

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc. and Western Surety
Company

Respondents,

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 Rhode, 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.

PSC Case No. GE-11-51

CIVIL NO. 08-2011-CV-00917

**PUBLIC SERVICE COMMISSION
RESPONSE TO INTERVENOR
AMERICAN FEDERAL BANK'S
MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL**

**PUBLIC SERVICE COMMISSION RESPONSE TO INTERVENOR AMERICAN
FEDERAL BANK'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Public Service Commission (Commission), as Trustee, respectfully opposes
Intervenor American Federal Bank's Motion for Summary Judgment for Dismissal of the

Intervenor Farmer's (Farmers) request for declaratory judgment. American Federal Bank (the Bank) should not be permitted to profit, at the expense of North Dakota grain producers, by the misdoings of an insolvent roving grain buyer.

This insolvency proceeding already has a convoluted history, and neither the Commission nor the Court is yet at a point at which the validity of actual producer claims for amounts due can be assessed. The Commission was appointed Trustee on May 10, 2011. Both before and after that appointment, other parties to the insolvency have been litigating related claims in Minnesota and North Dakota. One of those claims is currently before the Court.

The Bank asserts several reasons, both procedural and substantive, why it should be granted summary judgment dismissing with prejudice the Farmers' request for declaratory judgment. The Bank asserts that the Farmers have no standing, are barred by the doctrines of *res judicata* and collateral estoppel, have failed to exhaust their administrative remedies, and that it is the Bank, not the trust or the Farmers, who has first right to the proceeds of the liquidated grain assets of the insolvent grain buyer.

The Public Service Commission asserts that the Bank's arguments fail. There may exist sufficient questions of material fact such that summary judgment is improper. The Commission as Trustee is not a party to the Minnesota action and is not in privity with the Farmers. Consequently, the Bank's *res judicata* and collateral estoppel arguments cannot hold. The insolvency proceeding is not an administrative proceeding and the Farmers' do not need to exhaust any administrative remedies prior to making their claim for declaratory judgment. The Commission's position in the instant case is not inconsistent with Commission precedent in other insolvencies. Finally, and most importantly, the grain at issue, or the proceeds from the sale of that grain, should be considered a trust asset in the insolvency for the benefit of valid claimants.

While there are numerous issues before the Court at this time, the most important one is whether North Dakota grain farmers will be protected, as intended by North Dakota law, or left 'holding the bag' while the lender profits and the insolvent borrower avoids consequences. To grant the Bank's motion, the Court must conclude that the insolvent licensee and its lender can defeat statutory trust provisions simply by the licensee moving unpaid grain out of state.

II. UNDISPUTED MATERIAL FACTS and PENDING FACTUAL QUESTIONS

The Commission does not dispute the facts stated as undisputed at pages three through five in the Bank's brief in support of its motion. The Public Service Commission does dispute the inference the Bank claims should be drawn from those facts, namely that the Bank has a claim to the proceeds of the grain assets of Mitchell Feeds, Inc. superior to any claim of the Commission as Trustee.

Likewise, the Commission does not dispute the material facts asserted in the Farmers' response to the Bank's motion, set out on pages two and three of that response. However, the Commission is still in the investigation stage in administering this insolvency. The Commission recognizes and wishes to point out to the Court that there may be questions of material fact yet to be determined, either through the Commission's insolvency investigation or through discovery in this civil proceeding, that could impact the Bank's right to summary judgment of dismissal.

As pointed out in the Affidavit of Susan K. Richter, attached as Exhibit A, the Commission still needs to obtain additional information regarding the specific conditions and provisions of claimants' sales, and the time and method of the claimants' delivery of grain and the licensee's transportation of the grain out of state. This information could affect when the lien arose, its effectiveness, and the extent of the lien protection for each individual claimant.

The Commission wishes to point out several additional undisputed facts, as stated in the Affidavit of Susan Richter, Licensing Director, attached as Exhibit A. Mitchell Feeds, Inc.'s total bond under its roving grain buyer license is \$70,000. Claims filed to date total \$1,549,347. No determination has yet been made by the Commission regarding total valid claims.

Further, Mitchell Feeds, Inc. became licensed effective October 28, 2009. The Commission has received filed claims for grain deliveries made prior to October 28, 2009. The filed claims for grain deliveries made prior to October 28, 2009 total \$716,048.

According to claims filed with the Commission, Mitchell Feeds, Inc. took delivery of some grain at Hendrum, MN. Mitchell Feeds, Inc. was not licensed as a grain warehouse in Minnesota at the relevant time of these deliveries. *Id.* If Mitchell Feeds, Inc. had been licensed as a grain warehouse in Minnesota under Minn Stat §223.17 (2009), Mitchell Feeds, Inc. would have had an additional bond available to pay claimants. In addition, while we have not been able to verify this, we have been told that depending on the circumstances had Mitchell Feeds, Inc. been licensed in Minnesota, the grain in the Hendrum facility may have been available to share with claimants.

Many of these and possibly other factual determinations will be addressed by the Commission once the investigation is complete, as necessary and appropriate, in the Commission's Report and Recommendation of Trustee. As further discussed below, it would be helpful to the Commission to have a ruling on the question of law raised by the Farmers' request for declaratory judgment prior to the Commission preparing its Report and Recommendation. If we have such a ruling in this proceeding, the Commission can apply the ruling to the facts that the Commission obtains. If such a ruling is available to the Commission, the Commission's Report and Recommendation will be more conclusive. If the legal question on lien priority is not

resolved prior to the preparation of the Report and Recommendation, the Commission will likely produce two alternative Reports and Recommendations, one distributing both the grain assets and the bond and one distributing only the bond. Alternatively, the Commission will be put in the position of having to make a legal interpretation that should be made by a North Dakota Court.

III. LAW and ARGUMENT

To be entitled to summary judgment, the Bank must show that, when viewing the evidence in the light most favorable to the party against whom the summary judgment is sought, there is no genuine issue of material fact and the Bank is entitled to judgment as a matter of law. *Brown v. North Dakota State University*, 372 N.W.2d 879 (N.D. 1985).

The Bank is not entitled to summary judgment because there may exist genuine issues of material fact. Because the Commission's investigation is not yet complete, there may be material facts unknown today that may be necessary to a determination.

Further, the Bank is not entitled to summary judgment as a matter of law.

In considering the voluminous filings, arguments, interpretations and inferences in this case to date, the Commission asks the Court to focus on a few key points. Of the three stakeholders involved here: producers, borrower and lender, it is the producers who should be protected most under existing grain insolvency laws, not least. It is protection of the producers in situations just as we face in this case that is the primary purpose of the North Dakota grain licensing and insolvency laws. *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator Company*, 486 N.W. 2d 860 (N.D. 1992) and cases cited therein.

In *Woods*, the Court stated, quoting from *North Dakota Public Serv. Comm'n v. Central States Grain, Inc.*, 371 N.W.2d 767, 779 (N.D.1985), "The overriding purpose of requiring warehouseman's bonds is to protect all persons who sell or deliver grain to a warehouseman." *Woods*, 486 N.W. 2d 860, 864, (N.D. 1992) (other citations omitted) and "[T]he trust fund exists for the benefit of all unpaid sellers of grain." *Id.* Against this backdrop, the Commission asks the Court to carefully consider the assertions of the parties on the facts and law.

The proceeds from the sale of the sunflowers stored in Hendrum, Minnesota are part of the trust assets in the Mitchell Feeds, Inc. insolvency in North Dakota and should accrue to the benefit of receipt holders and not to the benefit of the Bank.

The proceeds from the sale of the sunflowers stored in Hendrum, Minnesota are part of the trust assets in the Mitchell Feeds insolvency in North Dakota. As such, under North Dakota law they are to accrue to the benefit of receipt holders and not to the benefit of the Bank.

To better understand the basis for this position, some discussion of the evolution of the statutes may be helpful. Mitchell Feeds, Inc., the insolvent licensee, was a roving grain buyer, licensed under N.D.C.C. chapter 60-02.1. N.D.C.C. Title 60 governs the grain buying and storage business in North Dakota, providing for the licensing of grain warehouses in N.D.C.C. chapter 60-02, grain buyers and facility based grain buyers in N.D.C.C. chapter 60-02.1, and hay buyers in N.D.C.C. chapter 60-03. Insolvency provisions for warehouses are found in N.D.C.C. chapter 60-04, while the insolvency provisions for facility-based grain buyers and roving grain buyers are in N.D.C.C. chapter 60-02.1 and those for roving hay buyers are in N.D.C.C. chapter 60-03. Prior to 1999 when chapter 60-02.1 was enacted, roving grain buyers were regulated under N.D.C.C. chapter 60-03, along with roving hay buyers.

The insolvency provisions in all three areas of regulation include provisions for a trust fund, and in all three, the grain or hay of the insolvent licensee is to accrue to the benefit of

unpaid producers. The language below applies to insolvencies for roving grain buyers, but virtually the same language can be found in N.D.C.C. Sections 60-04-03.1 for warehouses and 60-03-14 for roving hay buyers.

60-02.1-30. Trust fund established.

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.

As the Court can clearly see from the plain language of North Dakota law, a licensee's hay or grain, or the proceeds from conversion of that hay or grain, are part of the trust assets in the event of insolvency.

This conclusion is supported by legislative history and previous statutory provisions applicable to roving grain buyers. Between 1989 and 1999, chapter 60-03 was applicable to both hay buyers and grain buyers, not just hay buyers. In 1999, roving grain buyer regulation was moved from the grain and hay buyers chapter to a new chapter for roving grain buyers and facility based grain buyers (grain buyers with facilities licensed by the federal government, see definition of facility-based grain buyer in N.C.C.C. section 60-02.1-01(4)). 1999 N.D. Sess. Laws Ch. 534.

Prior to 1989, and when roving grain buyers were still regulated with roving hay buyers, the process for handling buyer defaults in N.D.C.C. chapter 60-03 was very different than it is today. Prior to 1989, an unpaid producer who sold grain to a roving grain buyer, and who wanted to make a claim for payment, had to bring an administrative complaint before the Commission. After hearing, upon due notice, the Commission could order the licensee or the bonding company (or both) to pay the determined loss or damages. The process could be

expanded by the Commission to include notice to other potential claimants. In addition, upon payment, the Commission had the authority to exonerate the payor from further liability. See copy of repealed N.D.C.C. section 60-03-09.1, attached as Exhibit B, H.B. 1502 (1989), Legislative History of House Bill 1502, 1989, and 1989 N.D. Sess. Laws Ch.743.

In 1989, the legislature revised the scheme for dealing with defaulting roving grain and hay buyers from an administrative complaint procedure before the Commission, to an insolvency process in district court. *Id.* Testimony of the Public Service Commission during the legislative hearing on 1989 House Bill 1502 states that the change was proposed in order to align the process for dealing with insolvent roving grain and hay buyers with that applicable to insolvent warehouses. H.B. 1502 (1989) *supra.*, Testimony of Dale Sandstrom for the Public Service Commission, February 3, 1989, before the House Agriculture Committee.

This change is extremely important to an analysis of the current insolvency laws for roving grain buyers, and to an analysis of the Bank's assertion that any claim for declaratory judgment is barred for failure to exhaust administrative remedies (discussed further below). This statutory change in how roving buyer insolvencies are handled supports the Farmers' position that the grain at issue in this case is an asset of the trust. As the legislative testimony discloses, the change from an administrative complaint procedure to a civil insolvency procedure was intended to align the roving grain buyer insolvency process with that of warehouses. The trust corpus provisions of the relevant statutes are consistent with that purpose, as they are alike.

One additional inquiry into legislative history is needed. Prior to 1985, North Dakota law did not specifically provide for a first lien in favor of producers, but one was implied as necessary protection for producers in *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528 (N.D. 1985). In the 1985 legislative session, new

language in the form of N.D.C.C. section 60-02-25.1 was enacted in substantially the same form as it is today:

60-02-25.1. Receiptholder's lien.

Grain contained in a warehouse, including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receiptholders storing, selling, or depositing grain in the warehouse. The lien created under this section shall be preferred to any lien or security interest in favor of any creditor of the warehouseman regardless of the time when the creditor's lien or security interest attached to the grain. Notice of the lien created under this section need not be filed in order to perfect the lien. The lien created by this section is discharged as to grain sold by the warehouseman to a buyer in the ordinary course of business. Such sale does not discharge the lien in favor of an individual receiptholder in the remaining grain in the warehouse.

In essence, the legislature enacted a statute that codified what the Court implied in *Valley Bean*. 1985 N.D. Sess. Laws Ch. 661. What is important in the instant case, however, is the logic the Court used in *Valley Bean* to reach its conclusion. The Court in *Valley Bean* agreed with *First State Bank of Miami v. Gotham Provision Co., Inc.*, 459 U.S. 858, 103 S.Ct. 129, 74 L.Ed.2d 111 (1982), stating:

“Likewise, 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. *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528, 540 (N.D. 1985)

In *Valley Bean*, the Court implied the receiptholder’s lien in order to give effect to clear legislative intent that in grain insolvencies producers be protected before other creditors.

Just as the North Dakota Supreme Court implied a superior lien in favor of producers in *Valley Bean* in order to fulfill the purpose of the grain insolvency laws, this Court should imply the same superior producer lien in the roving grain buyer insolvency laws. The holding in *Valley*

Bean provides sufficient basis for this Court to do so. The holding in *Valley Bean* fully supports the Farmers' position and defeats the Bank's argument.

In 1985, when the receiptholder's lien was enacted for warehouses, there was no statutory proceeding for roving grain or hay buyers similar to a warehouse insolvency proceeding, so there was no reason for the legislature to enact a statute similar to the receiptholder's lien statute for roving grain or hay buyers. Instead, the complaint procedure referenced above existed in N.D.C.C. section 60-03-09.1 authorizing a producer who experienced a default to file a complaint with the Commission, and authorizing the Commission, after due notice to the licensee and the bonding company, to order the licensee, the bonding company, or both to pay the producer.

As noted above, this section was repealed in 1989. 1989 N.D. Sess. Laws Ch. 743. The Commission believes that these laws, considered together with relevant case law and the clear purpose of North Dakota's grain buying and storage regulatory scheme, support the Court finding an implied first lien on grain assets in favor of producers who sell to a roving grain buyer. The Bank's motion for summary judgment should be denied as a matter of law.

The most important reason why the Bank is not entitled to summary judgment of dismissal is the legal point just discussed. Granting the Bank's motion would unjustifiably negate the overriding purpose of the state's grain regulatory scheme. That scheme is intended to first protect producers, not warehousemen, grain buyers, or banks. Virtually all the recent North Dakota Supreme Court cases interpreting our grain warehouse insolvency laws confirm this basic premise. *See generally Public Service Commission v. Minnesota Grain, Inc.*, 422 N.W. 2d 405 (N.D. 2008), *Public Service Commission v. Wimbledon Grain Company*, 663 N.W. 2d 186 (N.D. 2003), *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator*

Company, 486 NW 2d 860 (N.D. 1992), *North Dakota Public Service Commission v. Jamestown Farmers Elevator, Inc.* 422 N.W. 2d 405 (N.D. 1988), *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528 (N.D. 1985) and *North Dakota Public Service Commission v. Central States Grain, Inc.* 371 N.W. 2d 767 (N.D. 1985), and cases cited therein.

In *Woods*, the court stated, quoting from *Central States Grain* “. . . We believe it to be beyond dispute that one of a warehouseman’s duties under the law is to pay for the grain that it has purchased.” *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator Company*, 486 NW 2d 860, 864 (N.D. 1992) (citations omitted). Also see *Minnesota Grain*, at 767.

In *Wimbledon*, the Court was tasked with interpreting ambiguous language in the grain insolvency statutes. In doing so, the Court stated “The law relating to grain insolvencies was intended for the benefit of claimants, and must be construed with sufficient liberality to effectuate its purpose of settling the legitimate demands of owners of grain delivered to an insolvent elevator without doing injury to those who are liable.” *Public Service Commission v. Wimbledon Grain Company*, 663 N.W. 2d 186, 193 (N.D. 2003) (citations omitted).

We recognize that these cited cases all involve warehouse insolvencies, and not roving grain buyer insolvencies. Regardless, the purpose of the grain warehouse laws and the roving grain buyer laws is the same, and we can gain substantial guidance from these cases interpreting and applying the warehouse insolvency laws. Further, the roving grain buyer insolvency process was rewritten in 1989 to parallel the warehouse insolvency process. H.B. 1502 (1989), Testimony of Dale Sandstrom, *supra*. This case guidance, together with the legislative evolution

of the grain buyer laws, lead to the conclusion that the grain, or the proceeds of the grain, which the insolvent licensee moved to Minnesota and signed over to the Bank are trust assets.

Public Service Commission precedent in Sustainable Systems, LLC dba Montola and PSC v. Minnesota Grain provide no basis for the Bank's position.

The Bank argues that a recent insolvency in which the Commission acted as trustee, *Public Service Commission v. Sustainable Systems, LLC dba Montola*, Civ. No. 08-09-C-1034 (Burleigh County, ND 2009), supports the Bank's argument that the grain at issue is not an asset of the trust. The Bank claims that the situation facing the Commission in the *Sustainable Systems* case is "exactly the same situation" as the Commission is facing in the instant case. American Federal Bank's Brief in Support of Motion for Summary Judgment of Dismissal, 21.

This assertion is just plain wrong, as the two cases are very different from each other and the *Sustainable Systems, LLC dba Montola* insolvency proceeding provides no support for the Bank's position. Most importantly, the grain purchased by Sustainable Systems, LLC dba Montola as a roving grain buyer in North Dakota was held in a licensed grain warehouse in Montana and subsequently liquidated, along with other assets, for the benefit of producers by Montana regulators. Sustainable Systems, LLC dba Montola did not simply buy grain in North Dakota and then transport it over state lines in an attempt to defeat producers' claims.

Sustainable Systems, LLC dba Montola operated as a roving grain buyer in North Dakota and also as a licensed grain warehouse in Culbertson, Montana. Sustainable Systems, LLC was unable to pay growers who delivered safflower (grain) to the Culbertson, Montana facility after harvest in 2008. The Montana Department of Agriculture liquidated the grain related assets on hand at Sustainable System, LLC's grain warehouse in Culbertson, Montana and distributed the proceeds to all claimants with valid claims, including North Dakota farmers. Regulators in

North Dakota and Montana worked closely together to ensure that if total assets were sufficient, growers would be paid 100%, from assets and each respective bond. Each valid North Dakota claimant received 77% of his or her valid claim from the Montana liquidation proceeds and 23% from the distribution of the North Dakota bond proceeds. Each state individually handled payments to producers from each state's respective bond proceeds. See Affidavit of Susan K. Richter, attached as Exhibit A and Report and Recommendation of Trustee, attached as Exhibit C.

As grain licensing laws intend in an insolvency, in the *Sustainable Systems* insolvency the proceeds of the grain that was in the warehouse in Montana did accrue to the benefit of unpaid producers, including North Dakota producers. In the instant case, rather than being a situation that is 'exactly the same' as *Sustainable Systems*, the situation is very different. In the instant case, at least as asserted by the Bank, the proceeds of the grain in Mitchell's unlicensed Minnesota warehouse should accrue to the benefit of the bank, not the producers. Nothing in *Sustainable Systems* supports the inference urged by the Bank that the grain and grain proceeds at issue in the instant case cannot be a trust asset.

Similarly, *Public Service Commission v. Minnesota Grain, Inc.*, 422 N.W. 2d 405 (N.D. 2008) does not support the Bank's inference. In *Minnesota Grain*, the Commission correctly concluded that the claims of North Dakota farmers for grain delivered to a Minnesota warehouse should be rejected and not considered payable from the trust assets. *Minnesota Grain, Inc.* operated two facilities, one at Rhame, ND and one at East Grand Forks, MN. In the subsequent insolvency proceeding, the Commission rejected the claims of the farmers who sold and delivered grain to the East Grand Forks location, and specified that such farmers had to submit

their claims to the Minnesota regulators. The District Court agreed with the Commission and the North Dakota Supreme Court affirmed. *Id.*

Rather than supporting the Bank's inference, Minnesota Grain supports the Farmers. In both *Sustainable Systems* and *Minnesota Grain* the insolvent licensee operated warehouse facilities licensed in other states. Had Mitchell Feeds, Inc. also been licensed in Minnesota, at least another bond, and perhaps the grain assets, would be available to help satisfy the claims of unpaid producers who delivered grain to Minnesota.

The Farmers are entitled to a declaratory judgment

While the Commission processes insolvency cases diligently and hopes to complete them without undue delay, the Commission has no strong objection to the Farmers' request that the Court hold this matter in abeyance until the appeal is complete in Minnesota. We believe that one way or the other, all of these issues will need to be resolved before any final disposition of trust assets can occur. However, a North Dakota court is the appropriate tribunal to determine what is and is not an asset of a trust in a North Dakota insolvency proceeding.

If declaratory judgment is otherwise appropriate at this time, the Commission supports the Farmers' request for a declaratory determination that the Bank's lien is inferior to the rights of Farmers, to the extent that Farmers are entitled to participate in the trust assets. The Farmers' declaratory judgment request is not defeated by any of the Bank's assertions that the question is collaterally estopped, *res judicata* or subject to a requirement that the Farmers exhaust administrative remedies. Consequently, the Bank is not entitled to a summary judgment of dismissal on any of these grounds.

Declaratory judgment is appropriate

The Farmers have met their burden justifying a declaratory judgment in their favor, as shown by their initial pleading and their response to the Bank's motion. To be entitled to a declaratory judgment, Farmers need to show a justiciable controversy between persons whose interests are adverse. Farmers must have a legal interest in the controversy, and the issue must be ripe for judicial determination. *In Interest of McMullen*, 470 N.W.2d 196, 198 (N.D.1991) citing *Iverson v. Tweeden*, 48 N.W.2d 367 (1951). The Court in *McMullen* also states "The declaratory judgment act is remedial and is to be liberally construed and administered." *McMullen*, 198. citing N.D.C.C. section 32-23-12 and *Iverson*. Further, "The purpose of declaratory relief under N.D.C.C. Ch. 32-23, is to settle uncertainties about rights, status, and other legal relations in an underlying justiciable controversy." *Id.*

As previously noted, the Commission would benefit from the Court making the declaratory determination. If the legal question raised by Farmers is settled, the Commission can apply that legal determination to the facts gathered in the investigation stage of the proceeding and prepare the Report and Recommendation accordingly. Certainly the case at bar qualifies as one of "uncertainties about rights, status and other legal relations in an underlying justiciable controversy." *Id.*

More importantly, however, a declaratory determination would promote judicial efficiency and economy. If Farmers' declaratory judgment request is dismissed, as urged by the Bank, the parties will be right back here following the filing of the Commission's Report and Recommendation of Trustee to litigate this issue all over again. If the declaratory judgment request is granted, the Commission can apply that determination to the facts as it makes its Report and Recommendation.

However, if the Court determines that it is more appropriate to hold the matter in abeyance and wait for the conclusion of the Minnesota case before deciding the question, as suggested by the Farmers in their reply to the Bank's motion, the Commission does not object to that course of action. The Court should know, however, that in that case, the Commission may likewise wait to complete and file its Report and Recommendation.

The Farmers' declaratory judgment request is not *res judicata* or subject to collateral estoppel

The Commission agrees with the Farmer's response that the Bank has not satisfied the tests necessary to justify barring the Farmers' claim on *res judicata* or collateral estoppel grounds. Specifically as concerns the Commission, we emphasize that the Commission was not a party to the Minnesota litigation, and the Farmers and the Commission are not in privity. The Commission, as Trustee, acts on behalf of the beneficiaries of the trust. To date, the Commission has not yet determined who those beneficiaries are. The Commission's determination on this question will be made in its Report and Recommendation of Trustee.

Even though this determination is not yet made, the Commission has reason to believe that the Farmers and the trust beneficiaries will not necessarily be the same. First of all, the Commission has claims filed by producers who are not part of the Farmers group. Affidavit of Susan K. Richter, Exhibit A. Secondly, we understand that the Intervenor Farmers group includes producers who sold grain to Mitchell Feeds, Inc. prior to the time Mitchell Feeds, Inc. became licensed as a roving grain buyer, and therefore prior to the time the bond was effective. We stress that the Commission has not yet taken a position on this issue in the instant case because the Commission is not yet ready to make its Report and Recommendation. However, under past Commission precedent, the Commission has recommended that a producer who sold

grain to a licensee prior to the effective date of the license and bond was not a valid claimant in an insolvency and should not share in the trust assets.

Either of these two facts is sufficient basis to show the Farmers and the Commission are not in privity. "Privity exists if a person is so identified in interest with another that he represents the same legal right." *Ungar v. North Dakota State University*, 721 N.W.2d 16, 21 (N.D. 2006). When the members of the two groups, the trust beneficiaries and the Intervenor Farmers are so different, and may ultimately be adjudicated as having vastly different rights, or no rights, in the trust assets, it cannot be said that one of the parties represents the same legal right as the other.

The Farmers rightfully point out the Bank's contradictory arguments: first that the Farmers were asserting the Commission's rights in the Minnesota proceeding (an argument for privity); then that the Farmers cannot assert claims that only the Trustee can assert (an argument for no privity); then that the Farmers' claim for declaratory relief must meet the definition of suits the Trustee is authorized to bring (an argument for privity again).

The Court should not be confused by these contradictory assertions. The Commission and the Farmers are not in privity. The Commission is not a party to the Minnesota proceeding. The Commission is administering the insolvency of Mitchell Feeds, Inc. before a North Dakota tribunal, as authorized by North Dakota law. One of the obligations of the Trustee and the Court in administering a roving grain buyer insolvency in North Dakota is to determine the trust assets available for distribution to claimants. N.D.C.C. chapter 60-02.1.

The Bank makes much of the fact that the Commission is not a party to the Minnesota action. This again, is an attempt to distract the Court from the real issues at hand. The North Dakota Public Service Commission is not subject to the jurisdiction of the State of Minnesota.

State court rules such as N.D.R.Civ.P.4(b) and Minn.R.Civ.P § 543.19 set forth the necessary requirements in order for a state to assert personal jurisdiction over a defendant from another state. In order for a court to assert personal jurisdiction, the defendant must have sufficient minimal contacts with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). To satisfy the minimal contact threshold, a defendant must voluntarily reach into another state and “purposefully avail” itself of the benefits and protections of that state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The right to declaratory judgment is not prohibited by the principles of exhaustion of administrative remedies or primary jurisdiction.

The Bank argues that one basis for granting their motion for summary judgment to dismiss the Farmers’ request for declaratory judgment is that the Farmers failed to first exhaust their administrative remedies. This argument fails because the Farmers have no administrative remedies to exhaust. The insolvency proceeding is a civil proceeding not an administrative one. The litigants’ due process rights in this insolvency proceeding exist in the judicial branch of North Dakota government, not the executive branch. Any appeal of the insolvency decision would be an appeal of a civil decision, not of an administrative decision.

The doctrine requiring a litigant to exhaust all administrative remedies prior to litigation is grounded in the doctrine of the separation of powers. *Brown v. State Board of Higher Education*, 711 N.W.2d 194 (N.D. 2006) citing *Tracy v. Central Cass Public School District*, 574 N.W.2d 781 (N.D. 1988). The doctrine presupposes the existence of a remedy for the alleged wrong in the administrative jurisdiction. The Commission draws the Court’s attention to the term *remedy*. The doctrine is applied when the remedy for a wrong lies in an executive branch administrative proceeding rather than a judicial branch proceeding, when the administrative agency can do something that will fix the problem. When there is mere activity or

interest, or even investigation, in the administrative branch, without a remedy available administratively, the doctrine does not apply. *Id.*

Also, for the doctrine to apply, the administrative remedy must provide adequate relief and an opportunity to appeal must be available in the proceeding. *Id.* In the case at bar, there is no remedy available via the Commission. The only remedy for an unpaid claimant in a roving grain buyer insolvency is for the Court to approve payment of the claim based on the Commission's recommendation or, if the Commission recommends the claimant not be paid, based on evidence and argument before the Court at the hearing required by law. Similarly, while claimants and other interested parties can appeal the Court's decision on the Commission's Report and Recommendation, there is no right to appeal from any interim Commission decision or action in the proceeding. Indeed, there is no right to appeal the Commission's Report and Recommendation, except as a basis for or component of the Court's order. The doctrine "does not apply when the relevant agency is unable to grant relief." *Alpharma, Inc. v. Pennfield Oil Company*, 411 F.3d 934, 936 (8th Cir. 2005) (citations omitted).

In North Dakota, the Commission's insolvency proceeding does not meet the statutory definition of "adjudicative proceeding" under N.D.C.C. chapter 28-32, the North Dakota Administrative Agencies Practice Act. An "adjudicative proceeding under that act means "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." N.D.C.C. section 28-32-91(1). The Commission publishes a notice in insolvency proceedings, but it is not a notice of hearing, it is a notice to file claims. N.D.C.C. sections 60-02.1-32, 60-03-16 and 60-04-04. Further, the appeal provisions in the Administrative Agencies Practice Act apply to "parties to any proceeding heard by an administrative agency. . . ." N.D.C.C. section 28-32-42(1). The Commission does not hear

insolvency cases, the Court does. Under North Dakota's grain insolvency and administrative laws, the insolvency proceeding is not an administrative proceeding and Farmers have no administrative remedy.

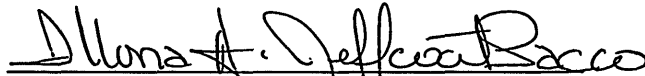
Finally, perhaps most importantly, recall from earlier discussion that prior to 1989, claimants in roving grain and hay buyer insolvencies **did** have an administrative remedy in an administrative proceeding before the Commission. See Exhibit B, attached. If the repealed N.D.C.C. section 60-03-09.1 still applied, the Bank might have a better argument. It is clear that the 1989 repeal of claimants' administrative remedy for nonpayment, and its replacement with the current civil insolvency process, refutes any possible argument that Farmers must exhaust administrative remedies in this case.

CONCLUSION

The Bank is not entitled to summary judgment of dismissal. Granting the Bank's motion would unjustifiably negate the overriding purpose of the state's grain regulatory scheme intended to first protect producers, not warehousemen, grain buyers, or banks. This overriding purpose consistently permeates North Dakota Supreme Court cases interpreting our grain insolvency laws. As stated in *Wimbledon, supra*. at 192, "The law relating to grain insolvencies was intended for the benefit of claimants, and must be construed with sufficient liberality to effectuate its purpose of settling the legitimate demands of owners of grain delivered to an insolvent elevator without doing injury to those who are liable."

Case precedent, legislative history, and basic fairness can lead to only one conclusion, that the grain, or the proceeds of the grain, which the insolvent licensee moved to Minnesota and signed over to the Bank, are trust assets. This conclusion is not defeated by any of the Bank's assertions. The Bank's motion must be denied.

Respectfully submitted this 29th day of June, 2012.

A handwritten signature in black ink, reading "Illona A. Jeffcoat-Sacco". The signature is written in a cursive style with a horizontal line underneath.

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