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IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA

Public Service Commission, Petitioner, vs. Grand Forks Bean Company, Inc., Auto-Owners Insurance Company, Respondents, PSC Case No. GE-15-36	Civil No. 18-2015-CV-00240 **BRIEF IN SUPPORT OF CLAIMANT BREMER BANK, NATIONAL ASSOCIATION'S OBJECTION TO REPORT AND RECOMMENDATION OF TRUSTEE**

¶1 Bremer Bank, National Association, having timely filed a claim in the above-entitled proceeding hereby brings the following objection to the Report and Recommendation of the Trustee brought by the Petitioner Public Service Commission (hereinafter "Commission").

Introduction

¶2 This is a grain warehouse insolvency proceeding instituted under North Dakota Century Code chapters 60-02, 60-04, and 60-10. The Commission has recommended to the Court that Bremer Bank, National Association "does not have a valid claim under N.D.C.C. ch. 60-02 or 60-04." For the reasons stated herein, Bremer Bank, National Association objects to the proposed distribution of any assets being administered by the Commission, and rather prays that the Court order that sufficient assets be distributed to Bremer to first satisfy its claim in full prior to distribution to other claimants.

Parties

¶3 The Commission was appointed trustee of the statutory trust pursuant to an order of this Court entered on the 23rd day of March, 2015, and amended by an amended order entered on the 25th day of March, 2015. (Doc. #24, 27.) Grand Forks Bean Company, Inc. (hereinafter "Grand

Forks Bean"), one of the Respondents, is a North Dakota corporation that was licensed by the Commission as a grain warehouse. Grand Forks Bean operated its grain warehouse in Grand Forks, Grand Forks County, North Dakota, taking delivery of pinto beans. Auto-Owners Insurance Company (hereinafter "Auto Owners"), the other Respondent, is the surety of Grand Forks Bean, having filed a bond as required by law with the Commission.

¶4 Claimant Bremer Bank, National Association (hereinafter "Bremer Bank") is a secured creditor of Grand Forks Bean. (Doc. ##31-41.) Pursuant to the Uniform Commercial Code Article 9, as enacted in North Dakota, Grand Forks Bean granted Bremer Bank a security interest in personal property owned or owned in the future by Grand Forks Bean. Bremer Bank filed a claim with the Commission on April 23, 2015, asserting Bremer Bank's interest in the bean inventory that is the subject of this proceeding. (Doc. ## 31-41.)

¶5 There are nine different Claimants who have filed claims with the Commission based on their delivery of pinto beans to Grand Forks Bean. These Claimants were the growers of, or assignees of growers, of the pinto beans delivered to Grand Forks Bean (hereinafter referred to collectively as the "Growers"). The Growers are the following persons: Beth Nelson, as assignee of the Estate of Brad Nelson, Brent Baldwin, Baldwin Farms, Inc., Duane Altendorf, Curt Amundson, Charles Nelson, WJS Nelson, Nicholas Adams, and Ronald Adams.

¶6 Claimant Fessenden Cooperative Association (hereinafter "FCA") filed a claim with the Commission, based on alleged breach of contract by Grand Forks Bean whereby Grand Forks Bean was obligated to purchase pinto beans from FCA. FCA did not claim any lien or other property interest in the beans that are the subject of this proceeding.

BACKGROUND

¶7 Bremer Bank loaned money to Grand Forks Bean to finance its operations. Grand Forks Bean executed security agreements in favor of Bremer Bank granting Bremer Bank security interests in certain of Grand Forks Bean's personal property, including inventory held by Grand Forks Bean. The inventory held by Grand Forks Bean consists of pinto beans that have been purchased from local farmers while Grand Forks Bean would process those beans and ultimately sell them to Grand Forks Bean's buyers. Bremer Bank perfected its security interest by filing a UCC-1 Financing Statement with the North Dakota Secretary of State's office. These financing statements are a filed UCC financing statement in favor of Alerus Financial dated September 30, 2005, a UCC financing statement assignment from Alerus Financial to Bremer dated October 3, 2011, and another filed UCC financing statement in favor of Bremer dated January 6, 2012.

Commission Inspections of Grand Forks Bean

¶8 The Commission regularly sent a warehouse inspector out to inspect Grand Forks Bean's facility and its records. (Erdmann Dep. 23:3-5.) Mr. Timothy Erdmann conducted a full inspection of the Grand Forks Bean facility, including reviewing the records of the facility, on February 26, 2014. (Erdmann Dep. 23:20 – 27:21.) At the February 2014 inspection, Mr. Erdmann reviewed the executed Price Later Marketing Agreements in the files of Grand Forks Bean and represented to Grand Forks Bean that those were credit-sale contracts. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4, Ex. 12-20.) At the February 2014 inspection Mr. Erdmann also observed a notice posted by Grand Forks Bean in its facility stating that "All beans are considered Price Later unless specified by grower." (Erdmann Dep. 37:2-24.) Mr. Erdman was not sure if he had seen that posting in prior inspections. (Erdmann Dep. 37:18-23.)

¶9 Mr. Erdmann also recalled conducting a full inspection of Grand Forks Bean, including its records, on August 18, 2009. (Erdmann Dep. 38:2-42:19.) Mr. Erdmann at the August 2009 inspection reviewed a couple of Price Later Marketing Agreements that had been fully performed and stamped them as cancelled. (Erdmann Dep. 39:15-42:10, Ex. 23-25.) Mr. Erdmann testified that he would have notified Grand Forks Bean if there were a problem with Grand Forks Bean using these form of Price Later Marketing Agreements. (Erdmann Dep. 42:15-19.)

¶10 In conducting warehouse inspections, Mr. Erdmann testified he would follow a Commission manual. (Erdmann Dep. 21:9-23:3, Ex. 11.) Mr. Erdmann testified he followed all of the steps in the manual for reviewing credit-sale contracts, which are contained in deposition exhibit 11, bates number PSC 2228. (Erdmann Dep. 21:5-23:2, Ex. 11.) This procedure included ensuring the credit-sale contract included all of the information required under N.D.C.C. § 60-02-19.1. (Erdmann Dep. Ex. 11.) Mr. Erdmann testified that the inspection on February 26, 2014, was conducted in accordance with the Commission inspection manual, including the provisions regarding reviewing credit-sale contracts. (Erdmann Dep. 26:1-10, Ex. 12.) Mr. Erdmann also testified that he followed the inspection manual in conducting the inspection in August of 2009. 42:11-14, Ex. 23.)

Grower Contact with Commission

¶11 The only communications with the Commission from any of the Growers concerning Grand Forks Bean prior to December 19, 2014 was on November 18, 2014, when Curt Amundson called Susan Richter at the Commission and discussed the possibility of redelivery of beans. (Richter Dep. 38:8-24 Ex. 6.) No discussion was had in November of 2014 with the Commission that there was any inability of Grand Forks Bean to uphold its obligations or that Grand Forks Bean was insolvent. (Richter Dep. 38:8-24, Doc. # 4.)

LAW & ARGUMENT

¶12 Grain warehouses and the delivery of grain to warehouses is regulated in North Dakota by the Public Service Commission under North Dakota Century Code chapters 60-02, 60-04, and 60-10. The term "grain" includes pinto beans. N.D.C.C. § 60-02-01(3), 60-04-01(3).

¶13 Upon a warehouse becoming insolvent, the Commission has a duty to institute an insolvency proceeding. N.D.C.C. § 60-04-03. This section provides that "Upon the insolvency of any warehouseman, the commission shall apply to the district court of a county in which the warehouseman operates a licensed warehouse for authority to take all action necessary and appropriate to secure and act as trustee of the trust fund described in section 60-04-03.1." Id. The Commission necessarily must take action once the warehouse is determined to be insolvent. The Growers have proposed an insolvency date as October 15, 2013. This proposed insolvency date is not credible. There is no documented claim filed with the Commission prior to the December 19, 2014 date as noted in the *Report and Recommendation*. There are no records of any of the Growers having contact with the Commission prior to that date noting there was any problem with Grand Forks Bean marketing or paying the Growers for beans sold to Grand Forks Bean. A claim now that over a year prior there was a demand is not credible. The Growers failed to take any action to obtain payment or otherwise attempt to collect in any verifiable manner. No lawsuit was started. No written demands were made.

¶14 When a warehouse becomes insolvent, the Commission is to establish a trust fund "for the benefit of noncredit-sale receiptholders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of this chapter." N.D.C.C. § 60-04-03.1. Also, there is a statutory lien on grain owned by the warehouse in favor of "receiptholders". N.D.C.C. § 60-02-25.1. The Commission is also supposed to petition the district court for a declaration that

the warehouse is insolvent and appointment of the Commission as trustee. N.D.C.C. § 60-04-03. A warehouse is insolvent when it "refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored." N.D.C.C. § 60-04-02. There is no definition of "receiptholder" in the North Dakota Century Code. A "receipt" is defined as "grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract." N.D.C.C. §§ 60-02-01(7), 60-04-01(6). Based on the definitions of "receipt" and "credit sale contract" contained in §§ 60-02-01 and 60-04-01, it appears that the trust fund to be established by the Commission upon the warehouse's insolvency is only for the benefit of those Growers who do not have a credit sale contract with Grand Forks Bean. The grain in the trust fund would also have a lien in favor of receiptholders. N.D.C.C. § 60-02-25.1. Thus, the classification of whether the Growers have a credit sale contract, or a noncredit sale contract is material in determining whether the Grower is entitled to participate in the trust fund called for under § 60-04-03.1 and whether they have a lien under § 60-02-25.1. This is the essence of Bremer Bank's objection, because without a lien having priority over Bremer Bank's perfected security interest, Bremer Bank's position is that any disposition by the Commission (including to pay the Commission's expenses) is wrongful as to Bremer Bank's perfected security interest.

Price Later Marketing Agreements are Credit-Sale Contracts

¶15 A "credit-sale contract" is defined as follows in N.D.C.C. chapter 60-02:

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

N.D.C.C. § 60-02-01(2). The identical definition is used in chapter 60-04:

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

N.D.C.C. § 60-04-01(2). The notice required for a credit-sale contract is that "the sale is not protected by the bond coverage provided for in section 60-02-09." Id. § 60-02-19.1(7). Thus, under the above definitions, there are only three requirements for a credit-sale contract: 1) a written contract, 2) the sale price may be paid more than 30 days after the grain is delivered, and 3) a warning that no bond coverage applies. The Price Later Marketing Agreements at issue in this case all meet three of these requirements in the definition of a credit-sale contract under sections 60-02-01(2) and 60-04-01(2).

¶16 First, all of the Price Later Marketing Agreements are in writing. They are signed by Grand Forks Bean and all of the Price Later Marketing Agreements are signed by someone for the Growers. There is a factual dispute and claim by several of the Growers that they did not execute the Price Later Marketing Agreement, but these claims of forgery should be deemed not credible for several reasons. The first reason is Grand Forks Bean had a posted notice at the warehouse facility publicly notifying those who are bringing beans that they are being delivered as Price Later arrangements. North Dakota Century Code § 60-02-11 requires that a warehouse post its policy regarding whether grain is being accepted for storage or only under a credit-sale. This statute provides as follows:

> Nothing in this chapter requires a warehouseman to receive grain for storage. A warehouseman shall publish and post, in a conspicuous place in its warehouse, a publication identifying whether storage will be available to its patrons or whether grain will be accepted via cash or a credit-sale contract arrangement.

N.D.C.C. § 60-02-11(2).[1]

¶17 Here, Grand Forks Bean posted its notice and manifested to those delivering grain that it was not accepting any grain for storage. Posted at the warehouse was a notice to persons delivering beans that "All beans are considered Price Later unless specified by grower". (Erdmann Dep. Ex. 22.) The posting and the presence of a Price Later Marketing Agreement for nearly every Grower (except WJS Nelson) indicates that both Grand Forks Bean, and the Growers who delivered the beans, understood that the beans were subject to a credit sale arrangement. The posting by Grand Forks Bean is not insignificant because there are numerous posting requirements in N.D.C.C. chapter 60-02, and these work to bind the warehouse, but also those delivering grain to the warehouse.

¶18 For instance, § 60-02-27 requires the grading of grain to be posted, and by such posting both the warehouse and person delivering grain are bound. The warehouse also must post the procedures for resolving disputes with persons delivering grain who are then bound by that dispute resolution process. N.D.C.C. § 60-02-05.1. The warehouse must post "the fees that will be assessed for receiving, storing, processing, or redelivering grain and the termination date of its warehouse receipts" which are then binding on persons holding a warehouse receipt from the warehouse. N.D.C.C. § 60-02-17. Given these posting requirements, and the posting at Grand Forks Bean that "[a]ll beans are considered Price Later unless specified by grower" there is sufficient evidence to indicate that the Growers who have a Price Later Marketing Agreement have entered into a written credit-sale agreement as contemplated by N.D.C.C. §§ 60-02-01(2) and 60-04-01(2).

[1] This section was amended in the 2015 Legislative Session, after this case was commenced, but the provision regarding posting was not substantively amended. See 2015 North Dakota Laws Ch. 470, § 1 (S.B. 2291). The quoted language above is from the version prior to amendment.

¶19 Both the Growers and the Grand Forks Bean had a duty to convert scale tickets into some sort of other documentation. North Dakota Century Code section 60-02-11(1)[2] provides that "[a]ll scale tickets must be converted into cash, noncredit-sale contracts, credit-sale contracts, or warehouse receipts within forty-five days after the grain is delivered to the warehouse." The statute does not proscribe who is required to take this action, and as other provisions bind and affect both the warehouse and persons delivering grain, this section is neutral and should be read to bind both parties. Thus, both the warehouse and the person delivering grain have an obligation to convert scale tickets into either a cash sale, noncredit-sale contract, credit-sale contract, or a warehouse receipt. Failure to so convert could be construed as the item failing to be classified as a receipt. While there is an express reference to "scale ticket" as being defined as a receipt, an unconverted scale ticket should not remain a receipt after the 45 day time limit imposed by § 60-02-11. Given the requirements of § 60-02-11, the posting at Grand Forks Bean, and the only other documentation besides scale tickets being the Price Later Marketing Agreements, there is sufficient evidence to find the subject Price Later Marketing Agreements for the Growers meet the first requirement that a credit-sale be in writing under N.D.C.C. §§ 60-02-01(2) and 60-04-01(2). The posting that all beans are Price Later, and the requirement of the farmers to convert the scale tickets should not result in a default treatment as a receipt for those farmers who fail to convert.

¶20 Second, the sale price under the Price Later Marketing Agreement "may be paid more than thirty days after the delivery . . . of the grain for sale . . . ." Id. The Price Later Marketing Agreement specifies that "[c]hecks for the pinto beans will be issued only on growers request." Thus, the terms of the Price Later Marketing Agreement, by allowing the payment to be made only after requested by the grower, provided for the possibility that the payment for the beans may be

[2] See note 1 regarding amendments to this section in the 2015 Legislative Session.

paid more than 30 days after the beans had been delivered. In fact, several farmers did receive partial payments under their Price Later Marketing Agreements, but all of those payments were made outside of the 30 days of delivery. (Erdmann Dep. Ex. 16-18, 20.) The term of the Price Later Marketing Agreements provided that the payment may have been less than 30 days after delivery or may have been more than 30 days after delivery. Sections 60-02-01(2) and 60-04-01(2) both contemplate that a portion of the same agreement could be a credit-sale or not a credit-sale based on when payment may be made. Since the Price Later Marketing Agreement and all of the outstanding beans could have been paid after 30 days, this requirement under §§ 60-02-01(2) and 60-04-01(2) has been met.

¶21 The Commission also focuses on the key item being payment beyond 30 days. Ms. Richter testified that the documents prepared and updated with her involvement recite that the key provision is that payment is made more than 30 days after the grain is delivered to the warehouse. (Richter Dep. 21:21-24:9, Ex. 1.) On deposition exhibit 1, bates number 2075, the Commission states as follows:

> Q7: What if a contract is signed on December 5th and it provides for a "window of payment" option (e.g. "Payment will be made between January 1-15.")? Is this a credit-sale contract?
>
> A: It depends on when the payment is actually made. If the license pays for the grain in 30 days or less, the transaction is not a credit-sale and no assessment should be collected. If payment is made after more than 30 days, the transaction is a credit-sale and the assessment should be collected.

(Richter Dep. 21:21-24:9, Ex. 1.)

¶22 Third, the Price Later Marketing Agreements all provide the warning that no bond coverage applies in the event of Grand Forks Bean's insolvency. The box at the bottom of the Price Later Marketing Agreement provides as follows: "THIS CONTRACT IS NOT PROTECTED BY STATUTORY BOND COVERAGE IN THE EVENT OF BUYER'S INSOLVENCY." This

warning is substantially identical to the warning prescribed in the Commission's regulations at N.D. Admin. Code section 69-07-03-06, which provides as follows: "THIS CONTRACT IS NOT PROTECTED BY BOND COVERAGE IN THE EVENT OF THE BUYER'S INSOLVENCY." Thus, the Price Later Marketing Agreements meet the third requirement of sections 60-02-01(2) and 60-04-01(2) to meet the statutory definition of a "credit-sale contract".

Status of Price Later Marketing Agreements as Credit-Sale Contracts is Not Dependent upon N.D.C.C. Section 60-02-19.1

¶23 In the Commission's Report and Recommendation, the Commission takes the position that there are several other requirements the Price Later Marketing Agreements must contain in order to be a credit-sale contract, those being contained in N.D.C.C. § 60-02-19.1. (Doc. #155, ¶38, 44-47.) This position is not accurate under the statutory scheme of N.D.C.C. chapters 60-02 and 60-04, and not accurate under the rules of statutory interpretation.

¶24 First, the definition of credit-sale contract in §§ 60-02-01(2) and 60-04-01(2), both cross reference subdivision 7 of section 60-02-19.1. The definitions supplied in §§ 60-02-01(2) and 60-04-01(2) provides that the only requirement of § 60-02-19.1 is that a credit sale contract "contains the notice provided in subsection 7 of § 60-02-19.1." The reference to subsection 7 of § 60-02-19.1 is significant because it shows the legislature's intent was that not all requirements of § 60-02-19.1 are required in order for a particular agreement to meet the definition of a credit-sale contract. If the legislature intended that all requirements of § 60-02-19.1 were incorporated into the definitions of §§ 60-02-01(2) and 60-04-01(2), then the legislature would have said so. The reference to § 60-02-19.1 would have been broader and more general, rather than the specific reference to the notice requirements in subsection 7 of § 60-02-19.1. If the legislature wanted all of the conditions specified in § 60-02-19.1, they could have written the definition as follows:

"Credit-sale contract" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale and which meets all of the conditions of § 60-02-19.1. (Alteration shown underlined.)

¶25 The definition of credit-sale contract in § 60-02-01(2) was substantially revised in 1985. S.L. 1985, ch. 661, § 1. The legislature in 1985 added the explicit requirement of the notice of no bond coverage contained in section 60-02-19.1 subsection 7 when there were several other subsections in section 60-02-19.1 at the time. See 1985. S.L. 1985, ch. 661, § 7. If the legislature in 1985 intended for all conditions specified in § 60-02-19.1 to be incorporated into the definition of credit-sale contract in § 60-02-01(2) they certainly could have said so. The legislature could have stated that all requirements of § 60-02-19.1 were required, but chose to only incorporate the warning regarding bond coverage.

¶26 A reading of the statutes that would require all conditions of 60-02-19.1 before an agreement can qualify as a credit-sale contract also does not comport with the structure of chapter 60-02 as a whole. There are several statutes throughout chapter 60-02 that place restrictions on warehouses and subject the warehouses to oversight and possible administrative or criminal penalties. For instance, the contents of a warehouse receipt is governed by §§ 60-02-16, -17. These sections state that "[a] warehouse receipt shall" be issued under certain conditions and have certain contents. N.D.C.C. § 60-02-16. Also, "[a] warehouse receipt must contain, either on its face or reverse side, the following warehouse and storage contract" which is spelled out in the statute. N.D.C.C. § 60-02-17. The contents of scale tickets are also provided for in statute and regulation. The scale tickets must be uniform, issued in duplicate, and consecutively numbered. N.D.C.C. § 60-02-11(1). They must also contain a listing of the address of the producer, type of grain, and grading information. N.D. Admin. Code § 69-07-03-08. A penalty is imposed for not

using the correct forms or other violation: "Any person who shall violate any of the provisions of this chapter or any rule adopted pursuant to this chapter, if punishment is not specifically provided for, shall be guilty of an infraction." N.D.C.C. § 60-02-12 (emphasis added). Use of an informal memoranda, rather than the statutory warehouse receipt is a misdemeanor. Id. § 60-02-21.

¶27 Under the position of the Commission in its *Report and Recommendation*, that all requirements of § 60-02-19.1 are necessary in order for an agreement to be a credit-sale contract does not comport with the similar provisions of chapter 60-02 regarding warehouse receipts and scale tickets. For instance, it is highly unlikely that the commission would take the position that a warehouse receipt issued without identifying the receiving station or without the address of the owner of the grain would fail for that reason to be a warehouse receipt. See id. § 60-02-16(2). Likewise, the Commission in the Report and Recommendation did not take the position that any of the scale tickets in this case without identifying kind of beans delivered were invalid scale tickets. (See, e.g., Doc. # 71, Ex. B to Claim of Ron Adams.)

¶28 Section 60-02-19.1 is by its own terms also a restriction on how a warehouse is supposed to enter a credit-sale contract, not necessarily determinative whether a particular transaction qualifies as a credit-sale contract. Section 60-02-19.1 beings as follows: "A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section." The focus at the beginning of § 60-02-19.1 is upon the actions that a warehouseman must take. Section 60-02-19.1 is regulatory in nature, not affecting the relative rights of parties to a transaction. Reading § 60-02-19.1 broadly, as pre-empting the definition of credit-sale contract at §§ 60-02-01(2) and 60-04-01(2) is faulty. Relying solely on § 60-02-19.1 renders the definition in §§ 60-02-01(2) and 60-04-01(2) without meaning. The North Dakota Supreme Court has held that in interpreting statutes, where there is a conflict in the provisions, the conflict should be resolved in order to give meaning

to both provisions. Kroschel v. Levi, 2015 ND 185, ¶ 18, 866 N.W.2d 109. "A cardinal rule of statutory construction requires interpretation of related provisions together, if possible, to harmonize and to give meaning to each provision." Id. The purpose of harmonizing the statutes is so that there is "give[n] meaning to each [statute] without rendering one or the other useless." BASF Corp. v. Symington, 512 N.W.2d 692, 696 (N.D. 1994).

¶29 Here, the conflict is whether all requirements of § 60-02-19.1, or only those in §§ 60-02-01(2) and 60-04-01(2), are required in order for any particular agreement to be considered a credit-sale contract. This conflict is resolved when the definitions of §§ 60-02-01(2) and 60-04-01(2) are used to determine the substantive rights of the parties involved, meaning the contractual and property rights of the growers, the warehouse, and creditors of the growers and warehouse, and § 60-02-19.1 is viewed as a regulatory statute determining liability of the warehouse as a licensee of the Commission.

¶30 In Dahl v. ConAgra, Inc., 998 F.2d 619, 621 (8th Cir. 1993), the Eighth Circuit held that there should be no private right of action for a farmer who claimed he was discriminated against in violation of N.D.C.C. § 60-02-20 when the farmer had grain stored at the warehouse and the warehouse purportedly was not buying grain at the time, but purchased grain from other farmers. The farmer alleged that the warehouse was "off the board" meaning not buying grain at a posted price, when it bought from other farmers. Id. The Eighth Circuit held oversight of warehouses by the Commission was not intended to affect the relative rights of the warehouse and farmer. The court wrote:

> "The North Dakota Public Service Commission has the duty and power to investigate all complaints of fraud and injustice, unfair practices, and unfair discrimination under Chapter 60–02 of the North Dakota Code. N.D.Cent.Code § 60–02–03 (1985). Sections 60–02–03 and 60–02–12 empower the Commission to regulate the grain industry and to impose penalties for any violation of Chapter 60–02. We conclude that the implication of a private right of action from Section 60–

> 02–20, where the legislature has provided a comprehensive regulatory scheme and has not explicitly provided such an action, would be an intrusion on the commission's regulatory authority."

Id. at 621-22. Like Dahl, in this instance, § 60-02-19.1 is regulatory in nature and should not be read to alter the relative rights of the warehouse, growers, and creditors of each. The language beginning § 60-02-20 at issue in Dahl and § 60-02-19.1 in this case are nearly identical. Compare N.D.C.C. § 60-02-20 ("No public warehouseman shall discriminate . . . .") with N.D.C.C. § 60-02-19.1 ("A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section."). Failing to purchase with all of the requirements should subject the licensee to an infraction under N.D.C.C. § 60-02-12, and it is the job of the PSC to enforce compliance with section 60-02-19.1. Any failure should not be viewed as affecting the rights of the warehouse, persons delivering grain to the warehouse, and creditors of each, when there are agreements that otherwise meet the definitional requirements under N.D.C.C. §§ 60-02-01(2) and 60-04-01(2).

¶31 The above analysis is shown to demonstrate that the plain meaning of the language in the statutes supports finding that the definition at §§ 60-02-01(2) and 60-04-01(2) controls the classification of the Price Later Marketing Agreements as "credit-sale contracts" and not § 60-02-19.1. The substantive rights determined under §§ 60-02-01(2) and 60-04-01(2) and regulatory provisions of § 60-02-19.1 give meaning to both statutes, while the position of the Commission that all conditions of § 60-02-19.1 are required does not.

Commission Should be Estopped from Denying Price Later Marketing Agreements are not Credit-Sale Contracts

¶32 The Commission, as part of its licensing function, regularly inspected the Grand Forks Bean warehouse. (Erdmann Dep. 23:3-5.) Mr. Timothy Erdmann regularly conducted inspections of Grand Forks Bean. (Erdmann Dep. 23:3-5.) The last regular inspection prior to the

commencement of this proceeding was in February of 2014. (Erdmann Dep. 23:20 – 27:21.) In February of 2014, Mr. Erdmann reviewed all of the Price Later Marketing Agreements at issue in this case. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4, Ex. 12-20.) Mr. Erdmann classified all of the Price Later Marketing Agreements as credit-sale contracts at the time of conducting the inspection (Erdmann Dep. 26:2 – 27:21; 30:6-35:4, Ex. 12-20.) Mr. Erdmann followed the Commission's handbook on conducting grain warehouse inspections when inspecting the Grand Forks Bean warehouse in February of 2014, and determined that the Price Later Marketing Agreements constituted credit-sale contracts defined under the law. (Erdmann Dep. 21:5-23:2, Ex. 11.) Mr. Erdman also conducted other inspections prior to February of 2014. On August 18, 2009, Mr. Erdmann inspected Grand Forks Bean and reviewed its records. (Erdmann Dep. 38:2-42:19.) In 2009, Mr. Erdmann also reviewed Price Later Marketing Agreements on the same form at issue in this case, and in 2009 determined that they were credit-sale contracts. (Erdmann Dep. 39:15-42:19, Ex. 23-25.)

¶33 The Commission also published and broadcast multiple documents that provided a credit-sale contract is defined by meeting the three requirements under §§ 60-02-01(2) and 60-04-01(2). For instance, in a document dated October of 2011, the director of the Licensing Division, Susan Richter, communicated to licensees that the definitions of §§ 60-02-01(2) and 60-04-01(2) determined whether a contract is a credit-sale. (Richter Dep. 23:19-26:16, Ex. 1-2.) The three requirements are also those noted by Ms. Richter in communicating the difference to grain sellers. (Richter Dep. 30:12-34:23, Ex. 5.) The only requirements noted are the written agreement, payment beyond 30 days, and the warning that there is no bond coverage. (Richter Dep. 30:12-34:23, Ex. 5.)

¶34 Estoppel is a form of equitable defense available against the government in North Dakota. Blocker Drilling Canada, Ltd. v. Conrad, 354 N.W.2d 912, 920 (N.D. 1984). In Blocker Drilling, the North Dakota Supreme Court determined a taxpayer could assert estoppel as a defense to a claim of underpayment of use tax when the Tax Comissioner's staff person had already determined the value of the property subject to the use tax and communicated the determination to the taxpayer. Id. The North Dakota Supreme Court noted that the

> basic elements of estoppel that must be met as to the person being estopped and as to the person claiming the estoppel. As to the person being estopped the elements are: 1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than those which the party subsequently attempts to assert; 2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence the other party or persons; and 3) knowledge, actual or constructive, of the real facts. As to the person claiming estoppel the elements are: 1) lack of knowledge and the means of knowledge of the truth as to the facts in question; 2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and 3) action or inaction based thereon, of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Id. The court found these elements were met under the following analysis:

> 1) the tax commissioner, acting through Mr. Stack, conveyed the impression that he was making a final determination as to the fair market value of the subject rigs and the resulting tax liabilities of each of the taxpayers and that the method of valuation used was acceptable; 2) the Department, through Stack, knew that Logan would rely on the determinations as final and that the taxpayers would use those determinations in setting their contract rates; and 3) the tax commissioner knew the original determinations were subject to change and that other methods were available to determine the fair market value of the rigs in addition to the one proposed by Logan. As to the taxpayers, the party claiming estoppel, the facts show that: 1) the taxpayers had no way of knowing that Stack was not making a final determination of value for use tax purposes and that the Department would later decide that the valuation method used was not acceptable; 2) the taxpayers reasonably believed that Stack had the authority to make a final determination of their use tax liability and relied on that belief in setting their rates or charging their operators pursuant to specific contractual provisions; and 3) the taxpayers can no longer change their rates to accommodate additional tax liability and, because of the current slump in the drilling rig industry, the taxpayers are suffering extreme financial hardship.

Id. at 920-21.

¶35 Like Tax Commissioner in Blocker Drilling, the Commission should be estopped from denying that the Price Later Marketing Agreements are not credit-sale contracts. First, Mr. Erdmann's inspections in February of 2014 and August of 2009 amounted to "conduct . . . which is calculated to convey the impression that the facts are otherwise than those which the party subsequently attempts to assert." Id. at 920. Erdmann communicated to Grand Forks Bean at these two inspections that it was properly using the Price Later Marketing Agreement form as a credit-sale contract. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4; 42:15-19.) Mr. Erdmann testified he followed the Commission's grain inspection handbook, and that if there were a question that the Price Later Marketing Agreement did not comply with state law that he would have documented this on a memorandum of adjustment. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4; 42:15-19.) Mr. Erdmann did not note this on the memorandum of adjustment following the inspections conducted in August of 2009 and February of 2014. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4; 42:15-19, Ex. 12, 23.)

¶36 Second, the Commission knew or should have known Grand Forks Bean would rely on the determination of its grain warehouse inspector would influence the form of agreement used by Grand Forks Bean, and ultimately represented by Grand Forks Bean to Bremer Bank. The Commission, acting through Erdmann, knew or should have known that classifying the Price Later Marketing Agreements would affect how Grand Forks Bean reports those agreements on its financial statements, and how those financial statements would affect decisions by Bremer Bank to extend credit to Grand Forks Bean.

¶37 Third, the Commission is the only party that knew the determination that the Price Later Marketing Agreement would not be used or followed in the event of the insolvency of Grand Forks

Bean. Like Blocker Drilling, the Commission was annually sending its warehouse inspector to Grand Forks Bean who is continually representing to Grand Forks Bean that the Price Later Marketing Agreements are credit-sale contracts, and in fact represented that the Grower's Price Later Marketing Agreements were credit-sale contracts, and only the Commission would have knowledge that it would later change that determination.

¶38 As to Bremer Bank, and Grand Forks Bean, the Commission should be estopped because, first, Grand Forks Bean, and derivatively Bremer Bank, had no idea that the Commission would change the categorization of the Grower's Price Later Marketing Agreements. The Commission was sending its employee to Grand Forks Bean blessing the Price Later Marketing Agreements as credit-sale contracts. Second, Grand Forks Bean, and derivatively Bremer Bank, reasonably believed that the classification of the Commission employee Erdmann was correct. Erdmann testified he followed the inspections manual, that if there were problems he would resolve those or document them on a memorandum of adjustment, and at the inspection in February 2014, where all of the beans under a Price Later Marketing Agreement, no such problems were raised by the Commission. (Erdmann Dep. 26:2 – 27:21; 30:6-35:4; 42:15-19, Ex. 12, 23.) Relying on this determination Grand Forks Bean reported these Price Later Marketing Agreements in a manner to Bremer Bank that influenced Bremer Bank's decisions regarding extending credit to Grand Forks Bean. Finally, relying on the financial statements of Grand Forks Bean based on the Commission's actions, Bremer Bank can no longer change its decisions on extending credit to Grand Forks Bean in light of the change of position that the Commission is taking now. Like Blocker Drilling, there is a strong equity in favor of Bremer Bank to estop the Commission from denying these Price Later Marketing Agreements are credit-sale contracts.

Commission Citation to* Grabanski *District Court Decision is not binding or persuasive.

¶39 The Commission in support of its position has cited to a district court decision from Walsh County for the proposition that all provisions of N.D.C.C. § 60-02-19.1 are required in order for an agreement to be classified a credit-sale contract. (See Walsh County Dist. Ct. No. 50-2011-CV-00029, Doc. 116.) This citation is objectionable for several reasons. As a general matter, trial court decisions in one case do no set binding precedent for other trial courts. See 21 C.J.S. Courts § 212. "Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court." Id. Additionally, the decision cited by the Commission was not a published decision. Regarding unpublished decisions, the North Dakota Supreme Court has held that unpublished decisions from other jurisdictions are persuasive authority at best. Lucas v. Riverside Park Condominiums Unit Owners Ass'n, 2009 ND 217, ¶ 19, 776 N.W.2d 801. Finally, the Commission does not demonstrate that the argument concerning the conflict between sections 60-02-01(2) and 60-04-01(2) and section 60-02-19.1 was briefed by any party in the Grabanski case. Without binding precedent from the North Dakota Supreme Court, the court in this proceeding is free to come to its own conclusions.

Commission calculation of "storage fees" instead of offset of service fees is inappropriate and undervalues the fees that are due to Grand Forks Bean from Growers.

¶40 The Commission in its Report and Recommendation acknowledges that none of the Growers have a warehouse receipt and that the beans delivered to Grand Forks Bean were not delivered for storage. Yet, the Commission recommends that the provisions regarding storage under N.D.C.C. § 60-02-30. Bremer Bank objects to limiting the service fees that are applicable to the Growers based on N.D.C.C. § 60-02-30 when there has been no storage contract alleged or claimed by any Grower, the Commission has acknowledged that service fees charged by

warehouses under arrangements other than storage contracts are not regulated by statute, and postings and the Price Later Marketing Agreements each provide that service fees apply. By the terms of § 60-02-30, storage contracts terminate each year. However, none of the Growers has claimed or asserted a storage contract with Grand Forks Bean. Ms. Susan Richter acknowledged in her deposition that the Commission does not regulate service fees that warehouses might charge for contracts other than storage contracts. (Richter Dep. 33:21-34:23.)

¶41 The Price Later Marketing Agreements, and postings permitted and required under statute, both identify that Grand Forks Bean intended to charge a service fee as a separate charge that is a different fee than a storage fee. Attached hereto as Exhibit A is a calculation showing the amount of service fee each Grower is liable for, based on the date of each individual scale ticket issued, through the proposed insolvency date of December 19, 2014. As the court can see, the valuation of the service fees by the Commission in the Report seriously undervalues the amount that is due from the Growers.

Commission Determination of Insolvency Date should be adopted, and Farmers Claims of earlier insolvency date are not credible or supported by their actions

¶42 A warehouse is insolvent under North Dakota law when the warehouse "refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored." N.D.C.C. § 60-04-02. The Commission in its Report and Recommendation recommends that Grand Forks Bean was insolvent as of December 19, 2014. (Doc. # 155, ¶ 77.)

¶43 None of the Growers have produced any documented demands on Grand Forks Bean. There was no formal action taken by any of the Growers until December 19, 2014, when written claims were submitted to Grand Forks Bean. The only communications with the Commission

from any of the Growers concerning Grand Forks Bean prior to December 19, 2014 was on November 18, 2014, when Curt Amundson called Susan Richter at the Commission and discussed the possibility of redelivery of beans. (Richter Dep. 38:8-24 Ex. 6.) No discussion was had in November of 2014 with the Commission that there was any inability of Grand Forks Bean to uphold its obligations or that Grand Forks Bean was insolvent. (Richter Dep. 38:8-24, Doc. # 4.) None of the Growers ever took legal action against Grand Forks Bean until December 19, 2014. None of the Growers commenced any legal process against Grand Forks Bean. The only written indication of any problem with Grand Forks Bean is when the Growers began contacting the Commission on December 19, 2014.

¶44 Contact with the Commission is significant because under state law, the Commission has the affirmative obligation to take action upon a warehouse being insolvent. North Dakota Century Code § 60-04-03 provides as follows: "Upon the insolvency of any warehouseman, the commission shall apply to the district court of a county in which the warehouseman operates a licensed warehouse for authority to take all action necessary and appropriate to secure and act as trustee of the trust fund described in section 60-04-03.1." The Commission is required to apply for appointment as trustee upon the insolvency. Persons delivering grain to a warehouse are not empowered to commence an insolvency proceeding unless the Commission neglects to take action, but are entitled to continue to enforce the obligations of the warehouse against the property of the warehouseman. N.D.C.C. § 60-04-05. Thus, the insolvency statutes contemplate that an insolvency is not something that is commenced or determined solely by grower action. Rather, because the Commission must take action upon an insolvency, and persons delivering grain to a warehouse only have recourse if the Commission fails to act, there is necessarily a connection between the insolvency date and contact with the Commission.

¶45 Here, given the lack of any documentation to justify the Grower's position of an earlier insolvency date, the lack of Grower contact with the Commission prior to December 19, 2014 asserting Grand Forks Bean was unable to perform its obligations, and the statutory scheme the contemplates early involvement by the Commission upon the insolvency of a warehouse, the court should adopt the Commission's recommended insolvency date of December 19, 2014.

Analysis and objection to treatment of each Grower's claim

¶46 The Commission analyzes the claims of each of the Growers, and Bremer Bank notes the following objections to that analysis and recommendations.

i. Estate of Brad Nelson

¶47 In Grand Forks Bean's records there is a Price Later Marketing Agreement signed by someone purportedly on behalf of Brad Nelson. The Price Later Marketing Agreement was dated on a date that Curt Amundson or someone for Curt Amundson was delivering beans to Grand Forks Bean, as shown by the Price Later Marketing Agreement dated September 5, 2013, and scale tickets issued to Curt Amundson on September 5, 2013. (Erdmann Dep. Ex. 19, Amundson Dep. Ex. 37.) Beth Nelson who is the personal representative of the estate gave authority to Curt Amundson to handle all aspects of the transaction involving the Estate's pinto beans after the death of Brad Nelson. (Beth Nelson Dep. 8:4-18.) Brad Nelson died on July 9, 2013. (Beth Nelson Dep. 19:17-18.) Both Curt Amundson and Beth Nelson claim to not have signed the Price Later Marketing Agreement or know who did. (Beth Nelson Dep. 11:5-17; Amundson Dep. 19:2-20:9.)

¶48 Grand Forks Bean held out the Price Later Marketing Agreement for Brad Nelson as the terms and conditions that the Estate's beans were delivered under to both the Commission during an annual inspection in February of 2014, as well as in financial statements and other information delivered to Bremer Bank. Given the timing involved for the date of the Price Later Marketing

Agreement for Brad Nelson was signed, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement and postings that all beans are accepted as a Price Later, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by the Estate. In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and the Estate is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to the Estate of Brad Nelson of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

ii. **Brent Baldwin**

¶49 Bremer Bank objects to the Commission's recommendation as to Brent Baldwin's claim. Brent Baldwin stated in his deposition that he treated his and Baldwin Farms, Inc.'s beans in the same manner and dealt with that as a group at Grand Forks Bean. (Baldwin Dep. 54:3-13.) There is a Price Later Marketing Agreement in the records of Grand Forks Bean noting Baldwin Farms, Inc. and Brent Baldwin. (Erdmann Dep., Ex. 18.) Baldwin Farms, Inc. also had a copy of a Price Later Marketing Agreement in its records. (Baldwin Dep. 28:11-24.) Mr. Baldwin indicated that his employee Steve Hartje likely signed the Price Later Marketing Agreement on his behalf and brought the copy back after having delivered a load of beans to Grand Forks Bean. (Baldwin Dep. 22:15-25, 28:11-24.)

¶50 Given the treatment of all the Brent Baldwin and Baldwin Farms, Inc. beans as being a whole unit, and the presence of the Price Later Marketing Agreement signed by an employee of Brent Baldwin and Baldwin Farms, Inc. on behalf of Brent Baldwin, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement, postings that all beans are accepted as a Price Later, and complete failure of Baldwins to repudiate or rescind the Price Later Marketing

Agreement, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by Brent Baldwin.

¶51 In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Mr. Baldwin is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to Mr. Baldwin of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

iii. Baldwin Farms, Inc.

¶52 For the same reasons, and using the same analysis, Bremer Bank hereby objects to the Commission's proposed distribution to Baldwin Farms, Inc. of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

iv. Duane Altendorf

¶53 Bremer Bank objects to the Commission's recommendation as to Duane Altendorf's claim. Duane Altendorf's beans were delivered by Brent Baldwin or Brent Baldwin's employees to Grand Forks Bean. (Altendorf Dep. 12:18-13:23.) As noted above, the Baldwin employees signed the Price Later Marketing Agreement on behalf of Mr. Baldwin, and it is more probable than not that those same employees signed the Price Later Marketing Agreement on behalf of Duane Altendorf. Mr. Altendorf in his deposition acknowledged that he does not have any other documents from Grand Forks Bean except scale tickets and that his normal practice in selling to other warehouses is to have a written agreement. (Altendorf Dep. 16:16-17:25, 25:21-26:14.) Given the presence of the Price Later Marketing Agreement likely signed by an employee of Brent Baldwin and Baldwin Farms, Inc. on behalf of Duane Altendorf, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement, postings that all beans are accepted as a Price Later, and

complete failure of Mr. Altendorf to repudiate or rescind the Price Later Marketing Agreement, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by Mr. Altendorf.

¶54 In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Mr. Altendorf is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to Mr. Altendorf of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

v. **Curt Amundson**

¶55 Bremer Bank objects to the Commission's recommendation as to Curt Amundson's claim. Curt Amundson acknowledged that he signed the Price Later Marketing Agreement and initialed in the box concerning a warning that no bond coverage applies. (Amundson Dep. 8:13-10:19.) Bremer Bank also objects to the application of an offset against Amundson's claim for an amount of seed purchased from Grand Forks Bean by Mr. Amundson in the amount of $51,312.15. Bremer Bank does not object to the calculation of the amount of the offset, but does object to the extent that the offset inures to the benefit of anyone other than Bremer Bank. The offset amount represents an account as defined under Article 9 of the Uniform Commercial Code, and Bremer Bank has a properly perfected security interest in the accounts of Grand Forks Bean. Amundson is aware of, has been notified of Bremer Bank's interest in this account, and again is hereby notified that any payment on the account should be directed to Bremer Bank. In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Mr. Amundson is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to

the Commission's proposed distribution to Mr. Amundson of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

vi. **Chuck Nelson**

¶56 Bremer Bank objects to the Commission's recommendation as to Chuck Nelson's claim. Chuck Nelson submitted a Price Later Marketing Agreement as part of his original claim file in this matter. During his deposition, Mr. Nelson agreed that by filing the Price Later Marketing Agreement with his claim he was adopting that as his signature. (Chuck Nelson Dep. 23:15-23.) He also indicated that employees and himself had delivered beans to Grand Forks Bean in September and November of 2013. (Chuck Nelson Dep. 16:3-16.) Given the presence of the Price Later Marketing Agreement likely signed by an employee of Chuck Nelson, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement, postings that all beans are accepted as a Price Later, and Chuck Nelson's adoption and ratification of the Price Later Marketing Agreement, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by Chuck Nelson.

¶57 In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Chuck Nelson is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to Chuck Nelson of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

vii. **Nicholas Adams**

¶58 Bremer Bank objects to the Commission's recommendation as to Nicholas Adam's claim. During his deposition, Mr. Nicholas Adams indicated that employees had delivered beans to Grand Forks Bean that are issue in this case. (Nicholas Adams Dep. 15:3-12.) Given the presence of the

Price Later Marketing Agreement, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement, and postings at Grand Forks Bean that all beans are accepted as a Price Later, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by Nicholas Adams.

¶59 In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Nicholas Adams is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to Nicholas Adams of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

viii. <u>Ronald Adams</u>

¶60 Bremer Bank objects to the Commission's recommendation as to Ronald Adam's claim. During his deposition, Mr. Ronald Adams indicated that employees had delivered beans to Grand Forks Bean that are issue in this case. (Ron Adams Dep. 16:18-20.) Ron Adams also claimed to have an oral agreement with Grand Forks Bean for the marketing of these beans. (Ron Adams Dep. 15:4-14.) Given the presence of the Price Later Marketing Agreement, as well as Grand Forks Bean's reliance on the Price Later Marketing Agreement, and postings at Grand Forks Bean that all beans are accepted as a Price Later, there is sufficient evidence to find that the Price Later Marketing Agreement was entered into by Ronald Adams.

¶61 In accordance with the analysis above, the Price Later Marketing Agreement is a credit-sale contract, and Ronald Adams is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly,

Bremer Bank hereby objects to the Commission's proposed distribution to Ronald Adams of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

ix. WJS Nelson

¶62 Bremer Bank objects to the Commission's recommendation as to WJS Nelson's claim. WJS Nelson's claim is based on scale tickets and there is no Price Later Marketing Agreement for WJS Nelson. WJS Nelson failed to comply with N.D.C.C. § 60-02-11 because it has failed to convert its scale tickets into cash, a credit sale contract or a warehouse receipt. Given the failure of WJS Nelson to convert its scale tickets, and postings at Grand Forks Bean that all beans are accepted as a Price Later, there is sufficient evidence to find that the WJS Nelson is not a "receiptholder" and is not entitled to any lien or claim superior to the security interest of Bremer Bank in the cash proceeds of the beans owned by Grand Forks Bean. Accordingly, Bremer Bank hereby objects to the Commission's proposed distribution to WJS Nelson of a portion of the bean proceeds held in trust prior to payment of Bremer Bank's claim in full.

Objection to any distribution from proceeds of beans to pay Commission fees/expenses

¶63 Bremer Bank objects to the distribution of any proceeds of the beans sold from Grand Forks Bean that would pay any fees and expenses of the Commission prior to payment in full of Bremer Bank's claim. There is no statute that provides the Commission a legal right with a higher priority to Bremer Bank's security interest in the beans and the proceeds of those beans. While there may be a super-priority lien in favor of receiptholders under N.D.C.C. § 60-02-25.1, such lien is not granted in favor of the Commission. It is admitted that the Commission is statutorily entitled to payment of its fees out of the trust fund. N.D.C.C. §§ 60-04-03.1, 60-04-10. However, these provisions do not state that the Commission's right to payment of expenses contravenes the interest

or rights of others in the funds held in trust. The trust fund does not consist only of the proceeds received from the sale of the beans, but also includes the proceeds of the bond. Here, there is no justification to distribution of any of the bean sales proceeds currently held by the Commission to pay the expenses of the Commission because doing so has the effect of destroying Bremer Bank's lien rights in the proceeds.

Public Policy Favors Finding that the Price Later Marketing Agreements are Credit-Sale Contracts.

¶64 There are sound policy reasons for finding that the Price Later Marketing Agreements at issue in this matter are credit-sale contracts, and denying protection to farmers who fail to convert their scale tickets into a warehouse receipt. As noted above, the Commission also throughout its oversight of Grand Forks Bean was representing to Grand Forks Bean that the Price Later Marketing Agreements were proper credit-sale contracts. Where there is posted notice at the warehouse that beans are not being accepted for storage, the sale arrangement is being documented by an approved form of credit-sale contract, the warehouse should be entitled to rely on these beans being free to assign as security. With decisions that will protect a farmer at all costs to access to the grain in the warehouse, access to capital will dry up for North Dakota grain warehouses and grain buyers.

¶65 This access to capital problem was duly noted in a similar case in the Bankruptcy Court for the Eastern District of Michigan. Matter of Biniecki Bros., 38 B.R. 519, 520 (Bankr. E.D. Mich. 1984). In Biniecki Bros., the bankruptcy court had to determine if a grower with only a scale ticket should be considered a receipt, in which case the grower would have all rights to the grain shown

in the scale ticket, or an unsecured creditor of the bankrupt warehouse. Id. at 522. The bankruptcy court noted there are strong policy reasons to not view a receipt as the default provision:

> In In re Durand Milling Co., Inc., 9 B.R. 669 (Bkrtcy.E.D.Mich.1981), my predecessor, the Hon. Harold A. Bobier, read into the statute the presumption that a bailment is created when grain is delivered and no document has been issued. He treated the "scale ticket" as a "non-negotiable warehouse receipt." That may have aided the result the court wished to reach in a complaint for nondischargeability against the elevator operator for his acts of conversion, but that outcome is not compelled by the statute. Indeed, the predominant practice in the industry is not to store under receipts, but to sell under price later agreements. This is primarily due to the fact that grain dealers form the marketing link—storage is a secondary aspect of their operations. Even if a producer holds a grain receipt, he will usually sell the grain to the grain dealer at a later date. Rarely does a producer assign his receipts as collateral to secure new borrowings. Under these circumstances, grain receipts and price later agreements become functional equivalents.
>
> There is, however, a significant legal difference between grain receipts and price later agreements. The grain receipt is a document of title, and the secured creditor or judgment creditor of the grain dealer cannot attach grain held under receipts. The grain is not owned by the grain dealer; the dealer is just the bailee under the farm producer's bailment. To the contrary is the case of grain sold to the grain dealer under price later agreements. The grain is owned by the grain dealer, and the seller is but an unsecured creditor with a contingent claim. The claim is contingent, not as to liability, but as to amount. The holder of a price later agreement loses to the secured creditor or judgment creditor of the grain dealer. Unfortunately, since farmers tend to ignore the differences in the two forms of "paper," and price laters are the dominant mode, the producers frequently find themselves frustrated by a legal structure which they ignore or about which they are ignorant.
>
> **The construction of scale tickets under the Grain Dealers Act as "non-negotiable receipts" proferred in Durand Milling, supra, is, if followed, prejudicial to agricultural lending practices. A secured lender to the grain dealer or elevator operator expects, when it has perfected a blanket security interest in all the personal property of the elevator, to include the elevator's inventory and proceeds. Since the grain delivered under a "price later" is included within this dealer's inventory, the Durand Milling analysis, if followed, would deny attachment of the lender's security interest to that grain. As such, Durand Milling is a disincentive to secured lending to elevator operators, and threatens to defeat the ability of the operator to obtain working capital loans.** This Court is fairly certain that my predecessor did not intend that result, but that is the logical consequence.
>
> To be sure, farm producers who sell their grain to an elevator operator on "price laters" run the risk that the operator will be insolvent on the date that the producer

> demands payment on the posted price. The producer also runs the risk that the grain he had earlier delivered and transferred will be subject to execution by a creditor having a judgment against the elevator operator. And it may well be that farm producers do not fully understand these risks under state law remedies; they surely do not understand the risks of preferential recoveries by bankruptcy trustees. On recent occasion the farmers' reactions to bankruptcy cases filed by or against elevator operators have bordered on civil insurrection. See State of Missouri v. United States Bankruptcy Court, 647 F.2d 768 (8th Cir.1981).

Id. at 522-23 (emphasis added). Even stronger policy reasons than noted in Biniecki Bros. is at work in this case. Here, the farmers would not simply be an unsecured creditor of Grand Forks Bean. Rather, the Growers would have available to them the credit-sale indemnity fund that was paid for by the farmers of the State of North Dakota. Finding that the Price Later Marketing Agreements on which Grand Forks Bean relied, and on which Bremer Bank relied as well, are not credit-sale contracts, when the representatives of the Commission specifically told Grand Forks Bean that there were no problems with using the form, will have a negative affect on access to capital for warehouses and grain buyers in North Dakota.

CONCLUSION

¶66 For the forgoing reasons, this court should determine that Growers for which there is in the records of Grand Forks Bean a Price Later Marketing Agreement are not entitled to participate in the trust fund, and direct that the Commission distribute sufficient assets from the trust fund to satisfy the claim of Bremer Bank in full.

Dated this 3 day of March, 2016.

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