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August 27, 2012

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VIA E-MAIL

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Re: Anderson Seed Co. Insolvency – ND PSC Letter dated August 22, 2012
Your File No.: 11369.001

Dear Mr. Jensen:

I write in response to a letter dated August 22, 2012, from Ms. Susan K. Richter, Director of the Licensing Division of the North Dakota Public Service Commission (“PSC”), to lien claimants and interested parties, providing an “update regarding the status of the Anderson Seed Co., Inc. insolvency.” While we appreciate the need for the communication and while we further appreciated receiving a copy of the communication, we note with some regret that the communication does not accurately reflect the agreement between the PSC, as court-appointed trustee for the lien claimants, and our client Legumex Walker, Inc. (“LWI” or “Legumex”).

First, the buyer of the sunflower seeds in the January 13, 2012, transaction was LWI, and not “Legumex Walker Sunflower, LLC.” In fact, Legumex Walker Sunflower, LLC, was not yet in existence on January 13, 2012, having been formed on February 1, 2012.

Second, the PSC’s communication does accurately reflect Legumex’s strong belief that it qualifies as a buyer in the ordinary course of business, which status supersedes any lien on the sunflowers pursuant to N.D.C.C. § 60-02-25, N.D.C.C. § 60-02-25.1, N.D.C.C. § 41-09-41(1) (UCC § 9-320) (buyer in the ordinary course takes free of security interest, even if the security interest is perfected and the buyer knows of its existence), and First Bank of North Dakota (N.A.) v. Pillsbury Co., 801 F.2d 1036, 1037-1040 (8th Cir. (N.D.) 1986) (although buyer knew of security interest, facts failed to support inference that buyer knew its purchase violated lender’s security agreement, and purchase was free of all liens) (applying North Dakota law). See also United Bank of Iowa v. Ind. Inputs (In re Western Iowa Limestone, Inc.), 538 F.3d 858, 864-65 (8th Cir. 2008) (applying Iowa law) (buyer in ordinary course takes over recorded security interest; possession includes constructive possession). The only exception to this rule — that a buyer who knows that the sale violates a term in an agreement with the secured lender



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takes subject to that security interest — is inapplicable. As a statutory lien, there are no contractual security-interest terms, and LWI has and had no knowledge of the terms of any security interest.¹

However, the PSC's communication is not accurate where it states that

Legumex Walker Sunflower, LLC has also agreed that in the event it is determined not to be a “buyer in the ordinary course of business” it will provide a payment to the PSC in the amount of approximately \$1.6 million....

To the contrary, by written agreement executed on July 20, 2012, LWI and the PSC agreed that

In the event that the ND PSC or any claimants takes the position that LWI was not a buyer in the ordinary course and that ***any and all other and further defenses which may be asserted by LWI, including, but not limited to the extraterritoriality defense***, should not apply, ND PSC or the claimant shall be entitled to commence all proceedings necessary to recover the value^[2] and percentage of the seed associated with such claim. LWI waives any defense based upon the assertion that the seed is no longer in its possession.

(July 20, 2012, Sunflower Seed Status and Handling Agreement, ¶ 2 (copy attached) (underlining in original; bold italics supplied).) The PSC communication erroneously does not make reference to LWI's extraterritoriality defense (or the reservation of any and all other defenses), notwithstanding the fact that these defenses are expressly mentioned and reserved in the July 20, 2012, Sunflower Seed Status and Handling Agreement.

As reflected in my letter to you of August 8, 2012, extraterritoriality is well established as a limitation on the effect of a statutory lien. See, e.g., Walworth v. Harris, 129 U.S. 355 (1889) (landlord's statutory lien on crops is lost when crops are harvested and transported out of state); J.T. Fargason Co. v. Furst, 287 F. 306, 309 (8th Cir. 1923) (Arkansas landlord lien has no extraterritorial effect when crop has left state); In re Symons Frozen Foods Inc., 432 B.R. 290

¹ Furthermore, LWI paid “new value” for the Tilden seed, proof of which has been provided to the PSC. See Farmers Livestock Exch. of Bismarck, Inc. v. Ulmer, 393 N.W.2d 65 (N.D. 1986).

² The stipulated value of \$1,593,400.00 is accurately characterized in the PSC's August 22, 2012, communication.



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(W.D. Wash. 2010) (finding that the Oregon lien statute is “ineffective beyond Oregon’s borders under the doctrine of extraterritoriality.”); Northeast Missouri Electric Power Coop. v. Eddingfield, 67 B.R. 1000, 1003 (Bankr. C.D. Ill. 1986) (“The rule is general that a statute of a state has no extraterritorial effect, and that it operates only within the boundaries of the state which enacts it.”). There is no language within § 60-02-25.1 which would overcome the presumption of extraterritoriality. As a state lien which applies explicitly to “[g]rain contained in a warehouse,” regardless of whether the sale took place in the ordinary course of business, any lien created under § 60-02-25.1 does not apply to grain stored or transferred outside the state of North Dakota. Since there is no grain currently held in North Dakota, and since LWI took possession of the grain outside of North Dakota, there is nothing for a producer lien to attach to.

As set forth above, we appreciate the need for the PSC’s communication. We also appreciate that the Anderson Seed Company insolvency is complicated, and our client has made every effort to provide information to the PSC and cooperate with the PSC’s investigation and attempt to provide appropriate payments to appropriate claimants. The Anderson Seed Company information referenced in the last paragraph on page 1 of the August 22, 2012, communication was provided by our office early on August 23, 2012 (or more than a week ahead of schedule) to Anderson Seed Company’s counsel for review and forwarding to the PSC, while the remaining Anderson Seed Company information appears to have been forwarded to the PSC on August 20, 2012, by Anderson Seed Company’s counsel, as promised.

Hoping that the above may more fully inform the Commission, claimants, and the public, and anticipating that the PSC will distribute this clarification as it deems necessary and advisable via its website or otherwise to such claimants and the public, I remain,

Very truly yours,

Stoel Rives LLP


Marc A. Al

cc: Illona Jeffcoat-Sacco, Esq., North Dakota Public Service Commission (via e-mail)