 60-741.3 relating to Equal Opportunity for Workers with Disabilities.

12. **CONTRACT LIQUIDATION:** Buyer expressly reserves the right to cause the liquidation of the Contract because of (a) the insolvency or financial condition of the Seller, (b) the commencement of a case under 11 U.S.C. §§101-1312b, (c) the appointment of or taking of possession by a trustee in a case under 11 U.S.C. §§101-1312b or by a custodian before such commencement, (d) any and all other defaults of the terms and conditions specified herein (either directly or by reference thereof).

13. **SET-OFF:** It is expressly agreed that this contract is subject to the Buyer's right to set off any mutual claims or debts against Seller, including any claims or credits affiliated with Seller, under or in connection with this Contract or any and all other commodity contracts and forward contracts between the parties as provided in 11 U.S.C. §362.

SHIPPER'S NO.
TRUCK LICENSE NO. FEW-140 ND
TRAILER LICENSE NO.
DATE 8-13-09



MITCHELL FEEDS, INC.

P.O. Box 8112
 Fargo, North Dakota 58108-9112
 (701) 688-9278 Home * (701) 261-4125 Cell

LADING NO. No 8241
FREIGHT BILL
DATE 8-13-09
SCALE TICKET NO.
DESTINATION WGT 52,280
FREIGHT CHARGES

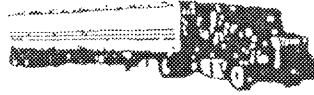
SOLD TO: <u>David Steves</u> <u>Shawwood ND</u>		APPLY ON CONTRACT NO. <input type="checkbox"/> DELI ON ARRIVAL <input type="checkbox"/> STORAGE	SCALE TICKET NO. GROSS POUNDS <u>85,940</u> TARE POUNDS <u>33,660</u> NET POUNDS <u>52,280</u> GROSS BUSHELS NET BUSHELS
GRAIN: <u>SunFlow N3500</u> GRADE & FACTORS: <u>N3500</u> DESTINATION ELEVATOR:	DELIVER ON OR BEFORE:	FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS FREIGHT RATE:	SHIPPER'S WEIGHT
LOCATION (CITY & STATE):	FREIGHT RATE:		
COMMENTS: <u>6 Ax</u> <u>Plus Freight</u>		BU. CWT.	

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER: <u>David Steves</u>	CARRIER: <u>Same</u>
ORIGIN ELEVATOR: _____	ADDRESS: _____
ADDRESS: _____	BY: _____
BY: <u>[Signature]</u>	CHAUFFER LICENSE NO.: _____

EXHIBIT
2-B

SHIPPER'S NO.
TRUCK LICENSE NO. FEW 140
TRAILER LICENSE NO.
DATE 8-11-09



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58108-9112
 (701) 588-9279 Home * (701) 261-4125 Cell

LOADING NO. No 8231
FREIGHT BILL
DATE 8-11-09
SCALE TICKET NO.
DESTINATION WGT. 52,340
FREIGHT CHARGES

SOLD TO David Steeves		APPLY ON CONTRACT NO.	SCALE TICKET NO.
<input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE		SHIPPERS WEIGHT	GROSS POUNDS 86,280
GRAIN SUNFLOWER MEAN	GRADE & FACTORS		TARE POUNDS 33,940
DESTINATION ELEVATOR	DELIVER ON OR BEFORE		NET POUNDS 52,340
LOCATION (CITY & STATE)	FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS		GROSS BUSHELS
COMMENTS: to Archer plus Freight		FREIGHT RATE	NET BUSHELS
		NO.	
		CWT.	

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER David Steeves	CARRIER Same
ORIGIN ELEVATOR	ADDRESS
ADDRESS	BY
BY <i>[Signature]</i>	CHAFFER LICENSE NO.

Administrative Code § 69-07-02-02.1, Mitchell Feeds, Inc. has a \$70,000 bond on file with the Public Service Commission.

That Mitchell Feeds, Inc. provided information to the Public Service Commission showing a significant amount of grain was received from producers in 2009 and 2010 for which payment has not been made.

That the Licensing Division is preparing and will be asking the Commission to file documents with District Court, asking that Mitchell Feeds, Inc. be declared insolvent, the Commission be appointed trustee, and the surety be joined as a party to the insolvency proceeding.

That it appears the bond on file with the Public Service Commission will not be sufficient to cover the total amount owed to producers for the sunflower seeds sold to Mitchell Feeds, Inc.

North Dakota Century Code § 60-02.1-39 provides the Commission with authority to issue a cease and desist order without prior notice against an entity that engages in an activity or practice that is contrary to the provisions of Chapter 60-02.1 or related rules.

Mitchell Feeds, Inc. has violated North Dakota Century Code § 60-02.1-08 (4)(a) by failing to faithfully perform the licensee's duties as a roving grain buyer and North Dakota Century Code § 60-02.1-28 by refusing, neglecting, or being unable upon proper demand to make payment for grain purchased or make redelivery.

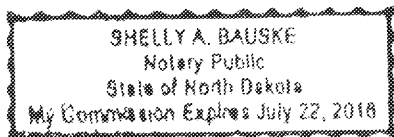
Affiant believes that good cause exists requiring ex parte action by the Commission because additional sellers of grain may suffer immediate economic loss, damage or injury if Mitchell Feeds, Inc. continues purchasing grain as a licensed roving grain buyer in North Dakota.

Affiant requests that the Commission issue an Ex parte Cease and Desist Order against Mitchell Feeds, Inc. as authorized by North Dakota Century Code § 60-02.1-39, ordering that Mitchell Feeds, Inc. cease and desist from purchasing grain in North Dakota.

Susan H. Richter

Subscribed and sworn to before me this 6th day of April, 2011.

Shelly A. Bauske
Notary Public



STATE OF MINNESOTA
COUNTY OF NORMAN

DISTRICT COURT
NINTH JUDICIAL DISTRICT

Don Ackerson, Lana Anderson d/b/a
Northland Farms, Mike Aasen, David
Deslauriers, Jeff Kling, Scott Lazorenko,
Nathan Neameyer, Steven Neameyer, Ron
Pelton, Mitch Preskey, James Routledge, Bart
Savelkoul, Mike Schollmeyer, Shane Sickler,
David Steeves, Paul Trout, Wurgler Farms,
and Kelly Wurgler,

Plaintiffs,

vs.

Mitchell Feeds, Inc. and Mitchell Farms, Inc.,

Defendants.

vs.

American Federal Bank,

Intervenor,

Civil No. CV 11-112

**COMPLAINT IN
INTERVENTION**

Intervenor, American Federal Bank ("American Federal") for its causes of action against Defendants Mitchell Feeds, Inc. and all other interested parties, including Plaintiffs named in the [Proposed First Amended] Complaint, presuming it is accepted by the Court, Michael Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B& D Farms, Inc., Busch Farms, Inc., David DesLauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul

Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, and Kelly Wurgler, states and alleges as follows:

THE PARTIES

1. Intervenor American Federal Bank is a federally chartered bank with its principal place of business at 215 North Fifth Street, Fargo, ND 58102.

2. Plaintiff Micheal Aasen is a farmer and resident of North Dakota, and his address is 4465 Co. Rd. 2, Sherwood, ND 58782.

3. Plaintiff Don Ackerson and Sheldon Ackerson are a farmers and residents of North Dakota, and their address is 5175 106th St. NW, Sherwood, ND 58782.

4. Plaintiff Lana Anderson, d/b/a Northland Farms, is a farmer and resident of North Dakota, and her address is 10845 53rd Ave. NW, Sherwood ND 58782.

5. Plaintiff B&D Farms, Inc. is a North Dakota farm corporation and its address is 3551 County Road 2, Sherwood, ND 58782. Jan Kostad is the registered agent. Brent Keith is the owner of B&D Farms.

6. Plaintiff Busch Farms, Inc. is a North Dakota farming corporation and its address is 309 2nd St. NW, Crosby, ND 58730. Gregory F. Busch is the registered agent.

7. Plaintiff David Deslauriers is a farmer and resident of North Dakota, and his address is 4915 Co. Rd. 2, Sherwood, ND 58782.

8. Plaintiff Scott Lazorenko is a farmer and resident of North Dakota, and his address is 899 Brew St., Killdeer, ND 58640.

9. Plaintiff Manna Farms, Inc. is a North Dakota farm corporation, and its address is 3755 County Road 2, Sherwood, ND 58782. Arlyn Keith is the registered agent

10. Plaintiff Nathan Neameyer is a farmer and resident of North Dakota, and his address is 614 9th Ave. NE, Rolla, ND 58367.

11. Plaintiff Steven Neameyer is a farmer and resident of North Dakota, and his address is HC1 Box 44, Mylo, ND 58353.

12. Plaintiff Mitch Preskey is a farmer and resident of North Dakota, and his address is 2485 Glenburn Rd, Glenburn, ND 58740.

13. Plaintiff Paul Rohde is a farmer and a resident of North Dakota, and his address is P.O. Box 251, Halliday, ND 58636.

14. Plaintiff James Routledge is a farmer and resident of North Dakota, and his address is 603 Bavaria Dr., Minot, ND 58703.

15. Plaintiff Bart Savelkoul is a farmer and resident of North Dakota, and his address is 8221 30th Ave. NW, Lansford, ND 58750.

16. Plaintiff Mike Schollmeyer is a farmer and resident of North Dakota, and his address is 549 101st Ave. SW, Dunn Center, ND 58626.

17. Plaintiff David Steeves is a farmer and resident of North Dakota, and his address is 4690 Cty Rd 2, Sherwood, ND 58782.

18. Plaintiff Robert Steeves is a farmer and resident of North Dakota, and his address is 227 3rd Ave. E, Sherwood, ND 58782.

19. Plaintiff Paul Trout is a farmer and resident of North Dakota, and his address is 10285 Hwy 28, Sherwood, ND 58782.

20. Plaintiff Wurgler Farms is a farming partnership and its address is 1600 Parkside Drive, Minot, ND 58701.

21. Plaintiff Kelly Wurgler is a farmer and resident of North Dakota, and his address is 1600 Parkside Dr., Minot, ND 58701.

22. Defendant Mitchell Feeds, Inc. is a Minnesota corporation created on January 10, 2006 with an address of 154 Hwy 75 S, Hendrum, MN 56550. Robert Mitchell is the registered agent.

23. Defendant Mitchell Feeds, Inc. was also registered as a foreign corporation in North Dakota on September 21, 2009. Defendant Mitchell Feeds, Inc. is a buyer of sunflowers and grain products with its principal office located at 154 Hwy 75 S, Hendrum, MN 56550. Jackie Mitchell is the registered agent for North Dakota with an address of 4905 County Hwy 81 S, Horace, ND 58047.

FACTUAL ALLEGATIONS

24. On or about February 24, 2010, Intervenor American Federal Bank ("American Federal") entered into a Security Agreement (the "Security Agreement") with Defendant Mitchell Feeds, Inc. ("Mitchell Feeds") and BJM Land, Inc. A true and correct copy of the Security Agreement is attached hereto as "Exhibit A."

25. The Security Agreement was given to secure payment of a Promissory Note given by Defendant Mitchell Feeds, Inc. and BJM Land, Inc. in favor of Intervenor American Federal. A true and correct copy of the Promissory Note is attached hereto as "Exhibit B." The Security Agreement granted Intervenor American Federal a security interest in collateral:

The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

All Fixtures, All Inventory, Chattel Paper, Accounts, Equipment including but not limited to attached "Exhibit A" [attached to the Security Agreement], and General Intangibles.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.

(B) All products and produce of any of the property described in this Collateral section.

(C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.

(E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

Some or all of the Collateral may be located on the real estate described in the attachment to the Security Agreement.

26. Intervenor American Federal filed its UCC-1 Financing Statement on Defendant Mitchell Feeds, Inc. with the Minnesota Secretary of State's office on March 1, 2010. A true and correct copy of the UCC-1 Financing Statement is attached hereto as "Exhibit C."

27. The Security Agreement delineates what is to be considered a default of the agreement and warranties Intervenor American Federal shall have in the event of a of a default. Those default terms are remedies include, but are not limited to, the following:

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the Indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

...

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Minnesota Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Accelerate Indebtedness. Lender may declare the entire Indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral,

shall become a part of the Indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the Indebtedness or apply it to payment of the Indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not Indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor; change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the

Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

28. Defendant Mitchell Feeds, Inc. and BJM Land, Inc. are currently in default of the Promissory Note for failure to make payment when due and because of other creditor proceedings.

29. The amount due on the Note is the principal sum of \$859,223.45, plus late charges of \$1,618.05, accrued interest through July 14, 2011 in the amount of \$9,153.12 (based on the 6.50% interest rate set forth in the promissory note), per day interest after the aforesaid date in the amount of \$155.14 until the promissory note is fully paid.

30. Plaintiffs are farmers or farming businesses who produce sunflowers.

31. Defendant Mitchell Feeds, Inc. purchased Plaintiffs 2008 and/or 2009 sunflower crops through contracts entered into with Plaintiffs either individually or as a business.

32. Plaintiffs received no payment or partial payment on their contracts to sell their sunflower crops to Defendant Mitchell Feeds, Inc.

33. Plaintiffs claim that they have a right to possession of Defendant Mitchell Feeds, Inc.'s sunflower inventory and/or the proceeds thereof.

COUNT ONE – SECURITY AGREEMENT

34. Paragraphs 1 through 33 above are restated herein.

35. On or about February 24, 2010, Defendant Mitchell Feeds, Inc. and BJM Land, Inc. executed and delivered to Intervenor American Federal a Security Agreement.

36. The Security Agreement is perfected with a filed UCC-1 financing statement filed with the Minnesota Secretary of State's Office of March 1, 2010.

37. The Security Agreement describes as collateral the following described property:

The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

All Fixtures, All Inventory, Chattel Paper, Accounts, Equipment including but not limited to attached "Exhibit A" [attached to the Security Agreement], and General Intangibles.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(F) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.

(G) All products and produce of any of the property described in this Collateral section.

(H) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(I) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.

(J) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

Some or all of the Collateral may be located on the real estate described in the attachment to Exhibit A.

38. The Security Agreement is in default by reason of Defendant Mitchell Feeds, Inc.'s failure to pay the Promissory Note secured by the Security Agreement and pursuant to Minnesota Statutes Annotated § 336.9-201 (UCC 9-201) providing that a security agreement is effective according to its terms between the parties.

39. Because of the default, Intervenor American Federal has the right to exercise its remedies under the Security Agreement and/or under the Uniform Commercial Code and other applicable laws of the State of Minnesota, and these remedies include but are not limited to the right of Intervenor American Federal to take possession of the secured collateral and sell or otherwise dispose of same with application of the proceeds of sale or disposition to be applied against the expenses of taking the collateral and readying it for sale, and then against the debt owed by Defendant to Plaintiff, pursuant to Minnesota Statutes Annotated §§ 336.9-601 through 336.9-628 (UCC 9-601 through 9-628), providing for procedure on default, collection rights of secured party, secured party's right to take possession after default, and secured party's right to sell or dispose of collateral and method of application of proceeds.

COUNT TWO - EMERGENCY REPOSSESSION RELIEF

40. Paragraphs 1 through 39 above are restated herein.

41. Plaintiff reserves its right in this action to seek an interim or emergency order for seizure of collateral prior to trial on the merits, if the circumstances so warrant, pursuant to Minnesota Statutes Annotated § 336.9-609 (UCC 9-609) permitting self-help or extra judicial seizure of collateral, Minnesota Statutes Annotated Ch. 565 (Claim and Delivery), or such other procedures as are available under Minnesota law for interim or emergency seizure of collateral pending final judgment on the merits.

COUNT THREE – DETERMINATION OF PRIORITY
AND DECLARATORY JUDGMENT

42. Paragraphs 1 through 41 above are restated herein.

43. Plaintiffs claim that Defendants Mitchell Feeds, Inc. and Mitchell Farms, Inc. wrongfully detained and withheld Plaintiffs' sunflowers and that Plaintiffs are entitled to the return of their property.

44. Intervenor American Federal claims a first priority security interest in the sunflower inventory of Defendant Mitchell Feeds, Inc. and the proceeds thereof.

45. There are competing claims in Defendant Mitchell Feeds' sunflower inventory and the proceeds thereof, and it must be determined who has priority to Defendant Mitchell Feeds' sunflower inventory and the proceeds thereof.

PRAYER FOR RELIEF

WHEREFORE, Intervenor American Federal Bank respectfully requests that the Court order the entry of judgment in favor of Intervenor American Federal Bank and against Plaintiffs and Defendant Mitchell Feeds, Inc. as follows:

1. On Count One, for a judgment against Defendant Mitchell Feeds, Inc. permitting Intervenor American Federal to take possession of all secured collateral, including the sunflower inventory and the proceeds thereof, with or without the aid of the Sheriff or other appropriate law enforcement authorities, and to dispose of same under the Uniform Commercial Code as enacted in North Dakota, with application of the net proceeds, after deduction for expenses of taking possession and sale or other disposition expenses, as a credit on the obligations owed to Intervenor American Federal by Defendant Mitchell Feeds, Inc.

2. On Count Two, for such emergency repossession relief as is warranted under the circumstances of this case, prior to trial on the merits.

3. On Count Three, a determination by the Court that Intervenor American Federal Bank has a first priority interest in Defendant Mitchell Feeds, Inc.'s sunflower inventory and the proceeds thereof superior to the claims of Plaintiffs.

4. Any and all other relief that the Court deems just and appropriate.

American Federal preserves its right to seek judgment against Defendant Mitchell Feeds, Inc. in this case or in a separate action pursuant to the terms of the other agreements between the parties, including the Promissory Note, Mortgages, and Guaranties.

Dated this 14 day of December, 2011.

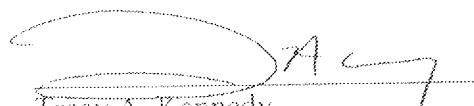

TRACY A. KENNEDY (MN ID# 030105X)

For: Zimney Foster, P.C.
3100 South Columbia Road, Ste. 200
P.O. Box 13417
Grand Forks, ND 58201
Phone: 701.772.8111 Fax: 701.772.7328
Attorneys for Intervenor American Federal

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that appropriate sanctions may be imposed against the parties and/or their attorneys' pursuant to Minnesota Statute §549.211 if the Court determines that the claims, defenses or other legal contentions contained herein are presented for an improper purpose, unwarranted by existing law, frivolously presented, without evidentiary support, not reasonably based upon knowledge, information and belief or made without reasonable inquiry under the circumstances.

Dated this 14 day of December, 2011.


Tracy A. Kennedy

COMMERCIAL SECURITY AGREEMENT JT

EXHIBIT A

Principal	Loan Date	Maturity	Loan No.	Coll / Coll	Account	Officer	Initials
\$950,000.00	02-24-2010	02-15-2020	8001157910			KRIND	

References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "*" has been omitted due to text length limitations.

Grantor: Mitchell Feeds, Inc. (TIN: 20-4441350)
 BJM Land Inc. (TIN: 204-44-0354)
 PO Box 9112
 Fargo, ND 58106

Lender: American Federal Bank
 Fargo South Bank
 1301 30th Ave South
 Fargo, ND 58103

THIS COMMERCIAL SECURITY AGREEMENT dated February 24, 2010, is made and executed between Mitchell Feeds, Inc. ; and BJM Land Inc. ("Grantor") and American Federal Bank ("Lender").

GRANT OF SECURITY INTEREST. For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.

COLLATERAL DESCRIPTION. The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement

All Fixtures

All Inventory, Chattel Paper, Accounts, Equipment including but not limited to attached "Exhibit A" and General Intangibles

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

- (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.
- (B) All products and produce of any of the property described in this Collateral section.
- (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.
- (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

Some or all of the Collateral may be located on the following described real estate:

SEE ATTACHED LEGAL DESCRIPTION

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Grantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Grantor holds jointly with someone else and all accounts Grantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Grantor authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL. With respect to the Collateral, Grantor represents and promises to Lender that:

Perfection of Security Interest. Grantor agrees to take whatever actions are requested by Lender to perfect and continue Lender's security interest in the Collateral. Upon request of Lender, Grantor will deliver to Lender any and all of the documents evidencing or constituting the Collateral, and Grantor will note Lender's interest upon any and all chattel paper and instruments if not delivered to Lender for possession by Lender. This is a continuing Security Agreement and will continue in effect even though all or any part of the indebtedness is paid in full and even though for a period of time Grantor may not be indebted to Lender.

Notices to Lender. Grantor will promptly notify Lender in writing at Lender's address shown above (or such other addresses as Lender may designate from time to time) prior to any (1) change in Grantor's name; (2) change in Grantor's assumed business name(s); (3) change in the management of any Corporation Grantor; (4) change in the authorized signer(s); (5) change in Grantor's principal office address; (6) change in Grantor's state of organization; (7) conversion of Grantor to a new or different type of business entity; or (8) change in any other aspect of Grantor that directly or indirectly relates to any agreements between Grantor and Lender. No change in Grantor's name or state of organization will take effect until after Lender has received notice.

No Violation. The execution and delivery of this Agreement will not violate any law or agreement governing Grantor or to which Grantor is a party, and its certificate or articles of incorporation and bylaws do not prohibit any term or condition of this Agreement.

Enforceability of Collateral. To the extent the Collateral consists of accounts, chattel paper, or general intangibles, as defined by the Uniform Commercial Code, the Collateral is enforceable in accordance with its terms, is genuine, and fully complies with all applicable laws and regulations concerning form, content and manner of preparation and execution, and all persons appearing to be obligated on the Collateral have authority and capacity to contract and are in fact obligated as they appear to be on the Collateral. At the time any account

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becomes subject to a security interest in favor of Lender, the account shall be a good and valid account representing an undisputed, bona fide indebtedness incurred by the account debtor, for merchandise held subject to delivery instructions or previously shipped or delivered pursuant to a contract of sale, or for services previously performed by Grantor with or for the account debtor. So long as this Agreement remains in effect, Grantor shall not, without Lender's prior written consent, compromise, settle, adjust, or extend payment under or with regard to any such Accounts. There shall be no setoffs or counterclaims against any of the Collateral, and no agreement shall have been made under which any deductions or discounts may be claimed concerning the Collateral except those disclosed to Lender in writing.

Location of the Collateral. Except in the ordinary course of Grantor's business, Grantor agrees to keep the Collateral (or to the extent the Collateral consists of intangible property such as accounts or general intangibles, the records concerning the Collateral) at Grantor's address shown above or at such other locations as are acceptable to Lender. Upon Lender's request, Grantor will deliver to Lender in form satisfactory to Lender a schedule of real properties and Collateral locations relating to Grantor's operations, including without limitation the following: (1) all real property Grantor owns or is purchasing; (2) all real property Grantor is renting or leasing; (3) all storage facilities Grantor owns, rents, leases, or uses; and (4) all other properties where Collateral is or may be located.

Removal of the Collateral. Except in the ordinary course of Grantor's business, including the sales of inventory, Grantor shall not remove the Collateral from its existing location without Lender's prior written consent. To the extent that the Collateral consists of vehicles, or other titled property, Grantor shall not take or permit any action which would require application for certificates of title for the vehicles outside the State of Minnesota, without Lender's prior written consent. Grantor shall, whenever requested, advise Lender of the exact location of the Collateral.

Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. While Grantor is not in default under this Agreement, Grantor may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Grantor's business does not include a transfer in partial or total satisfaction of a debt or any bulk sale. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or charge, other than the security interest provided for in this Agreement, without the prior written consent of Lender. This includes security interests even if junior in right to the security interests granted under this Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender.

Title. Grantor represents and warrants to Lender that Grantor holds good and marketable title to the Collateral, free and clear of all liens and encumbrances except for the lien of this Agreement. No financing statement covering any of the Collateral is on file in any public office other than those which reflect the security interest created by this Agreement or to which Lender has specifically consented. Grantor shall defend Lender's rights in the Collateral against the claims and demands of all other persons.

Repairs and Maintenance. Grantor agrees to keep and maintain, and to cause others to keep and maintain, the Collateral in good order, repair and condition at all times while this Agreement remains in effect. Grantor further agrees to pay when due all claims for work done on, or services rendered or material furnished in connection with the Collateral so that no lien or encumbrance may ever attach to or be filed against the Collateral.

Inspection of Collateral. Lender and Lender's designated representatives and agents shall have the right at all reasonable times to examine and inspect the Collateral wherever located.

Taxes, Assessments and Liens. Grantor will pay when due all taxes, assessments and liens upon the Collateral, its use or operation, upon this Agreement, upon any promissory note or notes evidencing the indebtedness, or upon any of the other Related Documents. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized in Lender's sole opinion. If the Collateral is subjected to a lien which is not discharged within fifteen (15) days, Grantor shall deposit with Lender cash, a sufficient corporate surety bond or other security satisfactory to Lender in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorneys' fees or other charges that could accrue as a result of foreclosure or sale of the Collateral. In any contest Grantor shall defend itself and Lender and shall satisfy any final adverse judgment before enforcement against the Collateral. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings. Grantor further agrees to furnish Lender with evidence that such taxes, assessments, and governmental and other charges have been paid in full and in a timely manner. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized.

Compliance with Governmental Requirements. Grantor shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Collateral, including all laws or regulations relating to the undue erosion of highly erodible land or relating to the conversion of wetlands for the production of an agricultural product or commodity. Grantor may contest in good faith any such law, ordinance or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Lender's interest in the Collateral, in Lender's opinion, is not jeopardized.

Hazardous Substances. Grantor represents and warrants that the Collateral never has been, and never will be so long as this Agreement remains in effect, used in violation of any Environmental Laws or for the generation, manufacture, storage, transportation, treatment, disposal, release or threatened release of any Hazardous Substance. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Collateral for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any Environmental Laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation to indemnify and defend shall survive the payment of the indebtedness and the satisfaction of this Agreement.

Maintenance of Casualty Insurance. Grantor shall procure and maintain all risks insurance, including without limitation fire, theft and liability coverage together with such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender and not including any disclaimer of the insurer's liability for failure to give such a notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest, Grantor will provide Lender with such loss payable or other endorsements as Lender may require. If Grantor at any time fails to obtain or maintain any insurance as required under this Agreement, Lender may (but shall not be obligated to) obtain such insurance as Lender deems appropriate, including if Lender so chooses "single interest insurance," which will cover only Lender's interest in the Collateral.

Application of Insurance Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Collateral, whether or not such casualty or loss is covered by insurance. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. All proceeds of any insurance on the Collateral, including accrued proceeds thereon, shall be held by Lender as part of the Collateral. If Lender consents to repair or replacement of the damaged or destroyed Collateral, Lender shall, upon satisfactory proof of expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration. If Lender does not consent to repair or replacement of the Collateral, Lender shall retain a sufficient amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Grantor. Any proceeds which have not been disbursed within six (6) months after their receipt and which Grantor has not committed to the repair or restoration of the Collateral shall be used to prepay the indebtedness.

Insurance Reserves. Lender may require Grantor to maintain with Lender reserves for payment of insurance premiums, which reserves shall be created by monthly payments from Grantor of a sum estimated by Lender to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before payment is due, the reserve funds are insufficient, Grantor shall upon demand pay any deficiency to Lender. The reserve funds shall be held by Lender as a general deposit and shall constitute a non-interest-bearing account which Lender may satisfy by payment of the insurance premiums required to be paid by Grantor as they become due. Lender does not hold the reserve funds in trust for Grantor, and Lender is not the agent of Grantor for payment of the insurance premiums required to be paid by Grantor. The responsibility for the payment of premiums shall remain Grantor's sole responsibility.

Insurance Reports. Grantor, upon request of Lender, shall furnish to Lender reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Grantor shall upon request by Lender (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of the Collateral.

Financing Statements. Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest. At Lender's request, Grantor additionally agrees to sign all other documents that are necessary to perfect, protect, and continue Lender's security interest in the Property. This includes making sure Lender is shown as the first and only security interest holder on the title covering the Property. Grantor will pay all filing fees, title transfer fees, and other fees and costs involved unless prohibited by law or unless Lender is required by law to pay such fees and costs. Grantor irrevocably appoints Lender to execute documents necessary to transfer title if there is a default. Lender may file a copy of this Agreement as a financing statement. If Grantor changes Grantor's name or address, or the name or address of any person granting a security interest under this Agreement changes, Grantor will promptly notify the Lender of such change.

GRANTOR'S RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. Until default and except as otherwise provided below with respect to accounts, Grantor may have possession of the tangible personal property and beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement or the Related Documents, provided that Grantor's right to possession and beneficial use shall not apply to any Collateral where possession of the Collateral by Lender is required by law to perfect Lender's security interest in such Collateral. Until otherwise notified by Lender, Grantor may collect any of the Collateral consisting of accounts. At any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness. If Lender at any time has possession of any Collateral, whether before or after an Event of Default, Lender shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if Lender takes such action for that purpose as Grantor shall request or as Lender, in Lender's sole discretion, shall deem appropriate under the circumstances, but failure to honor any request by Grantor shall not of itself be deemed to be a failure to exercise reasonable care. Lender shall not be required to take any steps necessary to preserve any rights in the Collateral against prior parties, nor to protect, preserve or maintain any security interest given to secure the indebtedness.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Grantor fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Agreement or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Collateral and paying all costs for insuring, maintaining and preserving the Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Agreement also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the Indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender

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monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure.

Cure Provisions. If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Grantor, after Lender sends written notice to Grantor demanding cure of such default: (1) cures the default within thirty (30) days; or (2) if the cure requires more than thirty (30) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Minnesota Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Accelerate Indebtedness. Lender may declare the entire Indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral, shall become a part of the Indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the Indebtedness or apply it to payment of the Indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not Indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor; change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

SBA. *The Loan Secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations:

- a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law.
- b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan.

Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties

as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. With respect to procedural matters related to the perfection and enforcement of Lender's rights against the Collateral, this Agreement will be governed by federal law applicable to Lender and to the extent not preempted by federal law, the laws of the State of Minnesota. In all other respects, this Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of North Dakota without regard to its conflicts of law provisions. However, if there ever is a question about whether any provision of this Agreement is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction that is evidenced by the Note and this Agreement has been applied for, considered, approved and made, and all necessary loan documents have been accepted by Lender in the State of North Dakota.

Joint and Several Liability. All obligations of Grantor under this Agreement shall be joint and several, and all references to Grantor shall mean each and every Grantor. This means that each Grantor signing below is responsible for all obligations in this Agreement. Where any one or more of the parties is a corporation, partnership, limited liability company or similar entity, it is not necessary for Lender to inquire into the powers of any of the officers, directors, partners, members, or other agents acting or purporting to act on the entity's behalf, and any obligations made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Agreement.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender as Grantor's irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to continue the security interest granted in this Agreement or to demand termination of filings of other secured parties. Lender may at any time, and without further authorization from Grantor, file a carbon, photographic or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the continuation of the perfection of Lender's security interest in the Collateral.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any person or circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other person or circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitations stated in this Agreement on transfer of Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Agreement or liability under the indebtedness.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code:

Agreement. The word "Agreement" means this Commercial Security Agreement, as this Commercial Security Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means Mitchell Feeds, Inc.; and RJM Land Inc. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all of Grantor's right, title and interest in and to all the Collateral as described in the Collateral Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default".

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Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto, or common law, and shall also include pollutants, contaminants, polychlorinated biphenyls, asbestos, urea formaldehyde, petroleum and petroleum products, and agricultural chemicals.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

Grantor. The word "Grantor" means Mitchell Feeds, Inc. ; and BJM Land Inc. .

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Grantor is responsible under this Agreement or under any of the Related Documents. Specifically, without limitation, Indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Agreement.

Lender. The word "Lender" means American Federal Bank, its successors and assigns.

Note. The word "Note" means the Note executed by Mitchell Feeds, Inc. ; and BJM Land Inc. in the principal amount of \$550,000.00 dated February 24, 2010, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

Property. The word "Property" means all of Grantor's right, title and interest in and to all the Property as described in the "Collateral Description" section of this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS. THIS AGREEMENT IS DATED FEBRUARY 24, 2010.

GRANTOR:

MITCHELL FEEDS, INC.

By: 

Robert J. Mitchell, President of Mitchell Feeds, Inc.

By: 

Jacquelyn Mitchell, Secretary of Mitchell Feeds, Inc.

BJM LAND INC.

By: 

Robert J. Mitchell, President of BJM Land Inc.

By: 

Jacquelyn Mitchell, Secretary of BJM Land Inc.

LEGAL DESCRIPTION

Those portions of the BNSF Railway Company's (formerly Great Northern Railway Company) Station Ground property at Hendrum, Minnesota, situated in the Northwest Quarter (NW¼) of Section 30, Township 144 North, Range 48 West of the 5th P.M., Norman County, Minnesota, described as follows, to-wit:

Commencing at the intersection of said Railway Company's Main Track centerline (now Minnesota Northern Railroad, Inc.) with the North line of said Section 30; thence Southerly along said Main Track centerline a distance of 1,176.0 feet; thence Easterly at right angles to said Main Track centerline a distance of 130.0 feet to the Westerly right of way line of U. S. Highway No. 75 and the True Point of Beginning; thence Southerly along said Westerly right of way line 450.0 feet; thence Westerly at right angles 78.5 feet; thence Northerly parallel with said Main Track centerline 450.0 feet; thence Easterly at right angles 78.5 feet to the True Point of Beginning, EXCEPTING THEREFROM, that portion, if any, lying within 8.5 feet of the existing Elevator Track centerline, as now located and constructed.

AND;

Commencing at the intersection of said Railway Company's Main Track centerline (now Minnesota Northern Railroad, Inc.) with the North line of said Section 30; thence Southerly along said Main Track centerline a distance of 701.0 feet; thence Easterly at right angles to said Main Track centerline a distance of 130.0 feet to the Westerly right of way line of U. S. Highway No. 75 and the True Point of Beginning; thence Northerly along said Westerly right of way line 525.0 feet; thence Westerly at right angles 78.5 feet; thence Southerly parallel with said Main Track centerline 525.0 feet; thence Easterly at right angles 78.5 feet to the True Point of Beginning, EXCEPTING THEREFROM, that portion, if any, lying within 8.5 feet of the existing Elevator Track centerline, as now located and constructed;

LESS

That portion of BNSF Railway Company's (formerly Great Northern Railway Company) Station Ground property at Hendrum, Minnesota, situated in the Northwest Quarter (NW¼) of Section 30, Township 144 North, Range 48 West of the 5th P.M., Norman County, Minnesota, described as follows: Commencing at the intersection of said Railway Company's Main Track centerline (now Minnesota Northern Railroad, Inc.) with the North line of said Section 30; thence Southerly along said Main Track centerline a distance of 701.0 feet; thence Easterly at right angles to said Main Track centerline a distance of 130.0 feet to the Westerly right of way line of U. S. Highway No. 75; thence Northerly along said Westerly right of way line 340 feet and the True Point of Beginning of said excepted tract; thence continue Northerly along said Westerly right of way line 185 feet; thence Westerly at right angles 78.5 feet; thence Southerly parallel with said Main Track centerline 185 feet; thence Easterly at right angles 78.5 feet to the True Point of Beginning, EXCEPTING THEREFROM, that portion, if any, lying within 8.5 feet of the existing Elevator Track centerline, as now constructed.

EXHIBIT A**Mitchell Feeds, Inc. and BJM Land, Inc.****Equipment List**

Description	Serial Number
Curtis Model SE 7.5 Air Compressor	#01F08001
Hyster Model 50 Forklift	#H177B309604
Clipper Mill Model Super X298D	#29698
Oliver Model 160 Gravity Mill	#12793
Fosberg 6X18 Classifier	#17892
Fosberg Model 15UFD	#17410
Howe Richardson Model GB25 Bagger	#128307
Satake ScanMaster III Model SMII200IE Electric Eye	#2008273
American Dryer Model 2424 Batch Dryer	#A2424-3P-57-PLC-1006

U.S. Small Business Administration



U.S. Small Business Administration

NOTE

SBA Loan #	38774450-05
SBA Loan Name	Mitchell Feeds, Inc
Date	February 24, 2010
Loan Amount	\$950,000.00
Interest Rate	6.50%
Borrower	Mitchell Feeds, Inc BJM Land, Inc.
Operating Company	Mitchell Feeds, Inc.
Lender	American Federal Bank

1. PROMISE TO PAY:

In return for the Loan, Borrower promises to pay to the order of Lender the amount of

Nine Hundred Fifty Thousand and no/100

Dollars,

interest on the unpaid principal balance, and all other amounts required by this Note.

2. DEFINITIONS:

"Collateral" means any property taken as security for payment of this Note or any guarantee of this Note.

"Guarantor" means each person or entity that signs a guarantee of payment of this Note.

"Loan" means the loan evidenced by this Note.

"Loan Documents" means the documents related to this loan signed by Borrower, any Guarantor, or anyone who pledges collateral.

"SBA" means the Small Business Administration, an Agency of the United States of America.

3. PAYMENT TERMS:

Borrower must make all payments at the place Lender designates. The payment terms for this Note are:

NOTE TERMS:

1. Maturity: The Note will mature in 10 years from Date of Note.
2. Repayment Terms:
 - The interest rate is 6.5% per year.
 - Borrower must pay principal and interest payments of \$10,787.00 every month, beginning one month from the month this note is dated; payments must be made on the 15th calendar day in the months they are due
 - Lender will apply each installment payment first to pay interest accrued to the day Lender receives the payment, then to bring the principal current, then to pay any late fees, and will apply any remaining balance to reduce principal.

Late Charges:

- If a payment on this Note is more than 10 days late, Lender may charge Borrower a late fee of up to 5.00% of the unpaid portion of the regularly scheduled payment.

4. RIGHT TO PREPAY:

Borrower may prepay this Note. Borrower may prepay 20 percent or less of the unpaid principal balance at any time without notice. If Borrower prepays more than 20 percent and the Loan has been sold on the secondary market, Borrower must:

- A. Give Lender written notice;
- B. Pay all accrued interest; and
- C. If the prepayment is received less than 21 days from the date Lender receives the notice, pay an amount equal to 21 days' interest from the date lender receives the notice, less any interest accrued during the 21 days and paid under subparagraph B.

If Borrower does not prepay within 60 days from the date Lender receives the notice, Borrower must give Lender a new notice.

5. DEFAULT:

Borrower is in default under this Note if Borrower does not make a payment when due under this Note, or if Borrower or Operating Company:

- A. Fails to do anything required by this Note and other Loan Documents;
- B. Defaults on any other loan with Lender;
- C. Does not preserve, or account to Lender's satisfaction for, any of the Collateral or its proceeds;
- D. Does not disclose, or anyone acting on their behalf does not disclose, any material fact to Lender or SBA;
- E. Makes, or anyone acting on their behalf makes, a materially false or misleading representation to Lender or SBA;
- F. Defaults on any loan or agreement with another creditor, if Lender believes the default may materially affect Borrower's ability to pay this Note;
- G. Fails to pay any taxes when due;
- H. Becomes the subject of a proceeding under any bankruptcy or insolvency law;
- I. Has a receiver or liquidator appointed for any part of their business or property;
- J. Makes an assignment for the benefit of creditors;
- K. Has any adverse change in financial condition or business operation that Lender believes may materially affect Borrower's ability to pay this Note;
- L. Reorganizes, merges, consolidates, or otherwise changes ownership or business structure without Lender's prior written consent; or
- M. Becomes the subject of a civil or criminal action that Lender believes may materially affect Borrower's ability to pay this Note.

6. LENDER'S RIGHTS IF THERE IS A DEFAULT:

Without notice or demand and without giving up any of its rights, Lender may:

- A. Require immediate payment of all amounts owing under this Note;
- B. Collect all amounts owing from any Borrower or Guarantor;
- C. File suit and obtain judgment;
- D. Take possession of any Collateral; or
- E. Sell, lease, or otherwise dispose of, any Collateral at public or private sale, with or without advertisement.

7. LENDER'S GENERAL POWERS:

Without notice and without Borrower's consent, Lender may:

- A. Bid on or buy the Collateral at its sale or the sale of another lienholder, at any price it chooses;
- B. Incur expenses to collect amounts due under this Note, enforce the terms of this Note or any other Loan Document, and preserve or dispose of the Collateral. Among other things, the expenses may include payments for property taxes, prior liens, insurance, appraisals, environmental remediation costs, and reasonable attorney's fees and costs. If Lender incurs such expenses, it may demand immediate repayment from Borrower or add the expenses to the principal balance;
- C. Release anyone obligated to pay this Note;
- D. Compromise, release, renew, extend or substitute any of the Collateral; and
- E. Take any action necessary to protect the Collateral or collect amounts owing on this Note.

8. WHEN FEDERAL LAW APPLIES:

When SBA is the holder, this Note will be interpreted and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Note, Borrower may not claim or assert against SBA any local or state law to deny any obligation, defeat any claim of SBA, or preempt federal law.

9. SUCCESSORS AND ASSIGNS:

Under this Note, Borrower and Operating Company include the successors of each, and Lender includes its successors and assigns.

10. GENERAL PROVISIONS:

- A. All individuals and entities signing this Note are jointly and severally liable.
- B. Borrower waives all suretyship defenses.
- C. Borrower must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender's liens on Collateral.
- D. Lender may exercise any of its rights separately or together, as many times and in any order it chooses. Lender may delay or forgo enforcing any of its rights without giving up any of them.
- E. Borrower may not use an oral statement of Lender or SBA to contradict or alter the written terms of this Note.
- F. If any part of this Note is unenforceable, all other parts remain in effect.
- G. To the extent allowed by law, Borrower waives all demands and notices in connection with this Note, including presentment, demand, protest, and notice of dishonor. Borrower also waives any defenses based upon any claim that Lender did not obtain any guarantee; did not obtain, perfect, or maintain a lien upon Collateral; impaired Collateral; or did not obtain the fair market value of Collateral at a sale.

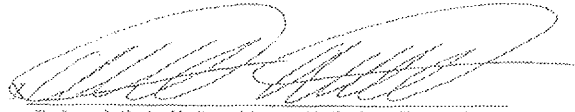
11. STATE-SPECIFIC PROVISIONS:

None


12. BORROWER'S NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated under this Note as Borrower.

MITCHELL FEEDS, INC.

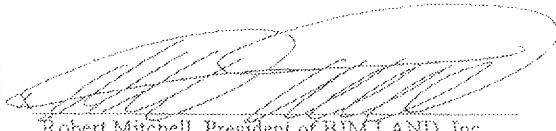


Robert Mitchell, President of Mitchell Feeds, Inc.



Jacqueline Mitchell, Secretary of Mitchell Feeds, Inc.

BJM LAND, INC



Robert Mitchell, President of BJM LAND, Inc.



Jacqueline Mitchell, Secretary of BJM LAND, Inc.

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)
 Jan Cumming 701-235-0906

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

American Federal Bank
 Fargo South Bank
 1301 30th Ave South
 Fargo ND 58103

Filing NO: 201019296773
 Filing Date: 2010/03/01
 Filing Time: 9:05 AM
 State of Minnesota
 Processing Office: Secretary of State
 Filed by: schdo01

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME (insert only one debtor name (1a or 1b) - do not abbreviate or combine names)

1a. ORGANIZATION'S NAME
 Mitchell Feeds, Inc.

OR

1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2a. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 PO Box 9112 Fargo ND 58106 USA

2b. SEE INSTRUCTIONS 20-44-0350 2c. TYPE OF ORGANIZATION Corporation 2d. JURISDICTION OF ORGANIZATION MN 2e. ORGANIZATIONAL ID # NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME (insert only one debtor name (2a or 2b) - do not abbreviate or combine names)

2a. ORGANIZATION'S NAME
 BJM Land Inc.

OR

2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 PO Box 9112 Fargo ND 58106 USA

2d. SEE INSTRUCTIONS 20A-44-0350 2e. TYPE OF ORGANIZATION Corporation 2f. JURISDICTION OF ORGANIZATION ND 2g. ORGANIZATIONAL ID # NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE or ASSIGNEE S.P.; insert only one secured party name (3a or 3b))

3a. ORGANIZATION'S NAME
 American Federal Bank

OR

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY
 1301 30th Ave South Fargo ND 58103 USA

4. THIS FINANCING STATEMENT covers the following collateral:
 All Inventory, Chattel Paper, Accounts, Equipment and General Intangibles; whether any of the foregoing is owned now or acquired later; all
 accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing;
 all proceeds relating to any of the foregoing (including insurance, general intangibles and other accounts proceeds).

5. ALTERNATIVE DESIGNATION (if applicable): LESSOR/LESSOR CONSIGNEE/CONSIGNEE BARE/BAR OR SELLER/BUYER AC LIEN NON-UCC FILING

6. THIS FINANCING STATEMENT is to be filed (for records) in the REAL ESTATE RECORDS (if applicable) 7. CHECK TO REQUEST SEARCH REPORT (if on CD-ROM) (optional) 8. Debtor's Order 1 Order 2

B. OPTIONAL FILER REFERENCE DATA

ACKNOWLEDGEMENT COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02) Horland Financial Solutions
 400 S.W. 6th Avenue, Portland, Oregon 97204

STATE OF MINNESOTA

FILED

IN DISTRICT COURT C

MAY 02 2012

COUNTY OF NORMAN

NORMAN COUNTY
DISTRICT COURT

NINTH JUDICIAL DISTRICT

Don Ackerson, Lana Anderson d/b/a
Northland Farms, Mike Aasen, David
Deslauriers, Jeff Kling, Scott Lazorenko,
Nathan Neameyer, Steven Neameyer, Ron
Pelton, Mitch Preskey, James Routledge, Bart
Savelkoul, Mike Schollmeyer, Shane Sickler,
David Steeves, Paul Trout, Wurgler Farms,
And Kelly Wurgler,

Plaintiffs,

vs.

JUDGMENT

Mitchell Feeds, Inc and Mitchell Farms, Inc.,
Defendants,

Court File: 54-CV-11-112

vs.

American Federal Bank,

Intervenor.

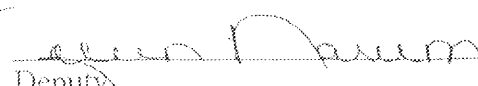
Pursuant to the Court's ORDER GRANTING SUMMARY JUDGMENT AND JUDGMENT
IN FAVOR OF INTERVENOR AMERICAN FEDERAL BANK dated May 1, 2012;

IT IS HEREBY ADJUDGED: That the said attached ORDER constitutes the Judgment
herein.

Dated: May 2, 2012

BY ORDER OF THE COURT:

LORETTA J. WIEBOLT
COURT ADMINISTRATOR

By: 
Deputy

(Seal)

FILED

STATE OF MINNESOTA

MAY 01 2012

DISTRICT COURT

COUNTY OF NORMAN

NORMAN COUNTY
DISTRICT COURT

NINTH JUDICIAL DISTRICT

Don Ackerson, Lana Anderson d/b/a)
Northland Farms, Mike Aasen, David)
Deslauriers, Jeff Kling, Scott Lazorenko,)
Nathan Neameyer, Steven Neameyer, Ron)
Pelton, Mitch Preskey, James Routledge, Bart)
Savelkoul, Mike Schollmeyer, Shane Sickler,)
David Steeves, Paul Trout, Wurgler Farms,)
and Kelly Wurgler,)

Plaintiffs,)

vs.)

Mitchell Feeds, Inc. and Mitchell Farms, Inc.,)

Defendants.)

vs.)

American Federal Bank.)

Intervenor.)

Civil No. CV 11-112

**ORDER GRANTING
SUMMARY JUDGMENT
AND JUDGMENT IN FAVOR
OF INTERVENOR
AMERICAN FEDERAL BANK**

.....
This action came on for hearing on the motion of Intervenor, American Federal Bank, for a summary judgment before the Court, the Honorable Michael J. Kraker presiding, on the 16th day of March, 2012. The Court reviewed the motion documents and any response thereto and duly considered all the pleadings, evidence, and documents on file in this case; and

NOW, THEREFORE,

IT IS HEREBY ORDERED AS FOLLOWS:

FACTS

1. On February 24, 2010, Intervenor American Federal Bank, entered into a security agreement with Defendant Mitchell Feeds, Inc. and BJM Land, Inc. A copy of the security agreement was attached to Intervenor American Federal Bank's Complaint in Intervention as Exhibit A and incorporated herein by reference.

2. A security agreement was given to secure payment of a promissory note given by Mitchell Feeds, Inc. and BJM, Inc. in favor of American Federal Bank. A copy of the promissory note was attached to Intervenor American Federal Bank's Complaint in Intervention as Exhibit B and is incorporated herein by reference. The security agreement granted American Federal Bank a security interest in collateral, including all fixtures, inventory, chattel paper, accounts, equipment, and general intangibles and proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of the collateral.

3. American Federal filed a UCC-1 financing statement on Mitchell Feeds with the Minnesota Secretary of State's office on March 1, 2010, filing no. 20109296773. A copy of the UCC-1 financing statement was attached to Intervenor American Federal Bank's Complaint in Intervention as Exhibit C and is incorporated herein by reference.

4. The security agreement delineates what is to be considered a default of the agreement and warranties American Federal Bank shall have in the event of a default.

5. Mitchell Feeds, Inc. and BJM, Inc. are currently in default of the note for failure to make payment when due and because of other creditor proceedings, including this suit filed against Defendants Mitchell Feeds by the Plaintiffs.

6. The amount due on the Note is the principal sum of \$859,223.45, plus late charges of \$1,618.05, accrued interest through July 14, 2011 in the amount of \$9,153.12 (based

on the 6.50% interest rate set forth in the promissory note), per day interest after the aforesaid date in the amount of \$155.14 until the promissory note is fully paid.

7. Plaintiffs are farmers or farming businesses who produce sunflowers.

8. Plaintiffs commenced this suit on April 6, 2011 in Norman County, Minnesota against Mitchell Feeds, Inc. and Mitchell Farms, Inc., both Minnesota corporations, claiming breach of contract and replevin of sunflowers located at Defendants Mitchell Feeds' elevator in Hendrum, MN.

9. Defendant Mitchell Feeds, Inc. purchased Plaintiffs 2008 and/or 2009 sunflower crops through contracts entered into with Plaintiffs either individually or as a business.

10. Plaintiffs received no payment or partial payment on their contracts to sell their sunflower crops to Mitchell Feeds.

11. Plaintiffs claimed in their Complaint that they have a right to possession of Defendant Mitchell Feeds' sunflower inventory and/or the proceeds thereof.

12. On July 14, 2011, Intervenor American Federal filed a Motion for Partial Summary Judgment; Brief in Support of Motion for Partial Summary Judgment, Notice of Hearing; and Affidavit of Mark Vining requesting relief against Defendants pursuant to the terms of the Security Agreement between the parties.

13. On September 9, 2011, Defendants responded to the Motion for Partial Summary Judgment, stating, "They do not oppose the Motion."

14. On November 29, 2011, the Court denied Intervenor American Federal's Motion for Partial Summary Judgment and granted Plaintiffs' Motion to Refuse or Continue Intervenor's Motion.

15. Intervenor American Federal filed its Complaint in Intervention on or about December 14, 2011.

16. Plaintiffs filed their Answer to the Complaint in Intervention and Demand for Jury Trial on or about January 6, 2012.

17. Defendant Mitchell Feeds, Inc. answered Intervenor American Federal's Complaint in Intervention on January 19, 2012.

18. The Court ordered that the sunflower inventory held at Defendants Mitchell Feeds' elevator located in Hendrum be sold pursuant to its "Order to Sell Sunflower Inventory" allowing American Federal Bank, with the assistance of Defendants and supervision of Plaintiffs, to sell the sunflower inventory in possession of Defendants. The Order, which was confirmed by the Court at a hearing on February 1, 2012, calls for the proceeds of the sale to be deposited in an interest bearing account at Frandsen Bank & Trust located at 410 2nd Street West, P.O. Box 187, Ada, Minnesota 56510.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Court makes the following Conclusions of Law:

1. There is no genuine issue as to material facts or inferences to be drawn from the undisputed facts.

2. All of the allegations of Intervenor American Federal Bank's Complaint in Intervention are true.

3. Intervenor American Federal Bank is entitled to summary judgment in its favor and against the Defendant Mitchell Feeds, Inc. because Mitchell Feeds, Inc. and BJM, Inc. defaulted under the terms of the parties' promissory note and security agreement pursuant to the

terms of the agreements between the parties and under UCC Article 9 as adopted by the State of Minnesota.

4. Plaintiffs transferred title and ownership in the sunflower inventory of Mitchell Feeds, Inc. upon the sale and delivery of the grain to Defendants pursuant to UCC Article 2 as adopted by the State of Minnesota and are thus barred from bringing an action for possession of the sunflowers or its proceeds.

5. Plaintiffs have no lien, consensual, statutory, or otherwise, in the sunflowers or the proceeds thereof.

6. Intervenor American Federal Bank has a perfected first priority security interest in the sunflowers and proceeds thereof under UCC Article 9 as adopted by the State of Minnesota.

7. Intervenor American Federal Bank is entitled to summary judgment in its favor and against Plaintiffs because American Federal Bank has a first priority security interest in Mitchell Feeds, Inc.'s sunflower inventory, and the proceeds thereof, which is superior to any interest Plaintiffs' claim.

ORDER

IT IS HEREBY ORDERED that Intervenor American Federal Bank's Motion for Summary Judgment be in all things GRANTED, to-wit, that Intervenor American Federal Bank is granted a judgment against the Defendant Mitchell Feeds, Inc. permitting Intervenor American Federal to take possession of all secured collateral under the terms of the parties Security Agreement dated February 24, 2010, including the sunflower inventory of Defendant Mitchell Feeds, Inc. and the proceeds thereof, with or without the aid of the Sheriff or other appropriate law enforcement authorities, and to dispose of the same under the Uniform Commercial Code as

enacted in Minnesota, with application of the net proceeds, after deduction for expenses of taking possession and sale or other disposition expenses, as a credit on the obligations owed to Intervenor American Federal by Defendant Mitchell Feeds, Inc.;

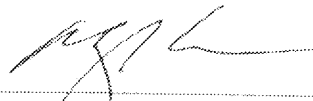
IT IS FURTHER ORDERED AND DECLARED that Intervenor American Federal Bank has a first priority interest in Defendant Mitchell Feeds, Inc.'s sunflower inventory and the proceeds thereof superior to any of the Plaintiffs' claims.

IT IS FURTHER ORDERED that judgment be entered against Defendant Mitchell Feeds, Inc. and Plaintiffs for all of the intervenor's costs and disbursements incurred as a result of this litigation and that Intervenor American Federal Bank is entitled to immediate possession of the sunflower inventory of Defendant Mitchell Feeds, Inc. and any proceeds from the sale of the sunflowers pursuant to the Court's previous orders authorizing the sale and deposit of proceeds.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED THIS 12th day of July, 2012.

BY THE DISTRICT COURT



Michael J. Kraker
Judge of the District Court

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT
Court File No.: 54-CV-11-112

Don Ackerson, Lana Anderson d/b/a
Northland Farms, Mike Aasen, David
Deslauriers, Jeff Kling, Scott Lazorenko,
Nathan Neameyer, Steven Neameyer, Ron
Pelton, Mitch Preskey, James Routledge, Bart
Savelkoul, Mike Schollmeyer, Shane Sickler,
David Steeves, Paul Trout, Wurgler Farms,
and Kelly Wurgler,
Plaintiffs,
v.
Mitchell Feeds, Inc. and Mitchell Farms, Inc.,
Defendant
v.
American Federal Bank
Intervenor.

PLAINTIFFS' RESPONSE TO
INTERVENOR AMERICAN FEDERAL
BANK'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION PURSUANT
TO MINNESOTA RULE OF CIVIL
PROCEDURE 56.06

I. INTRODUCTION

Plaintiffs Don Ackerson, Lana Anderson d/b/a Northland Farms, Mike Aasen, David Deslauriers, Jeff Kling, Scott Lazorenko, Nathan Neameyer, Steven Neameyer, Ron Pelton, Mitch Preskey, James Routledge, Bart Savelkoul, Mike Schollmeyer, Shane Sickler, David Steeves, Paul Trout, Wurgler Farms, and Kelly Wurgler, (collectively "Plaintiffs") submit this Response to Intervenor American Federal Bank's ("Bank" or "Intervenor") Motion for Summary Judgment. Plaintiffs respectfully request that this court deny Intervenor's Motion because the

evidence in this case supports a finding that the Bank's security agreement with Defendant Mitchell Feeds, Inc. constituted a fraudulent conveyance. Alternatively, Plaintiffs request that this court refuse or continue the Bank's motion because Plaintiffs are currently unable to present, by affidavit, facts essential to justify their opposition to the Bank's Motion for Summary Judgment and respectfully request a refusal or continuance of the Motion pursuant to Minn. R. Civ. P. 56.06. Plaintiffs also request that the Intervenor's Motion be denied because pursuant to North Dakota law, Plaintiffs have superior rights to the sunflowers or proceeds therefrom under North Dakota's grain buyer insolvency laws. See Affidavit of Derrick Braaten (attached hereto as Exhibit 1), and Exhibit E thereto.

II. LAW AND ARGUMENT

A. **Summary Judgment Should Be Denied because the Bank's Security Interest Is the Product of a Fraudulent Transfer.**

Pursuant to the security agreement, attached as Exhibit A to Intervenor's Complaint in Intervention, North Dakota law applies with respect to potential fraudulent transfers. The Security Agreement states:

Governing Law. With respect to procedural matters related to the perfection and enforcement of Lender's rights against the collateral, this Agreement will be governed by federal law applicable to Lender and to the extent not preempted by federal law, the laws of the State of Minnesota. In all other respects, this Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of North Dakota without regard to its conflicts of law provisions. . . .

See Exhibit A to Intervenor's Complaint in Intervention (emphasis added).

North Dakota has adopted the Uniform Fraudulent Transfer Act, which is set forth at N.D.C.C. ch. 13-02.1.¹ Pursuant to North Dakota law,

¹ The choice of law provision in the Security Agreement is irrelevant in this context, practically speaking, because Minnesota has also adopted the Uniform Fraudulent Transfer Act, and therefore has the same law as North Dakota. Compare N.D.C.C. ch. 13-02.1 and Minn. Stat. chapter 513.

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or...

N.D.C.C. § 13-02.1-04(1)(a).

1. Plaintiffs Have “Claims” and Are therefore “Creditors” under the Uniform Fraudulent Transfer Act.

Plaintiffs are “creditors” who fall within the ambit of the Uniform Fraudulent Transfer Act (“Act”). Pursuant to the Act, “‘creditor’ means a person who has a claim.” N.D.C.C. § 13-02.1-01(4). “‘Claim’ means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” N.D.C.C. § 13-02.1-01(3).

These definitions are very broad, and Plaintiffs, without question, are “creditors” for purposes of the Act based on a number of “claims”.

Plaintiffs clearly have a “claim” as that term is defined by the Act based upon their claims for breach of contract. The Bank admits as much. See Bank’s Memorandum of Law in Support of Motion for Summary Judgment, p. 15.

Despite the Bank’s arguments to the contrary, Plaintiffs also have a replevin claim for the grain, and its proceeds, sold under order of this court. The Bank cites to Jock v. O’Malley, 138 Minn. 388, 165 N.W. 233 (1917), claiming that if title had passed, replevin will not lie, and Plaintiffs must seek a different remedy. See Bank’s Memorandum of Law in Support of Motion for Summary Judgment, p. 16. The Supreme Court of Minnesota has stated, however, that “where a cash sale of goods is intended and a check in payment thereof is accepted, there is an

implied representation that the check will be paid upon presentation at the bank upon which it is drawn; and that if not so paid title to the goods will remain in the seller who may recover the goods or their value... Where goods are sold for cash on delivery and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods.” Guckeen Farmers Elevator Co. v. Cargill, Inc., 269 Minn. 127, 132-33, 130 N.W.2d 69, 73 (1964) (internal citations omitted). Id. In adopting the ‘cash sale’ doctrine, the Supreme Court of Minnesota stated that “[s]ince the ‘cash sale’ doctrine affords protection to those who by their toil, effort, skill and risk have produced the marketable commodities involved in cases of this kind, we feel that ‘concepts of social policy and business convenience’ compel and justify our adherence to this doctrine.” Id., 130 N.W.2d at 75. Pursuant to North Dakota law, Plaintiffs’ sale of sunflowers to Mitchell Feeds constituted a cash sale. See N.D.C.C. § 60-02.1-14 (listing requirements for a credit-sale contract which were met in this case).

Finally, and far more importantly, the sunflowers at issue and the proceeds of the sale of those sunflowers are part of the trust fund being administered by the North Dakota Public Service Commission (“PSC” or “Commission”), and the Bank’s purported lien cannot defeat that trust. This argument is set forth more fully below.

Therefore, based on their claims for breach of contract, replevin, and their rights as beneficiaries of the trust fund created in the North Dakota insolvency action, Plaintiffs have “claims” and are therefore “creditors” for purposes of the Uniform Fraudulent Conveyance Act.

2. The Bank's Purported Security Interest is Invalid because It Results from a Fraudulent Transfer.

The basic timeline of events illustrates well that grant of a security interest in the sunflowers to the Bank by Defendant Mitchell Feeds constituted a fraudulent transfer as defined by North Dakota law.

According to the Affidavit of Susan K. Richter, Director of the North Dakota Public Service Commission's Licensing Division, "Mitchell Feeds, Inc. provided information to the Public Service Commission showing a significant amount of grain was received from producers in 2009 and 2010 for which payment has not been made." See Exhibit B to Affidavit of Derrick Braaten, attached hereto. Many of the receipts or scale tickets held by Plaintiffs show that Plaintiffs' grain was delivered in August of 2009 to Mitchell Feeds, Inc. (located at a Fargo, ND address). See Exhibit C to Affidavit of Derrick Braaten. The contracts with Plaintiffs provided that payment was due ten days after delivery and grading. See Exhibit D to Affidavit of Derrick Braaten.

Under North Dakota's grain buyer insolvency laws, a licensed grain buyer is insolvent "when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or is unable to make redelivery upon proper demand." N.D.C.C. § 60-02.1-28 (emphasis added). Pursuant to the Uniform Fraudulent Transfer Act, "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. A debtor who is generally not paying debts as they become due is presumed to be insolvent...." N.D.C.C. § 13-02.1-02. Thus, based on the facts recited above, Mitchell Feeds, Inc. was insolvent by sometime in September of 2009.

The Bank's purported security interest came long after Mitchell Feeds, Inc. was insolvent. The Security Agreement relied upon by the Bank is dated February 24, 2010, and the UCC Financing Statement relied upon by the Bank was not filed until March 1, 2010. See Exhibits A and C to Intervenor's Complaint in Intervention. At the time the Bank took its security interest, Mitchell could have redelivered Plaintiffs' grain to them pursuant to N.D.C.C. § 60-02.1-28, as quoted above. By granting the Bank a secured interest in this collateral, he prevented Plaintiffs from obtaining redelivery under North Dakota's insolvency statutes.

"[T]he law will treat 'as null and void all fraudulent contrivances to screen the property of a debtor from his creditors; it is fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to defeat them by benefactions conferred upon others. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void.'" Sheridan v. McCormick, 168 N.W. 59, 60 (N.D. 1918).

It is telling that the Bank, assuming it did *any* due diligence whatsoever, would have known that the "collateral" being pledged by Mitchell Feeds in the form of grain inventory was unpaid-for grain belonging to Plaintiffs, and further, the Bank would have known that Mitchell Feeds was insolvent as a result of its failure to pay for that very grain. The Bank did not balk at this; rather, it gave Mitchell Feeds (or BJM Land, Inc.) a \$950,000.00 loan, and took as collateral grain it knew or should have known to be unpaid-for and subject to Plaintiffs' demands for redelivery or payment. Further, it is interesting that the Bank finds it significant to point out that Defendants responded to the Bank's prior Motion for Partial Summary Judgment stating "They do not oppose the Motion." See Bank's Memorandum of Law in Support of Motion for

Summary Judgment, ¶ 13. This begs the question: Why would Defendants prefer one creditor over another in this action?

The bottom line is that Mitchell Feeds was well aware that it was insolvent and holding Plaintiffs' grain without payment, and the granting of that grain to the Bank as collateral would inarguably hinder, delay, and defraud Plaintiffs from recovery, and prevent them from taking redelivery of the grain pursuant to North Dakota law. Under these circumstances, it is not surprising that Defendants are being uncooperative in responding to Plaintiffs' legitimate discovery requests, and that the Bank is eager to receive a judgment on its claim prior to allowing Plaintiffs time to conduct full discovery. Regardless, there is sufficient circumstantial evidence that the Bank's security interest is invalid because it is the result of a fraudulent transfer. Even if the evidence were not sufficient at this point to be conclusive on the issue, "[q]uestions regarding a constructive fraudulent transfer are questions of fact." Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 2000 ND 189, ¶ 20, 630 N.W.2d 24. Therefore, even if the court does not determine that the evidence is sufficient to invalidate the Bank's purported security interest as a matter of law, this becomes a factual issue for the trier of fact and summary judgment should be denied.

B. Summary Judgment Should Be Refused or Denied So Plaintiffs Can Discover Crucial Material Facts to Support Plaintiffs' Claims and Defenses.

Minn. R. Civ. P. 56.06 provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The district court has considerable discretion in determining whether to refuse or continue a summary judgment motion; under rule 56.06 (and Federal Rule 56(f) after which it is modeled) such continuances should be liberally granted. Rice v. Perl, 320 N.W.2d 407, 412 (Minn. 1982).

Normally the court will grant additional time to the nonmoving party to obtain the facts if the reason is a matter of insufficient time. A continuance or permission to engage in further discovery should not be denied to a party except in the most extreme circumstances. * * * As a practical matter, the court should be liberal in granting additional time for purposes of preparing affidavits or discovery if a party has any real reason to believe that facts can be established by such means.

Id. (quoting 2 J. Hetland & O. Adamson, Minnesota Practice 588 (1970) (hereinafter referred to as Minnesota Practice) (emphasis added)).

In determining whether to grant a motion under Rule 56.06, courts focus on two questions: (1) whether the plaintiff has been diligent in obtaining or seeking discovery prior to its Rule 56.06 motion, and (2) whether plaintiff is seeking further discovery in the good faith belief that material facts will be uncovered, or merely engaging in a fishing expedition. Rice, 320 N.W.2d at 412 (internal quotations omitted); see also Molde v. CitiMortgage, Inc., 781 N.W.2d 36, 45 (Minn.App. 2010).

In light of the complex nature of the case and questions regarding the disposition of the grain or the grain proceeds held by Defendants, there are numerous facts that must be uncovered before any issues are ripe for summary judgment. Plaintiffs have been diligent in seeking discovery. Plaintiffs sent out their first set of discovery requests to Defendants on September 7, 2011. A copy of Plaintiff's Interrogatories to Defendants and Plaintiffs' Request for Production of Documents to Defendants was attached to Plaintiffs' previous Memorandum in Support of their previous 56.06 Motion as Exhibit B and Exhibit C, respectively. Plaintiffs have made demands for supplemental discovery responses but

have yet to receive adequate responses from Defendants, and anticipate that a motion to compel will be necessary. See Exhibit I, Affidavit of Derrick Braaten.

In order to adequately defend against the Bank's Motion for Summary Judgment and to substantiate their own claims and defenses to the Bank's claims, there are many relevant material facts that Plaintiffs must uncover.

The majority of the information necessary to defend against the Bank's motion for summary judgment is in the exclusive possession of the Bank and Defendants.

Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party Indeed, the majority of the continuances granted under Rule 56(f)² involve cases in which one party has exclusive knowledge of the relevant facts. . . . [I]t probably is felt that granting a continuance in these situations is appropriate because extracting information from an opposing party may be a more difficult process than obtaining information from a disinterested source.

Rice, 320 N.W.2d at 412. (quoting Wright & Miller, Federal Practice and Procedure § 2741 at 733-34); see also Bixler v. J.C. Penney Co., 376 N.W.2d 209, 216-17 (Minn.1985) (holding that summary judgment for defendants was premature because appellants were likely to discover relevant material facts and because their discovery was diligent in light of the complex and confusing procedural occurrences). Rice and Bixler create a presumption in favor of granting motions to extend discovery when the moving party brings the motion in good faith, has been diligent, and the opposing party controls the material sought. Plaintiffs rely on all arguments made in their previous briefing on this issue in response to the Bank's prior Motion for Partial Summary Judgment, and offer the following as two specific areas in which discovery is clearly needed in this matter prior to any grant of summary judgment such as the Bank is requesting.

² Federal Rule 56 was amended in 2010 and the content of Rule 56(f) now appears in Rule 56(d).

1. The Facts Known Thus Far in this Case Indicate a Strong Likelihood of a Fraudulent Transfer from Defendant Mitchell Feeds, Inc. to American Federal Bank and Further Discovery is Needed.

Pursuant to North Dakota law,

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
 - b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

N.D.C.C. § 13-02.1-04. Further,

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
2. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

N.D.C.C. § 13-02.1-05. "Under the revised Act, fraudulent transfers are broadly separated into two classifications: actual fraud and constructive fraud. A fraudulent transfer may be attacked under either theory. Actual or intentional fraud requires a showing of intent while constructive

fraud requires a showing of inadequate consideration coupled with insolvency. Questions regarding a constructive fraudulent transfer are questions of fact....” Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 2000 ND 189, 630 N.W.2d 24, 30 (internal citations omitted).

There are several sets of facts that would result in a determination that the security agreement being relied upon by the Bank is the result of a fraudulent transfer by Defendant Mitchell Feeds, and consequently, that the Bank’s security interest must be set aside in favor of Plaintiffs’ rights.

Plaintiffs served a number of interrogatories and requests for production of documents on the Bank in order to gather information regarding the loan made to Mitchell Feeds, Inc. and BJM Land, Inc. by the Bank, and to learn more about the purported collateral which secures that loan. See Affidavit of Derrick Braaten, and Exhibit A attached thereto. This information is particularly crucial for Plaintiffs to discover because it is clear that Mitchell Feeds, Inc. was insolvent at the time of the loan, and that Mitchell Feeds, Inc. promised as collateral unpaid grain which belonged to the Plaintiffs. All of the elements of a fraudulent transfer pursuant N.D.C.C. § 13-02.1-04(1) and N.D.C.C. § 13-02.1-05(1) have already been met, except the requirement that Plaintiffs show that “a reasonably equivalent value in exchange for the transfer or obligation” was not received by Mitchell Feeds. A number of Plaintiffs’ discovery requests are focused on this issue specifically, and inquire about the collateral offered, by whom it was offered, and what was received in exchange and by whom it was received. Plaintiffs need to discover information on only a single element under this provision to prove that the security interest given by Mitchell Feeds was a fraudulent transfer. Further, this is only one of several provisions that could result in the security interest received by the Bank being a fraudulent transfer. “[Q]uestions regarding a constructive fraudulent transfer are questions of fact....”

Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 2000 ND 189, 630 N.W.2d 24, 30 (internal citations omitted). Not only are Plaintiffs entitled to further discovery on these issues, but even following such discovery, the issue is a question of fact for a jury.

Another red flag relates to BJM Land, Inc. Plaintiffs have attempted to gather information about BJM Land, Inc. and Robert Mitchell individually through both Defendants and the Bank. See Affidavit of Derrick Braaten, and Exhibit A attached thereto; see also Exhibits B and C (discovery requests to Defendants) attached to Plaintiffs' previously filed Memorandum Opposing Intervenor's first Motion for Partial Summary Judgment. Defendants have refused to provide information related to BJM Land, Inc as well as information related to Robert Mitchell. This is entirely improper considering that BJM Land, Inc. is a party to the Security Agreement and Promissory Note with the Bank. A simple hypothetical illustrates the necessity of allowing Plaintiffs discovery regarding BJM Land, Inc.: If the collateral offered in exchange for the loan was in truth owned solely by Mitchell Feeds, which was obviously insolvent, and the loan monies from the Bank were transferred entirely to BJM Land, Inc., then the security interest is a blatant fraudulent transfer under N.D.C.C. ch. 13-02.1.

To illustrate further, it is a simple thing to replace the generic terms in the statute with the parties here, and thereby make clear the likelihood of a fraudulent transfer:

A transfer made or obligation incurred by [Mitchell Feeds] is fraudulent as to Plaintiffs, whose claim[s] arose before the [Bank made its loan or Mitchell promised the sunflowers as collateral] if [the Bank made its loan or Mitchell promised the sunflowers as collateral] without receiving a reasonably equivalent value in exchange for the transfer or obligation and Mitchell Feeds was insolvent at that time.

N.D.C.C. § 13-02.1-05. Again, if the Bank transferred the loan proceeds to BJM Land, Inc., with nothing to Mitchell Feeds, the security interest from Mitchell Feeds is a fraudulent transfer.

Defendants have refused to provide any information to Plaintiffs related to BJM Land, Inc., which further raises the specter of a fraudulent transfer.

Plaintiffs should be allowed to conduct reasonable discovery before judgment is granted in these proceedings when the known facts point to a probable fraudulent transfer.

2. Even if a Court Determined that the Bank Has a Priority Right to the Sunflower Inventory and/or Proceeds, the Bank is Required to Marshal Assets and Plaintiffs Are Entitled to Discovery to Ensure this Happens.

The Bank would be required to marshal assets even if a court determined that it had a right to the sunflower inventory and/or proceeds therefrom. The essence of marshaling assets is that when a creditor has more than one source from which to collect a debt, and another creditor only one source, then the creditor with multiple sources must exhaust those other sources before relying on the shared source of assets. Thus, pursuant to law:

When a person has a lien upon several things and other persons have subordinate liens upon or interests in some but not all of the same things, the person having the prior lien, if that person can do so without the risk of loss to that person or of injustice to other persons, on the demand of any party interested, must resort to the property in the following order:

1. To the things upon which that person has an exclusive lien.
2. To the things which are subject to the fewest subordinate liens.
3. In like manner inversely to the number of subordinate liens upon the same thing.
4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had:
 - a. To things which have not been transferred since the prior lien was created;
 - b. To the things which have been so transferred without a valuable consideration; and
 - c. To the things which have been so transferred for a valuable consideration in the inverse order of the transfers.

N.D.C.C. § 35-01-15. “The statute is merely an enactment of the equitable rule.” Aberle v. Merkel, 70 N.D. 89, 291 N.W. 913, 918 (1940) (citing Douglas County State Bank v. Steele et al., 54 N.D. 686, 691, 210 N.W. 657, 659 (1926)).

Plaintiffs have served the Bank with written discovery focused specifically on what assets or other collateral the Bank has attempted to marshal, as well as what other collateral might exist. If the Bank has ample assets to collect from elsewhere, such as assets of BJM Land, Inc., then equity demands that it collect those assets first. As Plaintiffs have explained above, Plaintiffs have a right and claim to assets of Defendants, and Plaintiffs should be allowed to receive responses to their discovery in order to assess whether the Bank has marshaled assets pursuant to the requirements of North Dakota law. There are outstanding factual issues with respect to the Bank’s marshaling of assets that prevent summary judgment at this stage in the proceedings.

C. Summary Judgment Should Be Denied because the Bank’s Lien, to the Extent It Has a Valid Lien, Is Inferior to that of Plaintiffs.

Mitchell Feeds was licensed as a roving grain buyer as required by N.D.C.C. § 60-02.1-08 and N.D.A.C. § 69-07-02-02.1. See Exhibit B to Affidavit of Derrick Braaten (Affidavit of Susan Richter, Director of N.D. PSC’s Licensing Division). Pursuant to North Dakota law, “[u]pon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receipt holders” N.D.C.C. § 60-02.1-30 (emphasis added). The trust fund must consist of ... [n]onwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.” Id. (emphasis added).

The Supreme Court of Minnesota has addressed the issues raised by the circumstances in the case at bar. In Healy-Owen-Hartzell Co. v. Merricourt Equity Exch., the Court addressed whether a judgment creditor or grain ticket holders had a prior right to proceeds from grain sold

after a grain elevator became insolvent. 164 Minn. 1, 204 N.W. 527 (Minn. 1925). The grain ticket holder in that case argued that before the grain left North Dakota, it "had been subjected to a trust for the benefit of ticket holders; that by force of the statute the grain had become their property, was sold for their benefit, and that the proceeds now belong to them as against attaching creditors...." Healy-Owen-Hartzell Co., 204 N.W. at 527. The Supreme Court of Minnesota agreed. Id., 204 N.W. at 528.

The North Dakota law related to the grain and proceeds of the grain is clear that Plaintiffs have a priority lien by virtue of being the beneficiaries of the trust created by North Dakota statute. Because the North Dakota PSC has instituted insolvency proceedings in North Dakota and is the agency charged with administration of North Dakota's insolvency laws, and because all parties with claims in these proceedings are North Dakota citizens and Mitchell Feeds, Inc. was licensed as a roving grain buyer under North Dakota law, Plaintiffs have submitted a Motion for Declaratory Judgment in the North Dakota proceeding to get a final determination from the North Dakota court that the grain and the proceeds of the grain are a part of the trust fund being administered by the PSC under North Dakota law. Plaintiffs' Motion and Memorandum in Support are attached as Exhibit E to the Affidavit of Derrick Braaten, and set forth more fully Plaintiffs' arguments regarding the North Dakota insolvency laws.

III. CONCLUSION

Plaintiffs have explained in detail how the issues relating to a potential fraudulent transfer or to marshaling assets could bear upon the final resolution of this case. In previous briefing, Plaintiffs also pointed out additional legal theories for which they require further discovery.

By way of example, Robert Mitchell stated to several Plaintiffs on numerous occasions that they could come pick up their sunflowers that Defendants had not paid for, indicating that he

still considered the sunflowers to belong to Plaintiffs and that they were entitled to their return. See Affidavit of David Steeves in support of Plaintiffs' Motion for Temporary Restraining Order. This is relevant to the determination of whether Defendants had the ability or right to grant a security interest in the sunflowers that were being held by Defendants but had not been paid for according to the contract; "[H]ad [Plaintiffs] and the debtors intended that [Plaintiffs] retain ownership and control relinquishing only possession to the debtors, the debtors would clearly not have had sufficient rights to grant a security interest therein." In re Cook Angus Ranch, 63 B.R. 789, 797 (Bankr. D.N.D. 1986); see also Rohweder v. Aberdeen Production Credit Ass'n, 765 F.2d 109 (8th Cir. 1985). The statements made by Robert Mitchell are inconsistent with the Bank's claim that Mitchell Feeds accepted the sunflowers and thereby caused title to pass. Mitchell's actions and statements support a claim that his possession of the sunflowers was merely a bailment. This in itself should be sufficient to deny the Bank's Motion for Summary Judgment because it constitutes a material factual dispute.

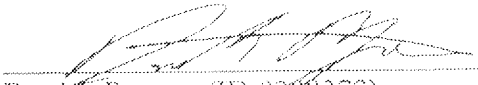
If Plaintiffs' Motion is denied, the court will not be adequately informed of the facts and legal principles of the case, and cannot make a just, fair, and fully informed decision on the merits of the case in the Bank's Motion for Summary Judgment. At this juncture, relevant material facts with regard to the Bank's purported interests and Plaintiffs' claims against Defendants remain undiscovered.

The case at bar is not a simple collection proceeding, despite the Bank's efforts to treat it as such. This case involves multiple jurisdictions, multiple parties, and a multitude of legal issues. In such complex litigation, it is crucial that parties be allowed sufficient time to investigate and discover information relevant to the many legal claims asserted. Plaintiffs have shown that they are diligently pursuing discovery under the unique circumstances of the case, that there are material, essential facts

necessary to substantiate their opposition to Intervenor's motion for summary judgment, and have evidenced that they do not intend to engage in a "fishing expedition." Because the facts that would presumably be necessary to defend against the Bank's purported claims are largely in possession of the Bank, and because Plaintiffs have met all the factors of the Rice test, Plaintiffs' Motion Pursuant to Minn. R. Civ. P. 56.06 to Refuse or Continue Intervenor's Motion for Summary Judgment should be granted.

Signed this 7th day of March, 2012.

BAUMSTARK BRAATEN LAW PARTNERS
Attorneys for Plaintiffs
222 North 4th Street
Bismarck, ND 58501-4004
Phone: 701-221-2911
Fax: 701-221-5842


Derrick Braaten (ID 0388372)
Lindsey Nieuwsma (ID 0390964)

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, to the parties against whom the allegations in the First Amended Complaint are asserted.


Derrick Braaten (ID 0388372)

3. I submit this affidavit pursuant to Minn. R. Civ. P. 56.06 in response to Intervenor American Federal Bank's Motion for Summary Judgment. I possess personal knowledge and am competent to address the specific factual matters related to the Bank's motion under Minn. R. Civ. P. 56.06.
4. This affidavit presents facts to support Plaintiffs' Motion Pursuant to Minn. R. Civ. P. 56.06 to Refuse or Continue Intervenor American Federal Bank's ("Bank") Motion for Summary Judgment. Plaintiffs request that the court refuse the Bank's motion, or in the alternative, continue such motion until completion of discovery in the case. This request is based on the following:

EXAMPLES OF DISCOVERY NOT YET COMPLETED

5. This affidavit provides illustrative examples of the discovery that has not yet been completed in the case, but which is likely to lead to relevant material facts that would preclude summary judgment. These examples are not comprehensive, and Plaintiffs cannot state with certainty at this preliminary stage exactly what proper discovery will uncover.
6. Plaintiffs have issued interrogatories and requests for production of documents to Defendants but have received only extremely incomplete responses to those related to:
 - a. Information regarding Defendants' partial payments or failure to pay on their respective contracts with Plaintiffs and Defendants records in connection with the same;
 - b. Information supportive of a bailment claim relating to representations made to Plaintiffs by Defendants after the delivery of the sunflowers to Defendants but

- prior to payment indicating that Plaintiffs were free to recover such sunflowers if they wished;
- c. Information regarding Defendant Mitchell Feeds, Inc.'s financial status and Robert Mitchell's representations to Plaintiffs regarding the same;
 - d. Information regarding Robert Mitchell's interest in, relationship with, and business activities in his multiple corporations and other unidentified entities, including but not limited to, Mitchell Feeds, Inc., Mitchell Farms, Inc., and BJM Land, Inc.,
 - e. Information regarding persons authorized to act on behalf of Defendants in entering into contracts, delivering grain, selling grain, buying grain, or conducting any other business activity on behalf of Defendants;
 - f. Information regarding the facilities utilized by Defendants to deliver, store, buy, or sell sunflowers under contract with Plaintiffs;
 - g. Information regarding the location of any of the facilities owned or utilized by Defendants in their business activities;
 - h. Information regarding Defendants' position and defenses with regard to their failure to perform under their respective contracts with Plaintiffs;
- b. Deposition of key witnesses including Robert Mitchell and other employees or agents of Defendants.
7. Plaintiffs have sent a detailed letter to Defendants explaining why Defendants are required to produce the documents and information to which Defendants objected or simply did not respond. Plaintiffs' counsel has also contacted Defendants' counsel by email and phone, and thus far counsel for the parties have not been able to resolve the

discovery dispute, and it appears to Plaintiffs' counsel that a motion to compel will be required to resolve the dispute.

8. Plaintiffs have issued discovery to the Bank, but have not received answers in the form of document requests, interrogatories, depositions, and other discovery inquiries related to, among other things:

- a. Information regarding the Bank's purported interest in the sunflowers in possession of Defendants, the specific facts supporting its purported interest, and details on what it believes constitutes a default under its contracts with Defendants;
- b. Information regarding the circumstances of the loan and type of loan entered into by BJM Land, Inc., Defendant Mitchell Feeds and the Bank, whether a first-time loan or refinancing;
- c. Information regarding a purported default on a loan or loans by Defendant Mitchell Feeds with the Bank;
- d. Information regarding BJM Land, Inc., including its assets, business activities, and its relationship with Defendants Mitchell Feeds and Mitchell Farms;
- e. Information regarding the distribution of the loan to BJM Land, Inc. and Defendant Mitchell Feeds and whether there was adequate value received in exchange for a pledge of the assets of each company as collateral;
- f. Information regarding the transfer of and use of the proceeds of the loan by BJM Land, Inc., Defendant Mitchell Feeds and/or any other companies or entities;
- g. Information regarding the types and value of all collateral which allegedly secures the Bank's loan.

- b. Information regarding any other attempts by the Bank to collect assets of Defendants' or BJM Land, Inc. that were purportedly pledged as collateral;
 - c. Information regarding other loans or security interests allegedly held by the Bank and entered into by Defendants and/or BJM Land, Inc.;
 - d. Information regarding the Bank's knowledge of Defendants' insolvent status and knowledge of Plaintiffs' claims against Defendants at the time of loan;
9. The discovery of the types of information listed above would produce evidence necessary to determine who is entitled to possession of or the proceeds from the sale of the sunflowers in possession of Defendants. This information will also provide instruction regarding Defendants' and Robert Mitchell's liability on the contracts with Plaintiffs, Plaintiffs' rights to the sunflowers delivered to Defendants but not paid for, Defendants' rights to pledge the sunflowers as collateral, Defendants' representations to Plaintiffs regarding their rights to the sunflowers in possession of Defendants, and the validity of the Bank's purported interest in Defendants' assets. Much of this discovery is directly related to proving Plaintiffs' theories with respect to a potential fraudulent conveyance, as well as Intervenor's failure to marshal assets pursuant to North Dakota law. These are all factors that affect the determination of who is entitled to the possession or proceeds of the sunflowers in possession of Defendants. Further, the types of information listed above will produce evidence that is necessary to determine the proper choice of law and jurisdiction for determining the rights of the parties in the case.
10. Attached hereto as Exhibit A is a true and correct copy of the interrogatories and requests for production of documents served by U.S. Mail upon American Federal Bank on March 1, 2012.

CERTIFICATE OF SERVICE

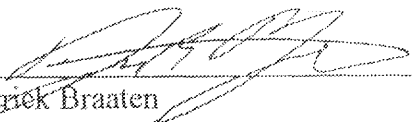
I hereby certify that a true and correct copy of the foregoing

- NOTICE OF MOTION AND MOTION PURSUANT TO MINN. R. CIV. P. 56.06 TO REFUSE OR CONTINUE INTERVENOR'S MOTION FOR SUMMARY JUDGMENT
- PLAINTIFFS' RESPONSE TO INTERVENOR AMERICAN FEDERAL BANK'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION PURSUANT TO MINNESOTA RULE OF CIVIL PROCEDURE 56.06
- AFFIDAVIT OF DERRICK BRAATEN (with Exhibits)

were on March 7, 2012, filed by fax with the court and mailed to the following:

David L. Johnson
Michael D. McNair
McNAIR, LARSON, CARLSON, LTD.
51 Broadway, Suite 600
P.O. Box 2189
Fargo, ND 58108-2189

Tracy A. Kennedy
ZIMNEY FOSTER P.C.
3100 South Columbia Road, Suite 200
P.O. Box 13417
Grand Forks, ND 58208-3417



Derrick Braaten

INSTRUCTIONS

1. The relevant beginning time period of these requests is from the time any business relationship developed between American Federal Bank and, whether individually or in combination, one of the following: Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., and/or any business, corporation, or entity owned in part or whole by any of the foregoing persons or entities. The relevant time period shall extend from the beginning time period through and including the present, unless otherwise stated in a particular request for production, and shall include all Documents which relate or refer to this period even though prepared before or subsequent to that period.
2. These Requests for Production of Documents are deemed to be continuing in nature and should you, your counsel, or anyone representing your interest become aware of, or acquire, any additional knowledge which affects the accuracy or completeness of any answers herein, or which relates to the matters into which these Interrogatories inquire, it is hereby demanded that such knowledge be immediately transferred to the undersigned attorney by way of supplemental answers to the full extent required by Minnesota Rules of Civil Procedure.
3. In answering these Requests for Production of Documents, you are required to furnish all information that is available to you or subject to reasonable inquiry by you, including information in the possession of you, your attorney, accountants, advisors, or other persons directly or indirectly employed by, or connected with you or your attorney, and anyone else otherwise subject to your control.
4. If you object to any Requests for Production of Documents on grounds of privilege,

provide for each document withheld on such grounds:

- a. the name of the author and each addressee and the person(s) who, on the face of the document, was (were) sent a copy;
- b. a general description, including date of creation, and summary of the document sufficient to sustain your claim of privilege; and
- c. the nature and basis for the privilege claimed to be applicable.

5. Each Request for Production of Documents (as well as these Instructions) may contain one or more terms that are defined below. You should construe each defined term according to the meaning of that word as set forth below. All other words should be construed consistent with customary usage given the context in which the words appear such that, in each instance, you should construe any word to bring that word within the scope of the discovery request in which it appears. Consistent with the above, the singular usage of a word shall be considered to include within its meaning the plural, and vice versa; the conjunctive shall be considered to include within its meaning the disjunctive, and vice versa; and the feminine shall be considered to include within its meaning the masculine, and vice versa.

DEFINITIONS

When used herein, the following terms and phrases shall be understood to have the following meanings:

1. "Advances" means any bank advance or extension of money to any Debtors during the relevant time period.
2. "Bank," "You," and "Your" means the American Federal Bank and each of its affiliates, attorneys, accountants, divisions, subdivisions, predecessors, directors or members, officers, employees, agents, representatives and all persons acting or purporting to act on

its behalf.

3. "Communication" or "Communications" means any verbal, written and/or electronic means of conversation or other statement from one person to another, including, but not limited to, any interview, conference, meeting or telephone conversation.
4. "Debtors" means Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., any business, corporation, or entity owned in whole or in part by the previously mentioned Persons and/or entities, and any of the foregoing persons' or entities' officers, employees, and authorized agents and representatives, unless otherwise specified within the Interrogatory.
5. "Defendants" means Mitchell Feeds, Inc. and Mitchell Farms, Inc. and any of its officers, employees and authorized agents and representatives, unless otherwise specified.
6. "Document" and "documentation" means any writing or recording as defined in Rule 1001 of the Minnesota Rules of Evidence, including, but not limited to, the original and any identical or non-identical copy or draft or revision thereof, regardless of origin or location, of any writing or record of any type or description, including, but not limited to: the original and any copy, of any book, pamphlet, periodical, letter, memorandum, telegram, report, study, handwritten or other note, working paper, chart, paper graph, index, tape, disc, data sheet or data processing card, correspondence, table, analysis, schedule, diary, message (including, but not limited to, reports of electronic mail or telephone conversations or conferences), magazine, booklet, circular, bulletin, instruction, minutes, purchase order, bill of lading, bid tabulation, memorandum of agreement, assignment, license, book of account, order, invoice, statement, bill (including, but not limited to telephone bills), check, voucher, notebook, film,

photograph, photograph negative, phone record, tape recording, wire recording, phonorecord, transcript or recordings, drawing, catalog, brochure, or any other data compilations in any format (including computer hard drives, discs, diskettes, compact disk, digital files, any other storage and retrieval media and the like) from which information can be obtained, printed, transcribed, punched, taped or filed; graphic matter, however produced or reproduced, to which the responding party has or has had access; and any record or notes of other communications (including interoffice, intra-office communications, electronic memoranda, voicemail messages and all other oral communications) and specifically including Electronically Stored Information ("ESI"). All sources are intended to be encompassed, including, but not limited to, the Bank and any other person, firm or corporation or governmental entity which has communicated with the Bank on the subject matter included in the requests below.

7. "ESI" means any electronically stored information-including writings, drawings, graphs, charts, photographs, Documents, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form as defined in Rules 26 and 34 of the Minnesota Rules of Civil Procedure and Rule 1001 of the Minnesota Rules of Evidence.
8. "Loan" or "loans" means any loans, indebtedness, revolving loan and/or credit transactions, extensions of credit, credit facilities, financing agreements, mortgage(s), and secured/unsecured lending transactions, by and between the Bank and Debtors or any businesses, corporations, or entities owned wholly or in part by Debtors.
9. "Person" means, without limitation, any natural person, corporation, partnership, limited

partnership, limited liability corporation, limited liability partnership, company, sole proprietorship, association, institute, joint venture, trust, association, organization, firm, business, or other entity, irrespective of whether privately or publicly owned or controlled, for profit or not for profit, or partially or fully government-controlled.

10. "Possession, custody, or control means actual and constructive possession, custody or control. A document that is not in a person's immediate physical possession, but which that person has a right to compel production from a third person (including attorneys possessing non-privileged materials), or that is otherwise subject to the control of the person in question, is within that person's "possession, custody or control."
11. "Relating to" or "relate to" means, without limitation, regarding, concerning, constituting, discussing, describing, summarizing, evidencing, listing, reflecting, referring to, pertaining to, relevant to, alluding to, mentioning, explaining, showing, describing, studying, embodying, pertaining to, constituting, comprising, responding to, connected with, associated with, commenting on, demonstrating, tending to prove, disprove or explain, or having any logical or factual connection whatsoever with the subject matter in question.
12. "Relevant time period": The relevant beginning time period of these requests is from the time any business relationship developed between American Federal Bank and, whether individually or in combination, one of the following: Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., and/or any business, corporation, or entity owned in part or whole by any of the foregoing persons or entities. The relevant time period shall extend from the beginning time period through and including the present, unless otherwise stated in a particular request for production, and shall include all

Documents which relate or refer to this period even though prepared before or subsequent to that period.

13. "Representative" means any person that could possibly be construed by a third party as acting on behalf of or speaking or acting for Intervenor, or relaying information on behalf of Intervenor, even if Intervenor would dispute an agency relationship.

14. "Support" and "supporting" mean tending to prove, to substantiate or to document.

15. "Transfer" or "Transfers" means any bank transfers or other distribution of proceeds or monies related to any Loans during the relevant time period.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Produce copies of any and all Documents relating to any Loans during the relevant time period, including, but not limited to, promissory notes, guarantees, loan agreements, mortgage(s) and/or mortgage modification agreements, cross-collateralization agreements, security agreements, loan instruments, subordination and/or assignment agreements, Small Business Association guarantees, communications, letters, correspondence, e-mails, facsimiles and any attachments thereto and internal memoranda related thereto, together with any other hard copy or ESI of any kind between You and any or all Debtors.

REQUEST FOR PRODUCTION NO. 2: Produce copies of any and all Documents, books and records relating to (i) the decision to make each of the Loans; (ii) the decision to structure the Loans; (iii) any other loan structure considered by the Bank in connection therewith, including, but not limited to, loan committee notes, minutes of loan committee meetings, minutes of board director and/or officer meetings, underwriting summaries or worksheets, loan and underwriting files, loan approvals and all notes, resolutions, correspondence, communications, e-

mails, letters, memoranda, computer generated data and any other hard copy or ESI of any kind.

REQUEST FOR PRODUCTION NO. 3: Produce copies of any and all Documents relating to any and all monies or property of any kind, including without limitation, any Transfers, paid or transferred to the Bank by, for the benefit and/or on behalf of, any of the Debtors from any source whatsoever, in connection with the Loans for relevant time period, including, but not limited to, Documents relating to the identity of the party making the transfer, the amount of the Transfer and/or the source of the Transfer.

REQUEST FOR PRODUCTION NO. 4: Copies of any and all Documents relating to any Advances for the relevant time period, including, but not limited to, loan account statements, banking statements, escrow account statements, canceled checks, trust and/or escrow account checks, drafts, cash receipts, deposit slips, wire transfer confirmation statements, computer generated data, and/or any other hard copy or ESI of any kind.

REQUEST FOR PRODUCTION NO. 5: Produce copies of any and all Documents, including, but not limited to, policy and procedures manuals and handbooks, loan committee notes and reports, correspondence, communications, e-mails, ESI, letters, memoranda, reports, internal memorandum, loan officer manuals and handbook, employee manuals and handbooks, procedural guidelines and rule books, and any other written communications prepared, transmitted and published by the Bank relating to (i) the qualifications, criteria and requirements of approving and underwriting the Loans; (ii) the servicing, administration, collection and application of any payments made by, for the benefit and/or on behalf of, any of the Debtors with respect to the Loans; (iii) the servicing, administration, collection and application of any payments made by, for the benefit and/or on behalf of, any of the Debtors with respect to any delinquent/defaulted loan accounts in respect of the Loans; (iv) the recovery and liquidation of

any asset pledged as collateral by any of the Debtors to the Bank in connection with the Loans; and (v) releasing, discharging and satisfying indebtedness due and owing the Bank by each of the Debtors in connection with any current, delinquent and/or defaulted loan accounts under the Loans for the four (4) prior to the Petition Date.

REQUEST FOR PRODUCTION NO. 6: Copies of any and all Documents submitted to the Bank by any of the Debtors relating to the Loans, including, without limitations, loan applications, offering memoranda, financial statements, tax returns and similar documents.

REQUEST FOR PRODUCTION NO. 7: Copies of all Documents obtained by the Bank from third parties other than any of the Debtors in connection with any underwriting, investigation or due diligence performed by the Bank in connection with the decision to make/approve the Loans.

REQUEST FOR PRODUCTION NO. 8: Any and all Documents created by the Bank or received by the Bank after the Loans were made to the Debtors relating to any of the Debtors, including any suspicious activity reports or similar reports prepared and/or filed by the Bank with any governmental or regulatory agency.

REQUEST FOR PRODUCTION NO. 9: Unless otherwise included in previous Requests any and all Documents contained in the Bank's loan files relating to each of the Loans.

REQUEST FOR PRODUCTION NO. 10: Produce all correspondence and communications, including but not limited to letters and emails, between you and Robert Mitchell, you and Jacqueline Mitchell, you and Debtors, and you and any business, corporations, or entities owned entirely or in part by Robert Mitchell and/or Debtors.

REQUEST FOR PRODUCTION NO. 11: Produce any and all documentation relating to the types and value of all collateral which allegedly secures the Loans.

REQUEST FOR PRODUCTION NO. 12: Produce any and all Documents referencing

Debtors' insolvency and/or the Bank's knowledge of such insolvency.

REQUEST FOR PRODUCTION NO. 13: Produce all scale tickets, assembly sheets, itemizations, settlement sheets, inspection reports, checks, check stubs, bills of lading, and any and all other Documents related to the inspection, quality testing, transportation and sale of the Sunflower Inventory, including any and all Documents received from Frandsen Bank & Trust of Ada, MN.

REQUEST FOR PRODUCTION NO. 14: Produce all Documents related to any communications between You and any persons or entities to whom the Sunflower Inventory was sold.

REQUEST FOR PRODUCTION NO. 15: Produce all Documents related to any communications, including but not limited to documentation of actual communications such as letters and emails, between You and Frandsen Bank & Trust of Ada, MN.

REQUEST FOR PRODUCTION NO. 16: Produce all Documents related to communications between You and Debtors.

REQUEST FOR PRODUCTION NO. 17: Produce all exhibits you intend to use at trial.

Dated this 5th day of March, 2012.

BAUMSTARK BRAATEN LAW PARTNERS

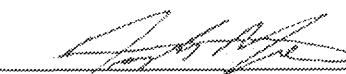
Attorneys for Plaintiffs

222 North 4th Street

Bismarck, ND 58501-4004

Phone: 701-221-2911

Fax: 701-221-5842

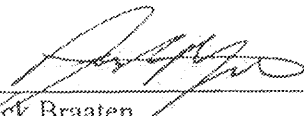

By: Derrick Braaten (0388372)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS TO INTERVENOR AMERICAN FEDERAL BANK was on March 1, 2012, mailed to the following:

Tracy A. Kennedy
ZIMNEY FOSTER P.C.
3100 South Columbia Road, Suite 200
P.O. Box 13417
Grand Forks, ND 58208-3417

David L. Johnson
Michael D. McNair
McNAIR, LARSON, CARLSON, LTD.
51 Broadway, Suite 600
P.O. Box 2189
Fargo, ND 58108-2189



Derrick Braaten

INSTRUCTIONS

1. The relevant beginning time period of these interrogatories is from the time any business relationship developed between American Federal Bank and, whether individually or in combination, one of the following: Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., and/or any business, corporation, or entity owned in part or whole by any of the foregoing persons or entities. The relevant time period shall extend from the beginning time period through and including the present, unless otherwise stated in a particular request for production, and shall include all Documents which relate or refer to this period even though prepared before or subsequent to that period.
2. These Interrogatories are deemed to be continuing in nature and should you, your counsel, or anyone representing your interest become aware of, or acquire, any additional knowledge which affects the accuracy or completeness of any answers herein, or which relates to the matters into which these Interrogatories inquire, it is hereby demanded that such knowledge be immediately transferred to the undersigned attorney by way of supplemental answers to the full extent required by Minnesota Rules of Civil Procedure.
3. In answering these Interrogatories, you are required to furnish all information that is available to you or subject to reasonable inquiry by you, including information in the possession of you, your attorney, accountants, advisors, or other persons directly or indirectly employed by, or connected with you or your attorney, and anyone else otherwise subject to your control.
4. In answering the Interrogatories, you are required to answer each Interrogatory and subpart separately, stating the facts, documents, witnesses, communications and other information applicable to each such Interrogatory or subpart.

5. Each Interrogatory (as well as these Instructions) may contain one or more terms that are defined below. You should construe each defined term according to the meaning of that word as set forth below. All other words should be construed consistent with customary usage given the context in which the words appear such that, in each instance, you should construe any word to bring that word within the scope of the discovery request in which it appears. Consistent with the above, the singular usage of a word shall be considered to include within its meaning the plural, and vice versa; the conjunctive shall be considered to include within its meaning the disjunctive, and vice versa; and the feminine shall be considered to include within its meaning the masculine, and vice versa.

DEFINITIONS

When used herein, the following terms and phrases shall be understood to have the following meanings:

1. "Account" shall be meant to include but not be limited to a savings account, a checking account, individual account, joint account, partnership account, limited liability account, corporate account, trust account, or any other type of account related to any and all services American Federal Bank provides.
2. "Bank", "You" and "Your" means the American Federal Bank and each of its affiliates, attorneys, accountants, divisions, subdivisions, predecessors, directors or members, officers, employees, agents, representatives and all persons action or purporting to act on its behalf.
3. "Debtors" means Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., any business, corporation, or entity owned in whole or in part by the previously mentioned Persons and/or entities, and any of the foregoing persons' or entities'

officers, employees, and authorized agents and representatives, unless otherwise specified within the Interrogatory.

4. "Describe" or "state" means to provide a comprehensive, complete, accurate, and detailed description, enumeration, explanation, or listing of the matter inquired of.
5. "Entity," "Entities," or "Person" means any natural person, corporation, partnership, company, sole proprietorship, association, institute, joint venture, trust, firm, business, or other entity, irrespective of whether privately or publicly owned or controlled, for profit or not for profit, or partially or fully government-controlled.
6. "Identify" or "identity" means:
 - a. When used in reference to a natural person, to state:
 1. that person's full name and present or last known address; and
 2. present or last known position, title and employer or business affiliation.
 - b. When used in reference to a business entity, to state:
 1. the entity's name and address;
 2. its principal place of business; and
 3. the legal nature of the entity (i.e. corporation).
 - c. When used in reference to a document, to state:
 1. the document's date;
 2. its author;
 3. its addressee;
 4. its type; and
 5. its present custodian.
7. "Information" or "knowledge": means any facts, knowledge, data, beliefs, or opinions,

however obtained.

8. "Loan" or "loans" means any loans, indebtedness, revolving loan and/or credit transactions, extensions of credit, credit facilities, financing agreements, mortgages, and secured/unsecured lending transactions, by and between the Bank and Defendant and/or any of the Debtors or any businesses, corporations, or entities owned wholly or in part by the Defendant and/or any Debtors.
9. "Possession" or "control" means actual and constructive possession, custody or control. A document that is not in a person's immediate physical possession, but which that person has a right to compel production from a third person (including attorneys possession non-privileged materials), or that is otherwise subject to the control of the person in question, is within that person's "possession, custody or control."
10. "Relevant time period": The relevant beginning time period of these requests is from the time any business relationship developed between American Federal Bank and, whether individually or in combination, one of the following: Robert Mitchell, Mitchell Feeds, Inc., Mitchell Farms, Inc., BJM Land, Inc., and/or any business, corporation, or entity owned in part or whole by any of the foregoing persons or entities. The relevant time period shall extend from the beginning time period through and including the present, unless otherwise stated in a particular request for production, and shall include all Documents which relate or refer to this period even though prepared before or subsequent to that period.
11. "Representative" means any person that could possibly be construed by a third party as acting on behalf of or speaking or acting for American Federal Bank or relaying

information on behalf of American Federal Bank, even if American Federal Bank would dispute an agency relationship.

12. "Sunflower Inventory" means all sunflowers held by Defendants in this matter which were ordered to be sold pursuant to the Order to Sell Sunflower Inventory issued by the Norman County District Court and dated September 27, 2011.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons who answered or assisted in answering these interrogatories.

INTERROGATORY NO. 2: Identify all persons who you know to have discoverable knowledge or information regarding the claims in this lawsuit and summarize each individual's knowledge or information.

INTERROGATORY NO. 3: Identify all witnesses you intend to call at trial.

INTERROGATORY NO. 4: Identify all Debtors who have or have had an Account or Loan with You at any time during the relevant time period.

INTERROGATORY NO. 5: Identify any and all Loans given by You to any of the Debtors in the past ten years, including, but not limited to, promissory notes, guarantees, Small Business Association guarantees, loan agreements, mortgage(s) and/or mortgage modification agreements, cross-collateralization agreements, security agreements, loan instruments, subordination and/or assignment agreements granted by You to Debtors. For each and every Loan identified, state:

- a. the amount of each Loan;
- b. to whom each Loan was issued;
- c. the date each Loan was issued;

- d. the outstanding amount on each Loan;
- e. if there were joint debtors, the amount of the Loan distributed to each debtor;
- f. if the loan was closed, the date the Loan was closed;
- g. the original collateral offered which secured the loan;
- h. whether there has been additional collateral securing each Loan and value of such collateral; and
- i. to whom any funds advanced pursuant to the Loan were transferred, including to what account any funds advanced were transferred.

INTERROGATORY NO. 6: Identify all collateral known to You as referenced in Paragraph 25 of Your Complaint in Intervention.

INTERROGATORY NO. 7: Describe all attempts and efforts made by You to collect or liquidate collateral securing the Promissory Note attached as Exhibit A to Your Complaint in Intervention, other than the Sunflower Inventory.

INTERROGATORY NO. 8: Describe all attempts You have made to marshal assets other than the Sunflower Inventory.

INTERROGATORY NO. 9: Identify the date of default as referenced in Paragraph 28 of Your Complaint in Intervention, and describe all instances or actions of Debtors which you claim constitute a default under the promissory note and security agreement attached as Exhibits A and B to Your Complaint in Intervention.

INTERROGATORY NO. 10: With respect to the promissory note and security agreement attached as Exhibits A and B to Your Complaint in Intervention, state the following:

- a. to whom or to what entity (e.g. BJM Land, Inc., Mitchell Feeds, etc.) the

- loan proceeds were distributed, and in what amount;
- b. the purpose of the loan with respect to each entity/person receiving the loan;
 - c. the collateral for the above-referenced promissory note and security agreement known to You at the time of the initial distribution of the loan.

INTERROGATORY NO. 11: State the date that You first became aware that Plaintiffs claimed a right and interest to the sunflower inventory of Defendants as well as non-Defendant BJM Land, Inc., and describe the manner in which you learned of Plaintiffs' claimed interests.

INTERROGATORY NO. 12: For all sunflower inventory marketed under the orders of the Norman County District Court in this matter, dated September 27, 2011 and February 23, 2012, identify all persons or entities to which any sunflowers were sold, the price paid for the sunflowers, and describe any discounts due to the quality of the sunflowers.

INTERROGATORY NO. 13: Describe all efforts taken by You to market the Sunflower Inventory, identify all entities or persons consulted in marketing or attempting to market the Sunflower Inventory, all entities you contacted related to a potential sale of the Sunflower Inventory, and describe all communications between you and any potential or actual buyers of the sunflowers.

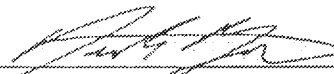
INTERROGATORY NO. 14: Identify each communication you had with Debtors and include the following:

- a. State the type of communication, e.g., personal, telephone, email, other correspondence;
- b. State the date of the communication;
- c. Identify each person who participated in or was present at each communication;

- d. State the purpose of the communication and summarize the content of the communication; and
- e. Identify each document, if any, related to the communication.

Dated this 15th day of March, 2012.

BAUMSTARK BRAATEN LAW PARTNERS
Attorneys for Plaintiffs
222 North 4th Street
Bismarck, ND 58501-4004
Phone: 701-221-2911
Fax: 701-221-5842

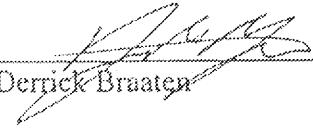

By: Derrick Braaten (0388372)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PLAINTIFFS' INTERROGATORIES TO INTERVENOR AMERICAN FEDERAL BANK** was on March 1, 2012, mailed to the following:

Tracy A. Kennedy
ZIMNEY FOSTER P.C.
3100 South Columbia Road, Suite 200
P.O. Box 13417
Grand Forks, ND 58208-3417

David L. Johnson
Michael D. McNair
McNAIR, LARSON, CARLSON, LTD.
51 Broadway, Suite 600
P.O. Box 2189
Fargo, ND 58108-2189



Derrick Braaten

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Mitchell Feeds, Inc.
Ex Parte Cease & Desist

Case No. GE-11-103

AFFIDAVIT OF SUSAN K. RICHTER

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Susan K. Richter, being first duly sworn, deposes and states:

That she is the Director of the Public Service Commission's Licensing Division.

That on February 1, 2011, the Commission received a letter with attachments from James Burckhard of Towner, North Dakota, alleging he had not been paid for sunflower seeds sold to Mitchell Feeds, Inc.

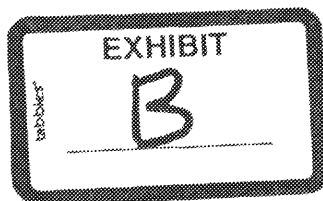
That on March 30, 2011, the Commission received a letter with attachments from David Steeves of Sherwood, North Dakota, alleging he had not been paid for sunflower seeds sold to Mitchell Feeds, Inc.

That on April 4, 2011, the Commission received a letter with attachments from Gene E. Allen, attorney representing David Deslauriers of Sherwood, North Dakota, alleging David Deslauriers had not been paid for sunflower seeds sold to Mitchell Feeds, Inc.

That on April 5, 2011, the Commission received letters with attachments from Paul A. Ronde of Halliday, North Dakota, Don Ackerson of Sherwood, North Dakota, and Steven Neameyer of Mylo, North Dakota, each alleging he had not been paid for sunflower seeds sold to Mitchell Feeds, Inc.

That during the week of March 28, 2011, the Licensing Division received numerous phone calls from additional North Dakota producers, all alleging they had not been paid for sunflower seeds sold to Mitchell Feeds, Inc.

That Mitchell Feeds, Inc. is licensed as a roving grain buyer since October 28, 2009. As required by North Dakota Century Code § 60-02.1-08 and North Dakota



1

GE-11-103 Filed: 4/6/2011
Affidavit of Susan K. Richter

Pages 2

Public Service Commission

Administrative Code § 69-07-02-02.1, Mitchell Feeds, Inc. has a \$70,000 bond on file with the Public Service Commission.

That Mitchell Feeds, Inc. provided information to the Public Service Commission showing a significant amount of grain was received from producers in 2009 and 2010 for which payment has not been made.

That the Licensing Division is preparing and will be asking the Commission to file documents with District Court, asking that Mitchell Feeds, Inc. be declared insolvent, the Commission be appointed trustee, and the surety be joined as a party to the insolvency proceeding.

That it appears the bond on file with the Public Service Commission will not be sufficient to cover the total amount owed to producers for the sunflower seeds sold to Mitchell Feeds, Inc.

North Dakota Century Code § 60-02.1-39 provides the Commission with authority to issue a cease and desist order without prior notice against an entity that engages in an activity or practice that is contrary to the provisions of Chapter 60-02.1 or related rules.

Mitchell Feeds, Inc. has violated North Dakota Century Code § 60-02.1-08 (4)(a) by failing to faithfully perform the licensee's duties as a roving grain buyer and North Dakota Century Code § 60-02.1-28 by refusing, neglecting, or being unable upon proper demand to make payment for grain purchased or make redelivery.

Affiant believes that good cause exists requiring ex parte action by the Commission because additional sellers of grain may suffer immediate economic loss, damage or injury if Mitchell Feeds, Inc. continues purchasing grain as a licensed roving grain buyer in North Dakota.

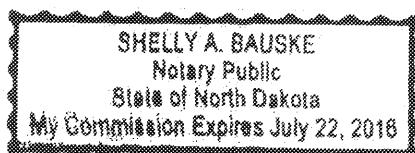
Affiant requests that the Commission issue an Ex parte Cease and Desist Order against Mitchell Feeds, Inc. as authorized by North Dakota Century Code § 60-02.1-39, ordering that Mitchell Feeds, Inc. cease and desist from purchasing grain in North Dakota.

Susan H. Richter

Subscribed and sworn to before me this 6th day of April, 2011.

Shelly A. Bauske

Notary Public



SHIPPER'S NO.
TRUCK LICENSE NO. FEW 140
TRAILER LICENSE NO.
DATE 8-11-09



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58106-9112
 (701) 588-9279 Home • (701) 261-4125 Cell

LADING NO. Nº 8231
FREIGHT BILL
DATE 8-11-09
SCALE TICKET NO.
DESTINATION WGT. 52,340
FREIGHT CHARGES

SOLD BY David Steeves		APPLY ON CONTRACT NO.	SCALE TICKET NO.	
GRAIN SUNFLOWER NUSH		<input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE	SHIPPER'S WEIGHT	
DESTINATION ELEVATOR		DELIVER ON OR BEFORE		GROSS POUNDS 86,280
LOCATION (CITY & STATE)		FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS		TARE POUNDS 33,940
COMMENTS: Le Axles Plus Freight		FREIGHT RATE		NET POUNDS 52,340
		BU. CWT.		GROSS BUSHELS NET BUSHELS

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.

The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER David Steeves

ORIGIN ELEVATOR _____

ADDRESS _____

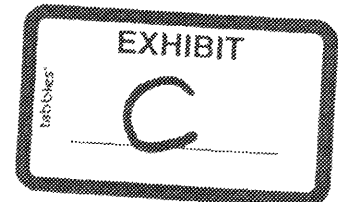
BY [Signature]

CARRIER Same

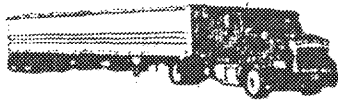
ADDRESS _____

BY _____

CHAUFFER LICENSE NO. _____



SHIPPER'S NO.
TRUCK LICENSE NO. FEW-140 ND
TRAILER LICENSE NO.
DATE 8-13-09



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58106-9112
 (701) 588-9279 Home * (701) 261-4125 Cell

LADING NO. No 8241
FREIGHT BILL
DATE 8-13-09
SCALE TICKET NO.
DESTINATION WGT. 52,280
FREIGHT CHARGES

SOLD TO: David Steeves Sherwood ND		APPLY ON CONTRACT NO. <input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE	SCALE TICKET NO. GROSS POUNDS 85,940 TARE POUNDS 33,660 NET POUNDS 52,280 GROSS BUSHELS NET BUSHELS
GRAIN Soft Flour	GRADE & FACTORS NJS00	DELIVER ON OR BEFORE FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS FREIGHT RATE BU. CWT.	SHIPPER'S WEIGHT
DESTINATION ELEVATOR LOCATION (CITY & STATE) COMMENTS: 6 Ax Plus Freight	FREIGHT RATE BU. CWT.		

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER <u>David Steeves</u>	CARRIER <u>Same</u>
ORIGIN ELEVATOR _____	ADDRESS _____
ADDRESS _____	BY _____
BY _____	CHAUFFER LICENSE NO. _____

SHIPPER'S NO.
TRUCK LICENSE NO. FET 600
TRAILER LICENSE NO.
DATE 7-28-09



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58108-9112
 (701) 588-9279 Home * (701) 261-4125 Cell

LADING NO. 3187
FREIGHT BILL
DATE 7-28-09
SCALE TICKET NO.
DESTINATION WGT. 52900
FREIGHT CHARGES

SOLD TO: David Des Lauriers		APPLY OR CONTRACT NO.	SCALE TICKET NO.
GRAIN SunFlow NDSun		<input type="checkbox"/> BELL ON ARRIVAL <input type="checkbox"/> STORAGE	GROSS POUNDS 81,860
GRADE & FACTORS			TARE POUNDS 28,980
DESTINATION ELEVATOR	DELIVER ON OR BEFORE	SHIPPER'S WEIGHT NET POUNDS 52,900 GROSS BUSHELS NET BUSHELS	NET POUNDS
LOCATION (CITY & STATE)	FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS		GROSS BUSHELS
COMMENTS: Dues Freight	FREIGHT RATE		NET BUSHELS
		BU.	
		CWT.	

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER <u>Same</u>	CARRIER <u>David Des Lauriers</u>
ORIGIN ELEVATOR _____	ADDRESS <u>Sherwood ND</u>
ADDRESS _____	BY _____
BY _____	CHAUFFER LICENSE NO. _____

SHIPPER'S NO.
TRUCK LICENSE NO. FET 600
TRAILER LICENSE NO.
DATE 8-14-09



MITCHELL FEEDS, INC.

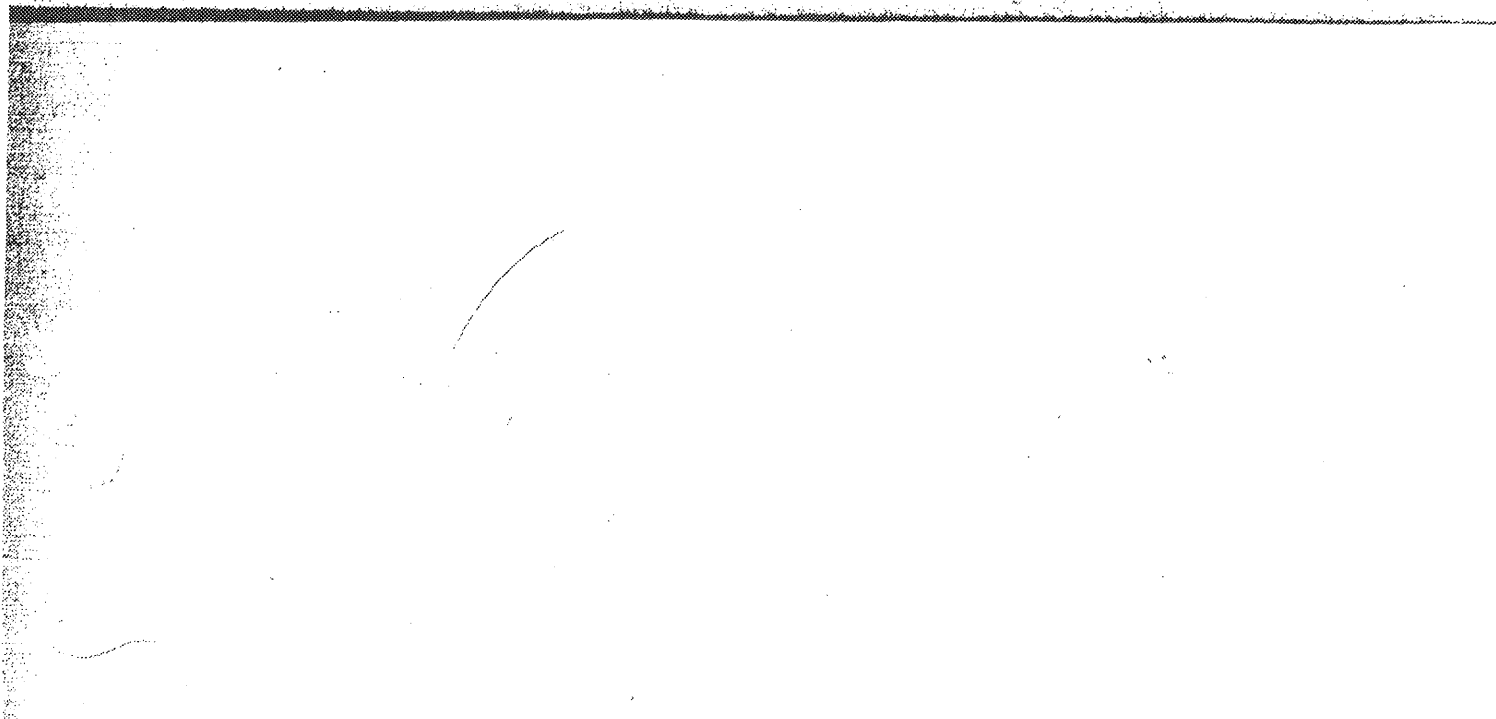
P.O. Box 9112
 Fargo, North Dakota 58106-9112
 (701) 588-9279 Home * (701) 281-4125 Cell

LADING NO. 0245
FREIGHT BILL
DATE 8-14-09
SCALE TICKET NO.
DESTINATION WQHT. 52440
FREIGHT CHARGES

SOLID TO: David Doylann		APPLY OR CONTRACT NO.	SCALE TICKET NO.
<input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE		SHIPPER'S WEIGHT	GROSS POUNDS 81080
GRAIN: Sun Flow GRADE & FACTORS: NU SUN			TARE POUNDS 28640
DESTINATION ELEVATOR			NET POUNDS 52440
LOCATION (CITY & STATE)			GROSS BUSHELS 1
COMMENTS: 5 Axle Plus Freight		<input type="checkbox"/> MITCHELL FARMS	NET BUSHELS 1
DELIVER ON OR BEFORE		FREIGHT TO BE PAID BY	
FREIGHT RATE		<input type="checkbox"/>	
BUJ.			
CWT.			

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER David Doylann	CARRIER Same
ORIGIN ELEVATOR _____	ADDRESS _____
ADDRESS _____	BY _____
BY David Rowe	CHAUFFER LICENSE NO. _____



MITCHELL FEEDS, INC.

P.O. Box 9112
 Fargo, North Dakota 58106-9112
 (701) 588-9279 Home • (701) 261-4125 Cell



SHIPPER'S NO.
 TRUCK LICENSE NO. FEZ 141AD
 TRAILER LICENSE NO.
 DATE 7-29-09

LADING NO. N1 819
 FREIGHT BILL
 DATE 7-29-09
 SCALE TICKET NO.
 DESTINATION WGT. 40,440
 FREIGHT CHARGES

APPEL OR CONTRACT NO. <input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE		SCALE TICKET NO.	
GRAIN <u>Sunflower</u> GRADE & FACTORS <u>Co. Oil</u>		SHIPPER'S WEIGHT	GROSS POUNDS <u>70,120</u>
DESTINATION ELEVATOR			TARE POUNDS <u>29,680</u>
LOCATION (CITY & STATE)			NET POUNDS <u>40,440</u>
COMMENTS <u>5 Axles</u> <u>Plus Freight</u>			GROSS BUSHELS NET BUSHELS
DELIVER ON OR BEFORE		FREIGHT TO BE PAID BY <input checked="" type="checkbox"/> MITCHELL FARMS	
FREIGHT RATE		BU.	CWT.

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER Mike Schollmeyer CARRIER Same
 ORIGIN ELEVATOR E Bank ADDRESS _____
 ADDRESS _____ BY _____
 BY _____ CHAUFFER LICENSE NO. _____



UNITED STATES DEPARTMENT OF AGRICULTURE
FEDERAL GRAIN INSPECTION SERVICE
U.S. GRAIN STANDARDS ACT

Approved OMB No. 0550-0013

SUBMITTED SAMPLE INSPECTION

OFFICIAL PINK CERTIFICATE

ORIGINAL

NR-0969095

NOT NEGOTIABLE

LEVEL OF INSPECTION:

Original

ISSUED AT:

Fargo, ND

DATE OF SERVICE:

August 3, 2009

IDENTIFICATION:

8195

NOT OFFICIALLY SAMPLED

GRADE AND KIND: U.S. NO. 1 Sunflower Seed

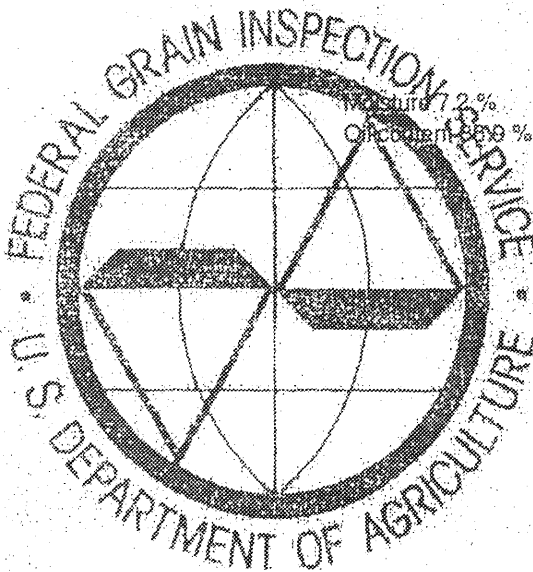
RESULTS:

Test Weight 29.0 lbs/bu

Foreign Material 5.5 %

Moisture 12.0 %
Oil content 48.9 %, 10 % moisture basis.

REMARKS:



The sample identification and inspection results shown on this certificate are assigned only to the quantity in the sample and not to any specified carrier, container, or lot from which the sample may have been taken. This certificate does not meet the requirements of section 5 of the U.S. Grain Standards Act.

I CERTIFY THAT THE SERVICES SPECIFIED ABOVE WERE PERFORMED WITH THE RESULTS STATED.

APPLICANT NAME: Mitchell Feeds Inc.

NAME OR SIGNATURE: Darcy R. Rasmussen

ISSUING OFFICE: North Dakota Grain Inspection Service, Inc.

This certificate is issued under the authority of the United States Grain Standards Act, as amended (7 U.S.C. 71 et seq. and the regulations thereunder (7 CFR 800.0 et seq.). It is issued to show the kind, class, grade, quality, condition, or quantity of grain; or the condition of a carrier or transportation of grain; or other facts relating to grain as determined by official personnel. The statements on this certificate are considered true at the time and place the inspection or weighing service was performed. The certificate shall not be considered representative of the lot if the grain is transferred or is otherwise transferred from the specified carrier or container or if grain or other material is added to or removed from the total lot. If this certificate is not approved by a supervising certificate, it is recognized by all courts of the United States as prima facie evidence of the truth of the facts stated therein. This certificate does not excuse failure to comply with the provisions of the Federal Food, Drug, and Cosmetic Act or other Federal law.

WARNING: Any person who shall knowingly falsify weights, issues, sales, torps, or counterfeits this certificate, or participate in any such actions, or otherwise violate provisions in the U.S. Grain Standards Act, the U.S. Warehouse Act or related Federal laws is subject to criminal, civil, and administrative penalties. The conduct of all services and the licensing of personnel under the regulations governing such services shall be accomplished without discrimination as to race, color, religion, sex, national origin, age, or handicap. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information is 0550-0013. The time required to disclose this recordkeeping requirement is to average 18.04 hours per recordkeeper annually, including the time to retain such records, and to notify, disclose, and report to third parties such recordkeeping requirements.



MITCHELL FEEDS, INC.

P.O. Box 9112
Fargo, North Dakota 58106-9112
(701) 588-9279 Home * (701) 261-4125 Cell

SHIPPER'S NO.
TRUCK LICENSE NO.
TRAILER LICENSE NO. 203274ND
DATE 7-29-09

LADING NO. 8196

APPLY ON CONTRACT NO.	
SCALE TICKET NO.	
<input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE	

GRAIN	GRAIN FACTORS
Soy Flour (low-oil)	
DESTINATION ELEVATOR	
LOCATION (CITY & STATE)	
COMMENTS	

SHIPPER'S WEIGHT	GROSS POUNDS 82460
	TARE POUNDS 33720
	NET POUNDS 48740
	GROSS BUSHELS

FREIGHT BILL
DATE 7-29-09
SCALE TICKET NO.
DESTINATION WGT. 48.740
FREIGHT CHARGES

Plus Freight

DELIVER ON OR BEFORE	
FREIGHT TO BE PAID BY <input type="checkbox"/> MITCHELL FARMS	
FREIGHT RATE	BU.
	DWT.

NET BUSHELS

CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.

The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER Mike Schollmeyer

ORIGIN ELEVATOR E Bank

ADDRESS _____

BY [Signature]

CARRIER Same

ADDRESS _____

BY _____

CHAUFFER LICENSE NO. _____



UNITED STATES DEPARTMENT OF AGRICULTURE
FEDERAL GRAIN INSPECTION SERVICE
U.S. GRAIN STANDARDS ACT

Approved OMB No. 0580-0013

SUBMITTED SAMPLE INSPECTION
OFFICIAL PINK CERTIFICATE

ORIGINAL
NR-0969098
NOT NEGOTIABLE

LEVEL OF INSPECTION:
Original

ISSUED AT:
 Fargo, ND.

DATE OF SERVICE:
 August 3, 2009

IDENTIFICATION:
 8196

NOT OFFICIALLY SAMPLED

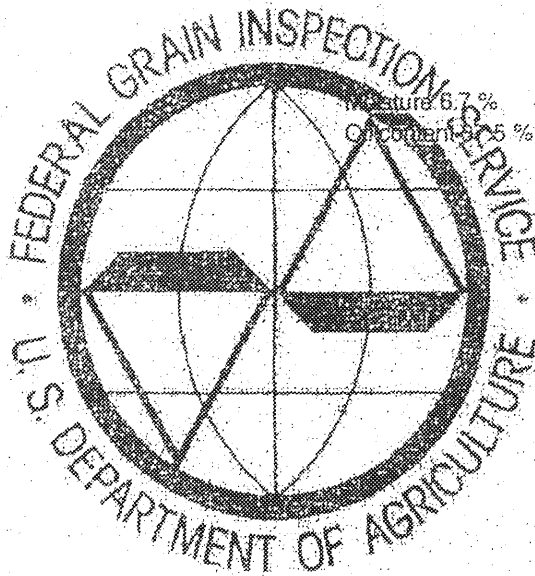
GRADE AND KIND: U.S. NO. 1 Sunflower Seed

RESULTS:

Test Weight 29.0 lbs/bu
Foreign Material 4.5 %

Moisture 6.7 %
Oil content 45 %, 10 % moisture basis.

REMARKS:



The sample identification and inspection results shown on this certificate are assigned only to the quantity in the sample and not to any certified carrier, container, or lot from which the sample may have been taken. This certificate does not meet the requirements of section 5 of the U.S. Grain Standards Act.

I CERTIFY THAT THE SERVICES SPECIFIED ABOVE WERE PERFORMED WITH THE RESULTS STATED.

APPLICANT NAME: Mitchell Feeds Inc.

NAME OR SIGNATURE: Darcy R. Rasmussen

ISSUING OFFICE: North Dakota Grain Inspection Service, Inc.

This certificate is issued under the authority of the United States Grain Standards Act, as amended (7 U.S.C. 71 et seq. and the regulations thereunder (7 CFR 800.2 et seq.). It is issued to show the kind, class, grade, quality, condition, or quantity of grain or the condition of a carrier or container for the storage or transportation of grain, or other facts leading to grain as determined by official personnel. The statements on this certificate are considered true at the time and place the inspection or weighing service was performed. The certificate shall not be considered representative of the lot if the grain is transhipped or is otherwise transferred from the identified carrier or container of the grain or other material is added to or removed from the total lot. If the certificate is not cancelled by a superseding certificate, it is receivable by all officers and all courts of the United States as prima facie evidence of the truth of the facts stated thereon. This certificate does not excuse failure to comply with the provisions of the Federal Food, Drug, and Cosmetic Act or other Federal law.
WARNING: Any persons who shall knowingly falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any such actions, or otherwise violate provisions in the U.S. Grain Standards Act, the U.S. Warehouse Act, or related Federal laws, is subject to criminal, civil, and administrative penalties. The conduct of all services and the licensing of personnel under the regulations governing such services shall be accomplished without discrimination as to race, color, religion, sex, national origin, age, or handicap.
According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information is 0580-0013. The time required to disclose this recordkeeping requirement is to average 18.64 hours per recordkeeper annually, including the time to retain such records, and to notify, disclose, and report to third parties such recordkeeping requirements.

Mitchell Feeds Inc.

March 24, 2008

154 Hwy 75 S
PO Box 128
Hendrum MN 58047

218-861-6262 (Elevator)
701-261-4125 (Cell)

PURCHASE CONTRACT NUMBER: MFI 014

Purchased From:

David Steeves
4690 County Rd 2
Sherwood ND 58782

Commodity and Grade: Nusun Sunflowers Moisture 10% / Test Weight 27 lbs bu

Quantity: ^{0.21} ~~200~~ ³⁰⁰ Acres Full Production

Price: \$0.30 /lbs Price Protection

Premium/Discount Scale: Moisture 2% dockage per 1% Moisture

Payment Terms: Payments Due 10 days after Delivery & Grading

Delivery Basis: Per Agreement with Farmer Picked up - IF Haul add .015*

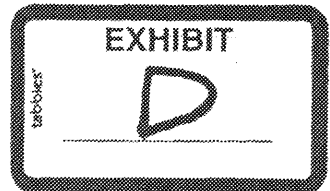
Shipment Period: Fall 08 thru Spring 09

Weights to Govern: Destination

Inspection to Govern: NDGI Grades

Remarks:

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS



In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules.
Receipt of this contract by the Seller, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

Print Name David L. Steeves

Mitchell Feeds Inc.

By [Signature]
Customer Signature

4-2-08
Date

By [Signature]
Robert Mitchell

PURCHASE TERMS

1. **RULES:** The Rules of the Association listed on the face of this Contract shall govern. All disputes arising out of this transaction, including any issues relating to contract formation, shall be resolved by arbitration in accordance with the rules of such Association. The decision and award determined by such arbitration shall be final and binding upon both parties. Seller represents and warrants to Buyer that Seller is a MERCHANT (as that term is used in the Uniform Commercial Code) with respect to the goods sold under this Contract.

2. **QUALITY:** Seller warrants to Buyer that all commodities sold and delivered hereunder will be of good, sound, dry and MERCHANTABLE quality in accordance with the specified grade and will comply with all applicable federal, state, and local laws and regulations and will not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, nor be a commodity which may not, under the provisions of Section 404 or 405 of the Act, be introduced into interstate commerce. SELLER ALSO WARRANTS THAT NO WATER HAS BEEN ADDED TO THE COMMODITIES TO BE DELIVERED HEREUNDER, AT ANY TIME OR FOR ANY PURPOSE, EXCEPT AS A CARRIER FOR INSECTICIDES APPLIED AT MANUFACTURERS RECOMMENDED LEVELS. THIS GUARANTEE MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES.

3. **WEIGHTS/GRADES TO GOVERN:** Unofficial unloaded weights and grades at place of delivery to govern, unless official weights and grades are specified on the face hereof.

4. **TITLE/RISK OF LOSS:** Title and risk of loss shall pass to Buyer only as said commodities or any part thereof is delivered to and accepted by Buyer, and then only as to so much of said commodities as is so delivered and accepted. Seller warrants that Seller has good and marketable title to the commodities and that the commodities will be delivered free and clear of all liens or other encumbrances.

5. **EXTENSIONS:** If Buyer's elevator or other storage facilities at delivery point are for any reason unable to receive said commodities on the delivery date or if Seller is unable to make delivery of said commodities for any reason on the delivery date, said date may be extended, either orally or in writing, at Buyer's option.

6. **CONTRACT ADVANCES:** If the cash value of this Contract falls below the level of any cash advances received by the Seller, at any time during the pricing period, the Buyer at its' discretion may request a portion of the advance to be returned.

7. **DEFAULT:** Seller agrees to pay to Buyer as minimum damages for default in delivery hereunder the difference between the specified Contract price and the highest market price at the place of delivery for the same kind and grade of the commodity on the day of default. In addition, Seller shall be strictly liable to Buyer for all direct, consequential, incidental and specific damages and all costs and fees incurred by Buyer as a result of Seller's breach of any of Seller's representations or warranties herein or the default by Seller in the performance of any of Seller's obligations hereunder. Acceptance of any delivery of commodities by Buyer after breach of the provisions of this Contract by Seller shall not waive any rights or remedies accruing to Buyer as a result of such prior breach or any subsequent breach.

8. **ALTERATION OF TERMS:** None of the terms and conditions contained in this Contract may be added to, modified, superseded or otherwise altered except with the written consent of an authorized representative of Buyer.

9. **SUCCESSORS:** This contract shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

10. **QUANTITY:** Seller warrants that the quantity sold is the bushel quantity specified on the front of the Contract and not the production of any specific acreage.

11. **BUYER IS AN EQUAL OPPORTUNITY EMPLOYER,** and is a government contractor. Therefore this contract is subject to the rules and regulations imposed upon contractors and subcontractors pursuant to 41 C.F.R. Chapter 60 and 61. Unless this contract is exempt by regulations issued by the Secretary of labor, there is incorporated herein by reference the following: (a) the Equal Employment Opportunity clause contained in 41 C.F.R. Section 60-1.4; (b) the Affirmative Action clauses contained in 41 C.F.R. Sections 60-250.3 and 61-250.10 both relating to the employment of Disabled Veterans and Veterans of the Vietnam Era; and (c) the Affirmative Action clause contained in 41 C.F.R. Section 60-741.5 relating to Equal Opportunity for Workers with Disabilities.

12. **CONTRACT LIQUIDATION:** Buyer expressly reserves the right to cause the liquidation of the Contract because of (a) the insolvency or financial condition of the Seller, (b) the commencement of a case under 11 U.S.C. §§101-151326, (c) the appointment of or taking of possession by a trustee in a case under 11 U.S.C. §§101-151326 or by a custodian before such commencement, (d) any and all other defaults of the terms and conditions specified herein either directly or by reference thereof.

13. **SET-OFF:** It is expressly agreed that this contract is subject to the Buyer's right to set off any mutual claims or debts against Seller, including any persons or entities affiliated with Seller, under or in connection with this Contract or any and all other commodity contracts and forward contracts between the parties as provided in 11 U.S.C. §362.

Mitchell Feeds Inc.

April 5, 2008

154 Hwy 75 S
PO Box 128
Hendrum MN ~~56044~~
56550

218-861-6262 (Elevator)
701-261-4125 (Cell)

PURCHASE CONTRACT NUMBER: MFI 037

Purchased From:

60% David Deslauriers 4915 Co Rd 2 Sherwood ND 58782	40% Marsha
---	---------------

Commodity and Grade: Nusun Sunflowers Moisture 10% / Test Weight 27 lbs bu

Quantity: 750 Acres Full Production / Price Protection

Price: \$0.30 /lb

Premium/Discount Scale: Moisture 2% dockage per 1% Moisture

Payment Terms: Payments Due 10 days after Delivery & Grading

Delivery Basis: Per Agreement with Farmer

Shipment Period: Fall 08 thru Spring 09

Weights to Govern: Destination

Inspection to Govern: NDGI Grades


Remarks:

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS

In respects not specified herein this contract is subject to Grain & Food Dealers National Association Trade Rules
Receipt of this contract by the Seller, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

Print
NAME _____

By _____
Customer Signature Date

Mitchell Feeds Inc.

By _____
Robert Mitchell

PURCHASE TERMS

1. **RULES:** The Rules of the Association listed on the face of this Contract shall govern. All disputes arising out of this transaction, including any issues relating to contract formation, shall be resolved by arbitration in accordance with the rules of such Association. The decision and award determined by such arbitration shall be final and binding upon both parties. Seller represents and warrants to Buyer that Seller is a MERCHANT (as that term is used in the Uniform Commercial Code) with respect to the goods sold under this Contract.

2. **QUALITY:** Seller warrants to Buyer that all commodities sold and delivered hereunder will be of good, sound, dry and MERCHANTABLE quality in accordance with the specified grade and will comply with all applicable federal, state, and local laws and regulations and will not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, nor be a commodity which may not, under the provisions of Section 404 or 405 of the Act, be introduced into interstate commerce. SELLER ALSO WARRANTS THAT NO WATER HAS BEEN ADDED TO THE COMMODITIES TO BE DELIVERED HEREUNDER, AT ANY TIME OR FOR ANY PURPOSE, EXCEPT AS A CARRIER FOR INSECTICIDES APPLIED AT MANUFACTURERS RECOMMENDED LEVELS. THIS GUARANTEE MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES.

3. **WEIGHTS/GRADES TO GOVERN:** Unofficial unloaded weights and grades at place of delivery to govern, unless official weights and grades are specified on the face hereof.

4. **TITLE/RISK OF LOSS:** Title and risk of loss shall pass to Buyer only as said commodities or any part thereof is delivered to and accepted by Buyer, and then only as to so much of said commodities as is so delivered and accepted. Seller warrants that Seller has good and marketable title to the commodities and that the commodities will be delivered free and clear of all liens or other encumbrances.

5. **EXTENSIONS:** If Buyer's elevator or other storage facilities at delivery point are for any reason unable to receive said commodities on the delivery date or if Seller is unable to make delivery of said commodities for any reason on the delivery date, said date may be extended, either orally or in writing, at Buyer's option.

6. **CONTRACT ADVANCES:** If the cash value of this Contract falls below the level of any cash advances received by the Seller, at any time during the pricing period, the Buyer at its' discretion may request a portion of the advance to be returned.

7. **DEFAULT:** Seller agrees to pay to Buyer as minimum damages for default in delivery hereunder the difference between the specified Contract price and the highest market price at the place of delivery for the same kind and grade of the commodity on the day of default. In addition, Seller shall be strictly liable to Buyer for all direct, consequential, incidental and specific damages and all costs and fees incurred by Buyer as a result of Seller's breach of any of Seller's representations or warranties herein or the default by Seller in the performance of any of Seller's obligations hereunder. Acceptance of any delivery of commodities by Buyer after breach of the provisions of this Contract by Seller shall not waive any rights or remedies accruing to Buyer as a result of such prior breach or any subsequent breach.

8. **ALTERATION OF TERMS:** None of the terms and conditions contained in this Contract may be added to, modified, superseded or otherwise altered except with the written consent of an authorized representative of Buyer.

9. **SUCCESSORS:** This contract shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

10. **QUANTITY:** Seller warrants that the quantity sold is the bushel quantity specified on the front of the Contract and not the production of any specific acreage.

11. **BUYER IS AN EQUAL OPPORTUNITY EMPLOYER,** and is a government contractor. Therefore this contract is subject to the rules and regulations imposed upon contractors and subcontractors pursuant to 41 C.F.R. Chapter 60 and 61. Unless this contract is exempt by regulations issued by the Secretary of labor, there is incorporated herein by reference the following: (a) the Equal Employment Opportunity clause contained in 41 C.F.R. Section 60-1.4; (b) the Affirmative Action clauses contained in 41 C.F.R. Sections 60-250.5 and 61-250.10 both relating to the employment of Disabled Veterans and Veterans of the Vietnam Era; and (c) the Affirmative Action clause contained in 41 C.F.R. Section 60-741.5 relating to Equal Opportunity for Workers with Disabilities.

12. **CONTRACT LIQUIDATION:** Buyer expressly reserves the right to cause the liquidation of the Contract because of (a) the insolvency or financial condition of the Seller, (b) the commencement of a case under 11 U.S.C. §§101-131326, (c) the appointment of or taking of possession by a trustee in a case under 11 U.S.C. §§101-151126 or by a custodian before such commencement, (d) any and all other defaults of the terms and conditions specified herein either directly or by reference thereof.

13. **SET-OFF:** It is expressly agreed that this contract is subject to the Buyer's right to set off any mutual claims or debts against Seller, including any persons or entities affiliated with Seller, under or in connection with this Contract or any and all other commodity contracts and forward contracts between the parties as provided in 11 U.S.C. §362.

Mitchell Feeds Inc.

March 24, 2008

154 Hwy 75 S
PO Box 128
Hendrum MN ~~56047~~
56550

218-861-6262 (Elevator)
701-261-4125 (Cell)

PURCHASE CONTRACT NUMBER: MFI 027

Purchased From:

Mike Schollmeyer
549 101st Ave SW
Dunn Center, ND 58626

Commodity and Grade: Con-Oils Moisture 10% / Test Weight 25 lbs bu

Quantity: 600 Acres Full Production

Price: \$0.265 /lbs

Premium/Discount Scale: Moisture 2% dockage per 1% Moisture

Payment Terms: Payments Due 10 days after Delivery & Grading

Delivery Basis: Per Agreement with Farmer

Shipment Period: Fall 08 thru Spring 09

Weights to Govern: Destination

Inspection to Govern: NDGI Grades

Remarks:

1
Sent 4-2-08

SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS

In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules.
Receipt of this contract by the Seller, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

Print
Name

By

Customer Signature

Date

Mitchell Feeds Inc.

By

Robert Mitchell

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Plaintiff,

v.

Mitchell Feeds, Inc. and Western Surety
Company,

Respondents,

Micheal Aasen, Donald Ackerson, Sheldon
Ackerson, Lana Anderson d/b/a Northland
Farms, B & D Farms, Inc., Busch Farms, Inc.,
David Deslauriers, Scott Lazorenko, Manna
Farms, Inc., Nathan Neameyer, Steven
Neameyer, Mitch Preskey, Paul Rohde, James
Routledge, Bart Savelkoul d/b/a Savelkoul
Farms, Mike Schollmeyer, David Steeves,
Robert Steeves, Paul Trout, Wurgler Farms,
and Kelly Wurgler,

and

American Federal Bank,

Intervenors.

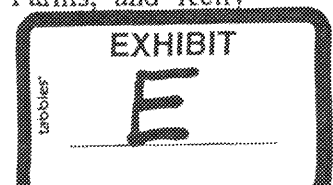
Civil No. 08-2011-CV-917

PSC Case No. GE-11-051

**NOTICE OF MOTION AND MOTION
FOR DECLARATORY JUDGMENT**

NOTICE OF MOTION

PLEASE TAKE NOTICE that Intervenors and Claimants Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B & D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, and Kelly



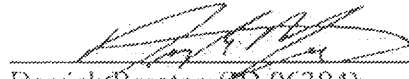
Wurgler ("Claimants") will bring their Motion for Declaratory Judgment pursuant to N.D.C.C. ch. 32-23 for a decision on the briefs filed by the parties to the above-captioned action unless oral argument is timely requested.

MOTION

Plaintiffs hereby move the Court for an order pursuant to N.D.C.C. ch. 32-23 declaring that the sunflower inventory and proceeds therefrom being held at Frandsen Bank and Trust located in Ada, MN, under order of the Minnesota District Court, County of Norman in Case No. 54-C-11-112 are part of the trust fund established by the North Dakota Public Service Commission pursuant to N.D.C.C. § 60-02.1-30(1), and that the statutory trust fund cannot be defeated or diminished by American Federal Bank's purported security interest as identified in American Federal Bank's Motion for Rule 24 Intervention and the Affidavit of Mark Vining attached thereto.

Signed this 7th day of March, 2012.

BAUMSTARK BRAATEN LAW PARTNERS
Attorneys for Intervenor Claimants
222 North 4th Street
Bismarck, ND 58501-4004
Phone: 701-221-2911
Fax: 701-221-5842



Derjick Braaten (ID 06394)
Lindsey Nieuwsma (ID 06857)

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Plaintiff,

v.

Mitchell Feeds, Inc. and Western Surety
Company,

Respondents,

Micheal Aasen, Donald Ackerson, Sheldon
Ackerson, Lana Anderson d/b/a Northland
Farms, B & D Farms, Inc., Busch Farms, Inc.,
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Farms, Mike Schollmeyer, David Steeves,
Robert Steeves, Paul Trout, Wurgler Farms,
and Kelly Wurgler,

and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-051

**MEMORANDUM IN SUPPORT OF
MOTION FOR DECLARATORY
JUDGMENT**

I. BACKGROUND

This action was initiated by the North Dakota Public Service Commission ("Commission" or "PSC"). On April 15, 2011, the Commission filed its Application for Appointment as Trustee and Motion to Join Surety as Party pursuant to N.D.C.C. ch. 60-02.1. This action is the result of the insolvency of Mitchell Feeds, Inc., which was operating in North Dakota as a roving grain buyer, and was licensed by the Commission pursuant to N.D.C.C. ch.

60-02.1. This motion is brought by Intervenors and Claimants Michael Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B & D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, and Kelly Wurgler ("Claimants"). Claimants have intervened in this action in order to protect their rights and interests, and are unpaid receipt holders of Mitchell Feeds, Inc ("Mitchell Feeds").

On June 23, 2011, American Federal Bank filed a Motion for Rule 24 Intervention, which was subsequently granted. American Federal Bank ("Bank") claims that it "has an interest relating to the property that the PSC is seeking to marshal, specifically, in so much as [the PSC] may seek to establish a priority claim in the grain for claimants." See Bank's Motion for Rule 24 Intervention of Right and Memorandum in Support (Docket No. 25). The Bank claims to have a first priority security interest in the property which is the subject of the Commission's action. Id.

The property referred to in the Bank's claim is approximately 2,000,000 lbs. of sunflower seeds purchased from Claimants in North Dakota by Mitchell Feeds, which was operating pursuant to a roving grain buyer license issued by the Commission. On information and belief, after purchase of the sunflowers from Claimants, some or all of the sunflowers were eventually transported to be stored at a facility in Hendrum, MN. See, e.g., Exhibit A, Supplemental Affidavit of David Steeves.

Under the contracts with Mitchell Feeds, payment for the sunflowers was to be made ten days after delivery and grading. See Exhibit B (Sampling of Contracts with Claimants). Most of the sunflowers were picked up or delivered in and around August, 2009. See Exhibit C (Sampling of Receipts from Claimants). Claimants are all individuals who have filed claims

with the Commission stating that they have not been paid for sunflowers sold to Mitchell Feeds. Thus, Mitchell Feeds was insolvent by sometime in September 2010. See N.D.C.C. § 60-02.1-28 (“A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased....”).

The Commission began receiving claims in February, 2011. See Affidavit of Susan K. Richter (Docket No. 2). In early April of 2011, a number of Claimants filed an action in the Minnesota District Court, County of Norman (“Minnesota action”), based on information that Mitchell Feeds and its agents intended to move and sell the sunflowers to unknown buyers. See Exhibit D (Complaint in Minnesota action and Affidavits filed in the same action). Claimants moved for and obtained a temporary restraining order and preliminary injunction preventing Mitchell Feeds from moving, transporting, secreting or selling any of the grain held in storage by Mitchell Feeds. See Exhibit E (Order from Norman County District Court in Minnesota action granting Claimant’s motion for a restraining order and preliminary injunction). Due to concerns over the declining quality of the sunflowers and its impact on the value of the grain, the parties agreed that the sunflowers should be liquidated, and the Minnesota court ordered that the sunflowers held in storage by Mitchell Feeds be sold in a commercially reasonable manner and that the proceeds be deposited in an interest bearing account. See Exhibit F (Order from Norman County District Court in Minnesota ordering sale of sunflowers held in storage).

Claimants are bringing this motion to request that this court enter judgment declaring that the sunflowers are part of the trust corpus established by N.D.C.C. § 60-02.1-30(1) and that the Bank’s lien does not defeat Claimants rights as beneficiaries of the statutorily created trust.

II. ARGUMENT

As beneficiaries of the statutory trust fund administered by the North Dakota Public Service Commission, Claimants are entitled to a judgment declaring that the sunflower inventory which were stored by Mitchell Feeds, and proceeds therefrom are part of the trust fund established by the North Dakota Public Service Commission pursuant to N.D.C.C. § 60-02.1-30(1), and that the statutory trust fund cannot be defeated or diminished by American Federal Bank's purported security interest as identified in American Federal Bank's Motion for Rule 24 Intervention and the Affidavit of Mark Vining attached thereto.

A. Declaratory Relief Is Appropriate.

Pursuant to N.D.C.C. § 32-23-01, "[a] court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Medcenter One, Inc. v. N.D. State Bd. of Pharmacy, 1997 ND 54, ¶ 10, 561 N.W.2d 634 ("Medcenter One"). "The declaratory judgment act, NDCC Ch. 32-23, is remedial and is to be liberally construed to settle uncertainty concerning rights, statuses, and other legal relations." Id. at ¶ 9.

1. The Bank Has Asserted a Claim Against the Trust Created by N.D.C.C. § 60-02.1-30 Contrary to Claimants' Rights.

The Bank's claims that it "has an interest relating to the property that the PSC is seeking to marshal, specifically, in so much as [the PSC] may seek to establish a priority claim in the grain for claimants." See Bank's Motion for Rule 24 Intervention of Right and Memorandum in Support (Docket No. 25). The property referenced by the Bank is the grain being held in storage by Mitchell Feeds. This grain is properly part of the trust fund established for Claimants pursuant to N.D.C.C. § 60-02.1-30. "The trust fund must consist of...[n]onwarehouse receipt grain of the insolvent licensee held in storage...." N.D.C.C. § 60-02.1-30(1) (emphasis added). Thus, there is a justiciable controversy meeting the first requirement as set forth in Medcenter One.

2. The Bank's Claim is Adverse to the Commission and to Claimants.

As stated above, the grain held in storage and the proceeds therefrom are properly part of the trust fund established by N.D.C.C. § 60-02.1-30. The Bank appears to be claiming that its security interest trumps these trust provisions. Therefore, the Bank's claim is adverse to Claimants as beneficiaries of that trust, which meets the second requirement of Medcenter One.

3. Claimants' Have a Legally Protectible Interest.

Claimants are all "noncredit-sale receiptholders" of Mitchell Feeds. N.D.C.C. § 60-02.1-01; N.D.C.C. § 60-02.1-30. Pursuant to N.D.C.C. § 60-02.1-30, the trust fund is established "for the benefit of noncredit-sale receiptholders and to pay the costs incurred by the commission in the administration of the insolvency." Therefore, Claimants have asserted a legally protectible interest and satisfy the third requirement of Medcenter One.

4. Claimants' Request Is Ripe for Determination.

In order for the Commission to complete its report as required by N.D.C.C. § 60-02.1-37, it is necessary to obtain a declaratory judgment that the grain held in storage by Mitchell Feeds and proceeds therefrom are properly a part of the trust fund created by N.D.C.C. § 60-02.1-30 and that a security interest held by the Bank does not defeat that trust. Claimants are seeking a declaratory judgment to this effect, which would also resolve the Bank's claim to the trust assets based on its security interest in the inventory of Mitchell Feeds and BJM Land, Inc. Therefore, this issue is ripe for judicial determination and meets the final requirement of Medcenter One.

B. The Grain Held in Storage by Mitchell Feeds and Proceeds Therefrom Are Part of the Trust Fund Established by N.D.C.C. § 60-02.1-30.

The plain language of N.D.C.C. § 60-02.1-30 establishes that the sunflower inventory are properly a part of the trust fund established for the benefit of Claimants.

Upon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receiptholders and to pay the costs incurred by the commission in the administration of the insolvency. The trust fund must consist of the following:

1. Nonwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.

N.D.C.C. § 60-02.1-30 (emphasis added). Mitchell Feeds is an insolvent licensee. See Affidavit of Susan K. Richter (Docket No. 2). The sunflower inventory is “[n]onwarehouse receipt grain of the insolvent licensee held in storage.”

C. American Federal Bank's Purported Lien Does Not Defeat the Trust Provisions of N.D.C.C. § 60-02.1-30.

Although the Bank does not disagree that the “PSC may be within its power to establish a trust on behalf of receipt holders of a roving grain buyer,” it nonetheless claims that those receipt

holders "do not have priority over secured creditors." See Exhibit G (Letter from Attorney for American Federal Bank Tracy Kennedy to North Dakota PSC). Based on its letter to the Commission, it appears that the Bank believes its security interest in the inventory of Mitchell Feeds defeats the trust provisions of N.D.C.C. § 60-02.1-30. The Bank is mistaken, and this issue has already been resolved in prior insolvency actions.

In its letter to the Commission, the Bank asserts that "[w]hile Chapter 60-02 gives receipt holders a priority claim over all secured creditors, it only applies to receipt holders of warehouses and warehousemen." See Exhibit G. The Bank's argument fails to recognize that N.D.C.C. § 60-02-25.1, relating to a receiptholder's lien, was simply a codification of an implied lien, which is and always has been a part of the trust provisions of the insolvency statutes.

In N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n ("Valley Farmers Bean"), the Supreme Court of North Dakota addressed a very similar situation. First, the Court recognized that under the laws related to warehousemen, a bank or other secured creditor could have no claim to grain held for storage.

The Banks have no claim to that portion of VFBA's inventory which represents beans held for storage. When a public warehouseman accepts grain for storage, "such delivery shall be a bailment and not a sale of the grain so delivered," and "[i]n no case shall the grain so stored be liable to seizure upon process of any court in any action against such bailee, except in an action by an owner of such warehouse receipt to enforce the terms thereof."

N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 539 (N.D. 1985). As the Court in Valley Farmers Bean noted, however: "A much closer question arises with regard to the competing interests of the Banks and the unpaid sellers of beans in the remaining inventory of VFBA." Id. at 539. It is crucial to recognize that this case was decided while

N.D.C.C. § 60-02-25.1 was being considered by North Dakota's Forty-ninth Legislative Assembly (and therefore was not enacted law at the time Valley Farmers Bean was decided).

The Court in Valley Farmers Bean relied upon *the insolvency statutes*, and the trust funds created by those statutes, to decide the issue of whether a secured creditor could defeat the trust provisions of North Dakota insolvency statutes. The Court specifically did *not* rely on N.D.C.C. § 60-02-25.1.

As the Court stated in Valley Farmers Bean, “[u]pon the insolvency of a grain warehouseman, a trust fund consisting of ‘[a]ll the grain in said warehouse’ is established for the redemption of outstanding receipts.... [B]ecause the purpose of the trust fund is to insure that farmers storing or selling grain in an insolvent warehouse receive payment for that grain to the fullest extent possible, assets of the insolvent warehouseman should be considered ‘grain’ includable in the trust fund ‘whenever reasonable.’” Valley Farmers Bean, 365 N.W.2d at 539. Significantly, the language relied on here is that found at N.D.C.C. § 60-04-03.1. The full language of this provision is as follows:

Upon the insolvency of any warehouseman, a trust fund shall be established for the benefit of noncredit-sale receipt holders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of this chapter. The trust fund must consist of the following:

1. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.

N.D.C.C. § 60-04-03.1. Because the Court was relying on this language, and doing so *prior* to enactment of N.D.C.C. § 60-02-25.1, it is important to compare this language to the trust provisions contained in the insolvency provisions for roving grain buyers. Those provisions are as follows:

Upon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receipt holders and to

pay the costs incurred by the commission in the administration of the insolvency. The trust fund must consist of the following:

1. Nonwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.

N.D.C.C. § 60-02.1-30. The reasoning of the court in Valley Farmers Bean was based upon the trust provisions of the laws pertinent to grain warehousemen. The trust provisions pertinent to roving grain buyers are almost identical, and the purpose of these provisions *is* the same: "The law was intended for the benefit of the claimants, and must be construed with sufficient liberality to effectuate its purpose without doing injury to those who are liable." State v. Hoover Grain Co., 248 N.W. 275, 278 (N.D. 1933).

As referenced in Valley Farmers Bean, the Fifth Circuit Court of Appeals analyzed a similar situation in In re Gotham Provision Co., Inc., 669 F.2d 1000 (5th Cir. 1982) ("Gotham"). The Gotham case related to the provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 *et seq.*

In [the Gotham case], a bank entered into a financing arrangement with Gotham whereby the bank would advance funds and take as collateral a security interest in Gotham's inventories, accounts receivable, and proceeds from the sale of meat. Gotham filed for bankruptcy, leaving a substantial loan balance due to the bank. Several livestock producers who had made cash sales to Gotham had not been paid. An escrow fund was created for the collection of Gotham's accounts receivable. The livestock producers claimed that their interest in the escrow fund was superior to that of the bank.

N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 539-40 (N.D. 1985) (citing Gotham). The court in Gotham noted that "[t]he second major argument advanced by the Bank is that even if the appellees are cash sellers, the trust provisions of the Packers and Stockyards Act should not be construed to give the cash sellers a superior interest in Gotham's

accounts receivable as against the Bank.” Gotham, 669 F.2d at 1008. The Gotham court found the statements of the principal sponsor of the 1976 amendments to the Packers and Stockyards Act very elucidating. Id. at 1009. Rep. Thone, during the House debates, explained:

What are the arguments for the trust? First we have the simple answer of equitable treatment. How can one argue that a packer should be able to commit property as collateral for a loan, in this particular case livestock, for which he has not paid and does not actually own, to a third party, and then allow the third party to stand ahead of the producers if the packer fails?

Again some would argue that by having the bond and the prompt pay and the solvency test, why do we need this trust provision? The answer is that the trust provision will help prevent a packer from giving a priority to subsequent secured creditors, over the livestock producer who has not been paid. The trust is the only provision here that gives any help to the farmer.

Gotham, 669 F.2d at 1009 (citing 122 Cong.Rec. 12864 (May 6, 1976)). The Gotham court agreed with Rep. Thone, stating,

we believe that if a lender could defeat the s 206 trust merely by taking a security interest in inventories and receivables, the clear intention of Congress would be thwarted and the trust provision of the Act would be reduced to a nullity.... Where the packer has given a lender a security interest in inventories or receivables that are subject to the s 206 trust, the unpaid cash sellers have priority over those assets and may recover the proceeds of those receivables to the extent of the outstanding balance on the cash sales. In this case, the appellees are entitled to the collections of the receivables held in escrow, and the Bank must return to the appellees from the payments on the accounts receivable....

In re Gotham Provision Co., Inc., 669 F.2d 1000, 1009-10 (5th Cir. 1982).

It is crucial to note that the court in Gotham had no need to resort to any explicit statutorily created liens to rule as it did. The fact the Congress had created a trust with the intent of protecting cash sellers from the insolvency of the facilities that bought the producers’ product was sufficient for the court to find that a lender taking a security interest in the inventory of such a facility cannot defeat the trust by claiming a priority interest.

The Supreme Court of North Dakota agreed with the analysis in Gotham, stating “we do not believe the Legislature intended that the trust provisions of § 60-04-02, N.D.C.C., could be defeated by a lender taking a security interest in an insolvent grain warehouseman's inventory. The purpose of Chapter 60-04, N.D.C.C., is to aid receipt holders in redeeming their receipts for as close to their full value as possible. Construing this legislation ‘with a view to effecting its objects and to promoting justice’ [§ 1-02-01, N.D.C.C.], we conclude that the valid receipt holders had priority over the Banks to VFBA's inventory.” Valley Farmers Bean, 365 N.W.2d 528, 540 (N.D. 1985).

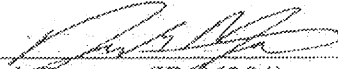
Again, the Court was referring not to the later enacted explicit lien found at N.D.C.C. § 60-02-25.1, but to *the trust provisions found in the insolvency statutes* at N.D.C.C. § 60-04-03.1 and N.D.C.C. § 60-02.1-30. The trust provisions are virtually the same, so the analysis of the Court in Valley Farmers Bean is equally applicable to the trust provisions for roving grain buyers. In other words, the presence of a provision granting an explicit lien in N.D.C.C. § 60-02-25.1 does nothing to negate the fact that the Legislature set up a trust for insolvent grain buyers, and that the claims of noncredit-sale receipt holders cannot be thwarted by a lender taking a security interest in the grain inventory being held in storage by an insolvent licensee.

III. CONCLUSION

For the reasons discussed above, Claimants respectfully request that this court enter judgment declaring that the sunflowers are part of the trust corpus established by N.D.C.C. § 60-02.1-30(1) and that the Bank's lien does not defeat Claimants rights as beneficiaries of the statutorily created trust.

Signed this 7th day of March, 2012.

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Attorneys for Intervenor Claimants
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