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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS

NORTHEAST CENTRAL JUDICIAL DISTRICT

Public Service Commission,)
)
 Petitioner,)
)
 vs.)
)
 Grand Forks Bean Company, Inc., and)
 Auto-Owners Insurance Company,)
)
 Respondents.)

Civil No.: 18-2015-cv-00240

**CLOSING ARGUMENT OF RESPONDENT
 AUTO-OWNERS INSURANCE COMPANY**

1. On March 14 and 15, 2016, a trial was conducted before the Court, the Honorable Jon J. Jensen, District Judge, presiding. The matter tried to the Court was the motion submitted by the Petitioner, (North Dakota) Public Service Commission (hereafter "PSC"), for court approval of the Report and Recommendation of the Trustee to Approve Payments and for Discharge of the Trustee.

2. The appearances of the parties and their counsel were all noted on the record.

3. The Court heard testimony from the parties and their witnesses, in support of and in opposition to the PSC's motion to approve their report and recommendations, to approve payments and to discharge the PSC as Trustee of Grand Forks Bean.

4. Following the conclusion of the testimony, late Tuesday morning, March 15, 2016, the Court ordered that counsel for the parties file with the Court and serve upon counsel for other parties, written closing arguments regarding their respective positions in this case, and

that the same be filed with the Court and served upon other counsel no later than March 29, 2016.

5. The Court also permitted the parties to file and serve, at their discretion, reply briefs to briefs of any other parties, no later than April 5, 2016.

6. Upon the receipt of reply briefs from the parties, or upon the expiration of the time to serve and file reply briefs, the matter would be then taken under advisement by the Court and the Court will issue a written decision later.

7. The following will constitute an outline of the closing argument and position of respondent Auto-Owners Insurance Company (hereafter "Auto-Owners"), in this action. Auto-Owners will attempt to outline the most salient and applicable points and arguments in support of its position. Obviously, because of consideration to the Court and constraints of time and space, Auto-Owners will not be able to cite or address every item of evidence or testimony presented at the trial. If this argument does not address any evidence or testimony that supports Auto-Owners' position in this action, that omission is inadvertent and Auto-Owners does not intend to abandon or waive any evidence or testimony in support of its position. Auto-Owners, of course, would request that the Court consider the entirety of the evidence presented at the trial, including that in support of the Auto-Owners' position, even if not directly cited or addressed herein.

SUMMARY OF ARGUMENT

- a. **N.D.C.C. § 60-02-41 applies in this action. That statute establishes that the market price for the growers' unconverted scale tickets or warehouse receipts is the price prevailing on the date that the GF Bean warehouse was closed because of insolvency. By the uncontradicted trial evidence, that date occurred in the middle to latter part of December, 2014, or early January, 2015. The statute provides that the growers must accept that price for their claims in this case and surrender their receipts for that price. That price is \$23.00 per c.w.t. as researched and established by the PSC.**

b. **Accordingly, by application of N.D.C.C. § 60-02-41, the Court should approve and adopt the Report and Recommendation of the PSC. Consistent with that, the Court must dismiss this action against Auto-Owners with prejudice and exonerate and discharge it from any obligations to the PSC, the growers, or others, under its surety bond to GF Bean.**

A. **The Auto-Owners' surety bond.**

8. North Dakota Century Code, (hereafter "N.D.C.C.") Chapter 60-02 governs the licensure, operations and management of grain and seed warehouses in the State of North Dakota. Pursuant to N.D.C.C. § 60-02-01(5), a "public warehouse" includes an elevator and grain warehouse. The word "grain" is a word of art within the application of N.D.C.C. Chapter 60-02 and includes beans, which also includes pinto beans. N.D.C.C. § 60-02-01(3).

9. Before any license is issued to a public warehouseman under N.D.C.C. Chapter 60-02, the public warehouseman is required to file a surety bond with the PSC in a sum of not less than \$5,000.00 for any one warehouse that runs through the state of North Dakota for the benefit of all persons storing or selling grain in the warehouse and that is conditioned upon the faithful performance of the licensee's (public warehouseman's) duty as a public warehouseman, among other requirements. N.D.C.C. § 60-02-09.

10. The surety bond must specify the location of each public warehouse intended to be covered by the bond and be for the specific purpose of protecting the holders of outstanding receipts and covering the costs incurred by the PSC in the administration of N.D.C.C. Chapter 60-04 in the event of the licensee's insolvency. N.D.C.C. § 60-02-09(5) and (6).

11. Pursuant to this statute, the surety bond does not accrue (or apply) to the benefit of any person entering into a credit sale contract with a public warehouseman. N.D.C.C. § 60-02-09(7).

12. Moreover, pursuant to this statute, in no event shall the aggregate liability of the surety under a bond accumulate for each successive annual license period during which the bond is in force, but for losses during any annual license renewal period, shall be limited in the aggregate to the bond amount stated or changed by appropriate endorsement or rider. N.D.C.C. § 60-02-09(8).

13. On November 20, 2007, Auto-Owners issued a surety bond to Grand Forks Bean Company, Inc., as principal, in the penal sum of \$100,000.00. The Auto-Owners' surety bond, including definitions of the terms used therein, as provided in the bond, is governed by the provisions of Chapters 60-02 and 60-04, N.D.C.C. As provided in the immediately preceding paragraph, the maximum ceiling of Auto-Owners' exposure under the bond, if any, cannot exceed the sum of \$100,000.00, regardless of the outcome of this action.

14. The Auto-Owners' surety bond involved in this action, issued to Grand Forks Bean Company, Inc., as principal, was received into evidence at the trial of this action as Exhibit "PSC-5".

15. As N.D.C.C. § 60-02-09(4) makes clear, the purpose of the Auto-Owners' surety bond was conditioned for the faithful performance of the licensee's (GF Bean's) duties as a public warehouseman and for its compliance with the provisions of law and the rules of the PSC relating to the storage and purchase of grain by such warehouseman. The public warehouseman, in this case, is Grand Forks Bean Company, Inc. See, also the fourth paragraph of Exhibit "PSC-5" which provides for the same conditions of the surety bond.

16. As that same paragraph in Exhibit "PSC-5" also clearly states, the Auto-Owners' surety bond shall not accrue to the benefit of any person entering into a credit sale contract with the principal, namely Grand Forks Bean Company, Inc. That bond limitation is expressly

mandated by subsection 7 of N.D.C.C. § 60-02-09, wherein the same bond limitation is statutorily provided. This contractual and statutory limitation of the applicability of the Auto-Owners' surety bond is relevant to the claims and position of Bremer Bank in this action, as will be discussed hereafter.

17. Moreover, as respects the claim and position of Bremer Bank in this action, that it has a preferred secured lien against the assets of the Grand Forks Bean trust, currently administered by the PSC and held at the Bank of North Dakota, because the Auto-Owners' surety bond only applies, as necessary, to protect the holders of outstanding receipts issued by the public warehouseman and is conditioned upon the faithful performance of the licensee's duties as a public warehouseman relating to the storage and purchase of grain by the warehouseman. The Auto-Owners' surety bond does not extend to a secured creditor of the public warehouseman, such as a bank. In other words, Bremer Bank, in pursuit of its loan recovery against GF Bean in this action, does not have a claim against the warehouseman's bond issued by Auto-Owners in this action. See, *Public Service Commission v. Valley Farmer's Bean Association*, 365 N.W.2d 528, 539 (N.D. 1985).

B. The PSC Report & Recommendation and Request for Approval of Payments and Discharge of Trustee should be, in all things, approved.

18. It is undisputed that Grand Forks Bean Company, Inc., ("GF Bean"), is insolvent, has closed its business and has ceased doing business as a warehouseman, because of its insolvency. That fact is undisputed and is not an issue in this case.

19. In fact, the reason the PSC became involved in this action, in the first place, was due to the insolvency of GF Bean. PSC became involved because GF Bean ceased doing business, closed its warehouse because of its insolvency, and the grower/creditors of GF Bean needed protection.

20. N.D.C.C. § 60-04-03 provides, in part, that upon the insolvency of any warehouseman, the PSC 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 § 60-04-03.1. The statute further provides that upon notice to the warehouseman, as the Court shall prescribe, the Court shall hear and determine the application of the PSC in a summary manner. The statute goes on to state that if it appears to the Court that the warehouseman is insolvent within the meaning of the Chapter, and that it would be in the best interests of the receipt holders that the Commission secure and execute the Trust, the Court shall issue an order granting the application, without bond, whereupon the PSC shall proceed to exercise its authority without further direction from the Court. *Id.*

21. The statute further provides that upon the filing of the Commission's application, the Court may issue *ex parte* such temporary order as may be necessary to preserve or protect the assets of the trust fund, or the value thereof, until the Court issues its order granting or denying the application. *Id.*

22. In this case, the Court, on February 18, 2015, executed its *ex parte* Order to preserve the trust assets of GF Bean until the Court issues its Order granting or denying the application for appointment of the PSC as trustee of the GF Bean trust fund in this proceeding. (Doc. Id. No. 11).

23. Later, the Court in this action issued its Amended Order appointing the PSC Trustee of the GF Bean Trust by virtue of the insolvency of GF Bean. (Doc. Id. No. 26).

24. Thereafter, the PSC notified appropriate parties of its appointment as Trustee and of their right to file claims against the GF Bean Trust. (Doc. Id. No. 28).

25. The PSC then prepared and issued its Report and Recommendation establishing the date of insolvency of GF Bean and the amount of payments to the claimant growers scale ticket/receipt holders (hereafter "growers") of GF Bean and the amount of payment that each grower was entitled to recover from the GF Bean Trust established by the PSC.

26. The growers having claims against GF Bean and the insolvency trust fund, all submitted objections to the PSC's Report and Recommendations and filed their respective claims against the GF Bean Trust.

27. The issues of whether the Court should approve the Report and Recommendations of the PSC, the claim of Bremer Bank, and the various amended claims of the growers were tried to this Court on March 14 and 15, 2016.

28. The PSC is charged by law with the responsibility of assuming the very important and fiduciary responsibility of Trustee of the insolvent warehouseman, GF Bean, and to establish, supervise and manage the trust fund of the insolvent warehouseman for the benefit of non-credit sale receipt holders of the insolvent warehouseman and to pay claims of those receipt holders in appropriate amounts as determined by the PSC. (Chapter 60-04, N.D.C.C.)

29. The PSC is the expert in an insolvency proceeding such as this. They are created by law and charged with the responsibility, by law, to protect the interests of noncredit sale receipt holders of the insolvent warehouseman and to pay the valid claims, in appropriate amounts, of those receipt holders as deemed appropriate by the PSC based upon the latter's investigation and expertise.

30. The Court heard testimony from Susan Richter, Licensing Director of the PSC, and Timothy Erdmann, the former (now retired) Grain Warehouse Inspector of 18 years, for the PSC.

31. Their testimony, unlike that of the growers, was consistent, credible, and never varied.

32. Ms. Richter testified that the first time she was contacted by any grower was not until November 8, 2014, when she was contacted by Curt Amundson. After that contact, and, I believe others, Ms. Richter testified that she instructed Tim Erdmann, the inspector, to go to the GF Bean premises to see if there were enough beans in the warehouse to re-deliver the pinto beans to the growers. According to Ms. Richter, Mr. Erdmann did that in early December of 2014. Mr. Erdmann determined that there was enough bean inventory in the GF Bean warehouses to make re-delivery of all beans to the growers at that time.

33. Mr. Erdmann testified consistent with this testimony of Ms. Richter.

34. Mr. Erdmann testified that notwithstanding the fact that there were enough pinto beans in the GF Bean warehouses, to satisfactorily re-deliver all of them to the growers, the growers began to file official claims to the PSC during that timeframe, and that is why the PSC commenced the present insolvency proceedings.

35. Mr. Erdmann testified that after insolvency proceedings were commenced against GF Bean, (the growers having refused re-delivery of their beans) the GF Bean inventory was sold to Central Valley Bean and the proceeds of that sale were placed in the GF Bean Trust and deposited in an interest bearing account at the Bank of North Dakota. The funds have been, and remain on deposit, earning interest, at this time, pending the Order of the Court for payment and distribution of those funds to the growers in amounts as determined by the Court. (See, Ex. "PSC-19", showing a balance of the GF Bean Trust Account of \$768,053.24 as of February 29, 2016).

36. Based upon his experience, investigation and expertise, Mr. Erdmann prepared a spreadsheet/report for this proceeding. In that report, he determined that the insolvency date of GF Bean was December 19, 2014. In that report, Mr. Erdmann calculated and determined the net amounts payable to each grower for their claims against GF Bean and the GF Bean Trust. Mr. Erdmann determined that the total aggregate amount payable to all of the growers in this action, after appropriate offsets, was \$643,090.37. (See, Ex. "PSC-32").

37. N.D.C.C. § 60-04-03.1 provides that upon the insolvency of a warehouseman, a trust fund shall be established for the benefit of noncredit-sale receipt holders of the insolvent warehouseman and to pay the costs incurred by the PSC in the administration of N.D.C.C. Chapter 60-04. The statute provides what the Trust Fund must consist of. It appears to list the required Trust Fund assets in a level of priority or hierarchy.

38. Subsection 1 of the said statute appears to state that the first priority asset of the Trust Fund is the grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain. It must be remembered that when Tim Erdmann of the PSC inspected the GF Bean warehouse inventory, he determined that there was enough grain in the warehouse to pay the growers' claims. Notwithstanding that, and because the growers filed formal claims with the PSC (apparently rejecting re-delivery of the beans in the warehouse, to them), the GF Bean inventory of beans was sold to Central Valley Bean Co. and the proceeds of that sale, with accruing interest, are currently on deposit with the Bank of North Dakota in the GF Bean Trust Fund established for payment of valid claims of the growers. (Ex. "PSC-19").

39. As the Court will note from the said that statute, the claims for relief, and proceeds therefrom, for damages upon the surety bond given by the warehouseman to ensure faithful performance of its duties, is at the fourth priority level for the makeup of the Trust Fund,

three levels down from priority item number 1, being proceeds from the sale of grain in the warehouse of the insolvent warehouseman.

40. As the Court is aware, even though the PSC joined Auto-Owners, as a required party respondent in this action (by virtue of its surety bond), pursuant to N.D.C.C. § 60-04-03.3, it is also clear that neither the PSC nor any of the growers ever requested that the Court order Auto-Owners to deposit the penal sum of its bond into the PSC Trust Account for the benefit of the creditors of GF Bean, per the same statute, pending a final determination of the surety's liability under the bond. The reason for this is obvious and evident. The amount of trust account cash proceeds currently on deposit at the Bank of North Dakota, from the sale of the GF Bean grain inventory to Central Valley Bean, namely \$768,053.24 (Ex. "PSC-19"), exceeds the total amounts determined by the PSC to be payable to the growers for their claims, which amount is \$643,090.37 (Ex. "PSC-32"). Thus, the Auto-Owners surety bond proceeds are not necessary for the GF Bean Trust Account to pay the growers.

41. As the PSC's brief in support of its motion to approve the Report and Recommendation of the Trustee and to Approve Payments and Discharge of Trustee (Doc. Id. No.: 155) states; as the testimony of Sue Richter and Tim Erdmann support; and as supported and established by Exhibits "PSC-19", "PSC-29" and "PSC-32" all establish, (plus the undisputed fact that neither the PSC nor anyone else ever requested that the Auto-Owners surety bond amount be placed into the current GF Bean Trust Account on deposit at the Bank of North Dakota), the Auto-Owners surety bond does not need to be added to the current trust proceeds, as sufficient proceeds already exist to pay the valid claims of the growers and therefore, this action against Auto-Owners must be dismissed and its bond exonerated.

42. The PSC will be filing its closing argument with the Court. Auto-Owners presumes that the PSC's position will remain consistent with its previous position in this action and its Report and Recommendations. Accordingly, Auto-Owners would support the position and arguments of the PSC as those would exonerate the Auto-Owners surety bond.

43. It cannot be overemphasized at this point that the PSC is truly a neutral, objective party to these proceedings. None of its personal monies or funds are at stake. In that sense, it really does not have any "skin in this game" or a "dog in this fight". Merely acting under the statutory authorities and mandates of law, the PSC stepped in to protect the grower creditors of GF Bean when the latter became insolvent. The PSC simply did its statutory job and collected and sold the GF Bean grain inventory, placing the proceeds in trust pending the approval by the Court of its Report and Recommendations. The PSC has no personal, financial or pecuniary self-interest in the outcome of this proceeding. The money on deposit in the trust account is not its own. It does not have a personal stake in the outcome of this proceeding other than to seek reimbursements, allowed by law, for its costs and disbursements in administering the trust in this action, which it would be entitled to regardless of the outcome of this action.

44. Therefore, the PSC has ever acted in any capacity other than objectively, neutrally, and without any pecuniary or financial self-interest or motivation. However, as will be shown hereafter, the same cannot be said of the growers/creditors of GF Bean.

45. For this additional reason, as well as from the trial evidence, the trial record and the arguments of the PSC, Auto-Owners respectfully requests that the Court approve, in all things, the Report and Recommendations of the PSC in this action and approve the payments determined and approved by the PSC and discharge the PSC from further responsibility as GF Bean's Trustee. In that event, because the current Trust proceeds of the GF Bean Trust, on

deposit at the Bank of North Dakota, exceed the amount of the approved claims of the growers, the Auto-Owners surety bond is not required to be placed into that Trust. Accordingly, upon the Court's approval of the Report and Recommendation of the PSC, Auto-Owners respectfully requests that the Court dismiss this action against Auto-Owners, with prejudice, and in all things discharge and exonerate the surety bond of Auto-Owners in this proceeding. See, also, ¶ 2 of Brief of PSC in support of its Motion to Approve Report and Recommendation, dated September 30, 2015, Doc. Id. No.: 155.

46. While the neutral, objective and learned position of the PSC has remained constant throughout these proceedings, the same cannot be said of any of the grower claimants. As is clear from the testimony of every one of the growers claimants, they all filed original claims with the PSC, and then amended their claims to request a different insolvency date of GF Bean and different market price dates in order that they could obtain a higher market price for their beans.

47. Duane Altendorf and Brent Baldwin/Baldwin Farms originally requested an insolvency date for GF Bean (with a market price for the beans as of that date), of on or before December 19, 2014, incidentally the insolvency date determined by the PSC. However, later, they amended and backdated their claims to October 15, 2013, to try to take advantage of a higher market price for their beans.

48. Curt Amundson, Beth Nelson (for the Brad Nelson Estate), and Chuck Nelson all changed their original claim dates from July 1, 2014, back to October 15, 2013, again in the hope of obtaining a higher market price for their respective beans.

49. In fact, and this directly impacts his credibility, Chuck Nelson wanted to utilize the market rate price existing on October 15, 2013, for his beans, even though he testified that many of his beans were not delivered to GF Bean until after that date.

50. WJS Nelson (by Steven Nelson), amended and backdated his original claim date of April, 2015, to May 30, 2014, again in the hope of obtaining a higher market price for its beans.

51. Nick Adams changed his original claim date of September 15, 2012, ahead to October 15, 2013, again in the hope of obtaining a higher market price for beans on the latter date.

52. Finally, Ron Adams changed his original claim dates from several months in 2012 and early 2013, to October 15, 2013, for the same reason.

53. Most, if not all, of the growers that testified at the trial admitted that they changed their proposed insolvency dates for GF Bean in the hope of obtaining a higher market price rate for their beans. They claimed that neither they nor their counsel did this in conjunction or collusion with each other and that it was merely a coincidence that all of their claim dates (with the sole exception of WJS Nelson) were changed to October 15, 2013, and that they picked that precise date completely on their own, without discussion, agreement, or in collusion with any of the others. However, they all agreed that they did so in order to attempt to obtain a higher market price for their beans.

54. Auto-Owners submits that these transparent tactics of the growers reflect very poorly on their credibility and must cause the Court to have great suspicion and doubt regarding the validity and veracity of their claims.

55. The testimony of eight of the nine growers that they all just, by chance, happened to select the same exact day for the insolvency date and market price date for their claims (October 15, 2013), without collusion or discussion with the others, simply defies all odds, logic, credibility, and believability.

56. Moreover, unlike the PSC, all of the growers have a personal, financial interest and motive behind their claims and their pursuit of the highest market price for their beans that they can obtain. Courts in this state instruct juries every day that one factor that a jury can utilize in determining the credibility of a witness is whether that witness has a personal or financial stake in the outcome of the action. Courts also instruct juries that the credibility of a witness can be impeached by evidence that the witness said something different on a different occasion. (See, N.D. Pattern Civil Jury Instructions C-80.01 and C 80.02).

57. Accordingly, the veracity and credibility of all of the growers is very much in doubt when they change their claims and eight of the nine of them assert the same insolvency and market price date of October 15, 2013, for their beans. The growers have a lot at stake, personally and financially, in the outcome of this proceeding. They are motivated to stretch the truth to benefit themselves financially. On the other hand, the PSC has no such motive. It has always been consistent in its objective position in this action, unlike the growers.

58. Auto-Owners respectfully requests the Court, in light of this factor as well, to accept and approve in all things the Report and Recommendation of the PSC.

59. Suffice it to say that there was much contradictory testimony as to the date of insolvency of GF Bean. The PSC determined that insolvency date to be December 19, 2014. (Ex. "PSC-32"). The growers, of course, all chose different insolvency dates for GF Bean (every one changing their claims and requested dates of insolvency), in the hope of increasing their

recoverable claims by choosing insolvency dates with a higher market price of pinto beans than their original claim dates.

60. There was other contradictory evidence regarding the date of insolvency of GF Bean, as well. For example, it is undisputed that the growers did not first contact the PSC and submit formal claims until November of 2014. Bremer Bank records show that GF Bean was still profitable into the summer and fall of 2014 (Bremer Bank Ex. 216, the "Borrowing Base and Compliance Certificate of GF Bean dated October 4, 2014, showing a substantial collateral surplus).

61. According to Susan Richter of the PSC, even though eight of the nine growers all select the date of October 15, 2013, as the date of GF Bean's insolvency, Ms. Richter testified that GF Bean was doing business after April of 2014.

62. Kevin Bieto of Bremer Bank testified that GF Bean was doing well until its principal owner, Todd McGurk, died in August of 2014, after which time Tad McGurk (who took over the GF Bean business after his brother died) went into Bremer Bank, basically threw the keys to the business on the desk of Mr. Bieto and told Bremer to take over the operation of GF Bean, as "things were not good" (at GF Bean), or words to that effect.

63. Other recitations of contradictory testimony and evidence at trial, regarding the precise insolvency date of GF Bean, could be cited. However, the above examples establish that much contradictory and inconsistent evidence and testimony (in addition to the wholly contradictory and self-serving testimony of the growers), compared to the consistent testimony and position of the PSC regarding the insolvency date, show that there was much disputed evidence presented as to precisely when GF Bean became insolvent. Relying upon N.D.C.C. § 60-04-09(5), the growers claim that GF Bean became insolvent on October 15, 2013, (the one

exception being WJS Nelson), and seek the market price prevailing on that date of \$38.00 c.w.t., as that is the highest market price before the pinto bean market began to collapse.

64. Therefore, what is the Court to do with this contradictory testimony and evidence? What date is the Court to utilize as the appropriate date for the price to be paid to the growers for their unconverted scale tickets or warehouse receipts for the beans they delivered to GF Bean? What is the Court to do with this disparate state of the trial record evidence and testimony?

65. The answer is very simple and is found at N.D.C.C. § 60-02-41.

66. N.D.C.C. § 60-02-41, states as follows:

60-02-41. Going out of business - Redemption of receipts.

When a public warehouseman ceases business through the destruction of a warehouse by fire or other cause, or through insolvency, such warehouseman shall redeem all outstanding unconverted scale tickets or warehouse receipts at the price prevailing on the date the warehouse was destroyed or closed because of insolvency. The holder of such receipts, upon due notice, must accept this price and surrender the receipts. Any public warehouseman who voluntarily ceases business or fails to renew an existing warehouse license or whose warehouse license is revoked shall notify the commission and all outstanding receipt holders of such closing and redeem all outstanding unconverted scale tickets or warehouse receipts at the price prevailing on the date the warehouse closed or at the option of the owner of the receipt redeliver the kind, grade, and quantity of grain called for by the unconverted scale ticket or warehouse receipt. On commingled grain the value of over and under deliveries in quantity, grade, and protein shall be settled in cash and priced on the market on the day of closing. (emphasis added).

67. As Auto-Owners has outlined above, and as the Court is aware from presiding over the recent trial of this action, there is a great discrepancy and divergence among the parties and the grower claimants as to both when GF Bean became insolvent and what date to utilize for the determination of the market price of the growers' pinto beans as it concerns the money they are entitled to receive for the pinto beans they delivered to GF Bean. As the Court will note from

the above statute, it is very specific as to when the insolvency date is to be determined and on what date the price payable to the holders of unconverted scale tickets or warehouse receipts is to be determined.

68. The above statute provides great certainty (in this uncertain state of the record) regarding resolving the growers' claims and provides the Court with clarity, certainty and guidance in this action. This is particularly important and essential considering the great discrepancy and wide array in the positions of all of the parties in this action as to what date to use for the insolvency of GF Bean and what market price to use for payment to the growers for the beans they delivered to GF Bean.

69. As the Court will note from this statute, the first sentence of the statute clearly states that when a public warehouseman (which GF Bean was) ceases business through or because of an insolvency, the warehouseman **shall** redeem all outstanding unconverted scale tickets or warehouse receipts at the price prevailing on the date that the warehouse was closed because of insolvency. The next sentence of the statute states that the holder of such receipts, upon due notice, **must accept this price** and surrender the receipts.

70. The statute also provides for the situation when the warehouse license of the warehouseman is revoked. Again, the price to be paid to the holders of outstanding unconverted scale tickets or warehouse receipts is the price prevailing (for the beans) on the date the warehouse closed, or at the option of the owner of the receipt, the warehouseman shall redeliver like grain (beans) called for by the unconverted scale ticket or warehouse receipt.

71. In this case, the undersigned recalls that Tim Erdmann of the PSC testified that in early or mid-December of 2014, he inspected the GF Bean warehouse and there was sufficient inventory of beans, in good condition, in the GF Bean warehouses, sufficient to re-deliver all

beans to all of the growers. The undersigned believes that the trial testimony showed that the PSC offered to re-deliver to all of the growers, the amount of their beans in storage. However, the undersigned recalls the trial testimony as being that the growers all rejected that offer and refused to accept re-delivery of their beans at that time, and instead filed formal claims with the PSC. Because of that, and in order that the beans not be wasted and deteriorate, the PSC took immediate action to commence this insolvency procedure, sell the beans to a third party, deposit the proceeds and protect the claims of the growers. Despite the obvious tactics of the growers, the PSC did its job.

72. It is almost too obvious to even say, however, the undersigned will. It is obvious that the reason the growers refused re-delivery of their beans from the GF Bean warehouse, in November or December of 2014, was because the market price for beans at that time was falling. The growers all wanted to utilize an earlier market rate price for their beans, with eight of the nine growers (again, not just by coincidence) opting for an October 15, 2013, market price which appears to have been the highest rate prior to the market falling.

73. Therefore, the growers in this case refused the option of re-delivery of their beans.

74. N.D.C.C. § 60-02-41, gives great clarity, guidance and certainty to the Court in what would otherwise be an uncertain and murky situation, considering the great divergence in the positions of the parties as to the proper date to utilize to determine the price the growers are entitled to recover in this proceeding. N.D.C.C. § 60-02-41 clearly provides that the market price that must be used to pay the growers for their beans in this case is the market price prevailing on the date GF Bean closed its doors because of insolvency.

75. In this case, the evidence was clear and undisputed that GF Bean did not close, because of insolvency, until the middle to latter part of December of 2014. I recall that Susan

Richter of the PSC testified that GF Bean closed, because of insolvency, on or about December 23, 2014, which was during the time that the PSC, GF Bean, Bremer Bank, and the growers were all working on the stipulation for the sale of the GF Bean inventory and deposit of proceeds, in this insolvency proceeding, due to the insolvency of GF Bean. It appears that all of the parties, through their authorized representatives, signed and executed that stipulation on either the 29th or 30th of January, 2015. (See Ex. "PSC-17").

76. Moreover, the Court is referred to the "Ex Parte Cease and Desist Order", dated January 16, 2015, issued by the PSC to GF Bean, because of the insolvency of GF Bean. This Ex Parte Cease and Desist Order, dated January 26, 2015, is also a part of Ex. "PSC-17" entered into evidence in this case.

77. Finally, on this subject, the Court is referred to Ex. "PSC-16", the suspension notice issued by the PSC to GF Bean dated February 5, 2015, informing GF Bean that their public warehouse license is suspended.

78. Of course, the PSC's Cease and Desist Order and license suspension, issued to GF Bean, shut the business down and barred GF Bean from receiving additional grain for purchase, storage, shipping or processing until the suspension was lifted. Ex. "PSC-16". That was the business of GF Bean at the time of that order and license suspension.

79. Moreover, Susan Richter testified that following that license suspension, GF Bean never re-opened its doors to again conduct business as a public warehouseman.

80. Therefore, the above-stated documentary evidence, as well as the testimony of Susan Richter, all clearly establish that the business of GF Bean as a public warehouseman, closed and ceased, because of its insolvency, in either mid to late December of 2014, or sometime in January, 2015.

81. There was simply no contradictory or other evidence submitted by any of the other parties, particularly the growers, to refute or contradict the fact that GF Bean ceased doing business and closed its doors as a public warehouseman in either December of 2014, or January of 2015, at the absolute latest.

82. Again, this was clear and explicit from the evidence and no one submitted any evidence contradicting this fact. In fact, no one from GF Bean even bothered to appear and testify at the Court proceeding. No one from GF Bean appeared and attempted to refute the PSC Report and Recommendation, particularly the date that GF Bean closed its doors due to its insolvency.

83. Based upon a December, 2014, insolvency date of GF Bean, the PSC determined that the market price for pinto beans on that date was \$23.00 per c.w.t. See, Ex. "PSC-32", top of first page.

84. That market price was based upon the extensive research that Tim Erdmann of the PSC conducted, regarding the prevailing market price for pinto beans in North Dakota and Minnesota. In fact, Mr. Erdmann's research on the market price of pinto beans was so thorough and extensive that – in order to give the benefit of any doubt to the growers – his market price research covered the time frame spread from October 7, 2014, through February 24, 2015, just to make sure that he arrived at a fair and accurate market price to pay the growers for their pinto beans. As the evidence clearly established, the market price for pinto beans, through that almost five month period, never changed and was always \$23.00 per c.w.t. See, Ex. "PSC-29".

85. The PSC utilized the \$23.00 c.w.t. figure to determine the payments all of the growers were entitled to receive for the beans they delivered to GF Bean. See, Ex. "PSC-32".

86. As with the clear and uncontradicted evidence as to when GF Bean ceased to operate and closed its doors for business as a public warehouseman because of insolvency, this evidence of the market price of pinto beans between October, 2014, and late February, 2015, was also not contradicted or disputed by any of the growers or anyone else at trial.

87. Certainly, to “hedge their bets”, so to speak, if the growers thought that \$23.00 per c.w.t. was too low for the insolvency date utilized by the PSC (December 19, 2014), they would have produced evidence on that price. They did not. Therefore, the PSC’s evidence regarding the market price for the growers’ pinto beans, during and covering the timeframe when GF Bean went out of business and ceased operating as a public warehouseman because of insolvency, was also undisputed and is the appropriate market price for the pinto beans for the Court to utilize in this action.

88. The growers may argue that N.D.C.C. § 60-02-41 should not apply and be utilized by this Court, because the growers base their claim under N.D.C.C. § 60-04-09(5), which is in a different Chapter of the Code. However, that argument would be erroneous.

89. It is a basic concept of statutory interpretation, in fact codified by North Dakota law, that the “particular controls general”, meaning whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so the effect may be given to both provisions. However, if the conflict between the two provisions is irreconcilable, the special provision must prevail and must be construed as an exception to the general provision unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail. N.D.C.C. § 1-02-07.

90. In this case, N.D.C.C. § 60-04-09(5) is more of a general provision in comparison to N.D.C.C. § 60-02-41. Section 60-04-09(5) refers only generally to redeeming and paying

scale tickets or warehouse receipts based upon the market price prevailing on the date of the insolvency. The statute does not specify what date is to be utilized to determine the date of the insolvency. This statute, then, lends itself to much uncertainty and disparate and contradictory claims and evidence as to the date of the insolvency, which is exactly what occurred in this case.

91. However, N.D.C.C. § 60-02-41 is much more specific and gives much greater certainty and specificity as to how to determine the date of insolvency of the warehouseman for purposes of redeeming outstanding unconverted scale tickets or warehouse receipts. Both statutes apply to paying or redeeming scale tickets and warehouse receipts. Both statutes tie the redemption price for those scale tickets or warehouse receipts to the warehouseman's insolvency. However, N.D.C.C. § 60-02-41 goes further and is much more specific, provides much greater certainty and provides more clarity for the Court to determine first, what date to use as the date of insolvency, and then what market price to use for that insolvency date.

92. As shown by Section 60-02-41, the date of insolvency, and therefore, the market price date for the beans, is the date that the warehouse was closed or ceased to do business because of insolvency. It is this latter provision of Section 60-02-41 that is more clear, particular and specific on the issue of what date to use for GF Bean's insolvency and therefore, what date to use for the market price for the growers' beans. Application of this statute prevents the very kind of strategical maneuvering utilized by all of the growers in this case in amending their claims to select a market price date for their beans that is most beneficial to them.

93. Application of 60-02-41 allows the Court to determine, through objective evidence, what insolvency date to use and therefore, what market price to utilize. It clarifies and gives certainty in this case, when the evidence was so diverse and contradictory (and a floating concept or moving target), as it was in this case.

94. Therefore, applying N.D.C.C. § 1-02-07, as the Court must, means that the Court must apply N.D.C.C. § 60-02-41 in this action. Section 60-02-41 is much more case specific and comprehensive than § 60-04-09(5). There is no manifest legislative intent expressed in the latter statute that it should control over the former.

95. As stated, the undisputed and uncontradicted evidence presented in this case was that GF Bean closed its warehouse business and ceased doing business as a public warehouseman in either December of 2014 or January of 2015. The growers presented no evidence disputing that. That closure date was clearly proven by the evidence and testimony of the PSC and other testimony. Accordingly, the market price to pay the growers for their outstanding, unconverted scale tickets or warehouse receipts for their beans, is the price prevailing on the date that GF Bean was closed and ceased doing business because of insolvency. As this statute also states, the holder of such receipts must accept this price and surrender the receipts for that price.

96. Therefore, based on our law of statutory interpretation, it is clear that the market price of \$23.00 per c.w.t., as determined by the PSC, is the prevailing market price that the Court must apply and the growers must accept from the PSC for their beans as that, by virtue of the uncontradicted evidence, was the prevailing market price on the date that GF Bean closed and ceased doing business because of insolvency.

97. There simply was no other or contradictory evidence submitted by the growers on that aspect of this case.

98. Finally, and as N.D.C.C. § 1-02-07 also states, if Sections 60-02-41 and 60-04-09(5) can be reconciled with each other, then effect must be given to both statutes. In this case, the two statutes could also be reconciled. N.D.C.C. § 60-02-41 can be read as a clarification,

instructive guidance or expansion of 60-04-09(5) to determine the date of insolvency to be used, inasmuch as 60-04-09(5) is silent on that issue.

99. Therefore, it may not even be necessary that one statute trumps the other as the result is the same. If one does, 60-02-41 would prevail as it is more specific and particular on the key issues before the Court. However, even applying both statutes, still allows the two statutes to be applied and reconciled and the market price to be determined as of the date the GF Bean warehouse closed business due to insolvency, as § 60-02-41 can be applied as an extension of § 60-04-09(5) in order to determine the appropriate date to use for both the date of insolvency and the market price.

100. In either event, the market price to be utilized in this case for payment to the claimant growers for their pinto beans is the date that GF Bean closed and ceased doing business due to its insolvency, namely in either December of 2014 or January of 2015.

101. Applying either statute, or both, it is clear that the PSC's Report and Recommendation is appropriate and the Court should approve it.

102. Finally, in case the grower claimants may argue that only Chapter 60-04 applies in this case, and not Chapter 60-02, that argument would be erroneous as well. By way of examples, and not intended to be exclusive, the Auto-Owners' surety bond, in the last paragraph before signatures, states that it is governed by the provisions of Chapter 60-02 and 60-04, N.D.C.C. (See, Ex. "PSC-5").

103. Moreover, Exs. "PSC-15, 16, and 17" all reference both Chapters 60-02 and 60-04, N.D.C.C., as applying to this insolvency proceeding.

104. Therefore, N.D.C.C. § 60-02-41, “breaks the tie” or “clears the log jam” so to speak that the claimants attempted to create by virtue of their shifting positions on the date of insolvency of GF Bean and the date to apply the market price for their beans.

105. This being said, Auto-Owners respectfully requests that the Court, in all things, approve, accept and adopt the Report and Recommendations of the PSC and order the payments to the growers as determined and established in the PSC report and the evidence it submitted at trial. In accordance with that, Auto-Owners would also respectfully request that the Court dismiss this action against Auto-Owners, with prejudice, determine that its surety bond does not have to be added to the GF Bean Trust, and that the Auto-Owners’ surety bond be, in all things, exonerated and discharged.

C. Bremer Bank’s Position.

106. As Auto-Owners understands the position of Bremer Bank, it contends that the relationships between GF Bean and the various growers are credit sale contracts, in whole or in part. See, for example, Ex. “PSC 24a”, the Curt Amundson contract, which definitely appears to be a credit-sale contract. Others are perhaps too. Of course, Bremer Bank will strenuously argue and advance that position. Auto-Owners would not oppose that argument of Bremer Bank because if the Court accepts that position in this case, the Auto-Owners’ surety bond would also not apply nor would it have to be potentially added to the existing trust in this case as both the terms of the bond and the applicable statute clearly provide that the Auto-Owners surety bond shall not accrue to the benefit of anyone entering into a credit sale contract with the principal (GF Bean). See, the end of the third paragraph of Ex. “PSC-5” and N.D.C.C. § 60-02-09(7).

107. In any event, regardless of how the Court rules on Bremer Bank’s position, one thing is clear and that is that as GF Bean’s lender, Bremer Bank has no claim or right of recovery

against Auto-Owners and its surety bond, in this action. See, *Public Service Commission v. Valley Farmers Bean Association*, at ¶ 17, *supra*.

108. Accordingly, if the Court sides with Bremer, Auto-Owners would be entitled to a dismissal of this action against it, with prejudice, and for an exoneration and discharge by the Court of any obligations under its surety bond issued to GF Bean.

CONCLUSION

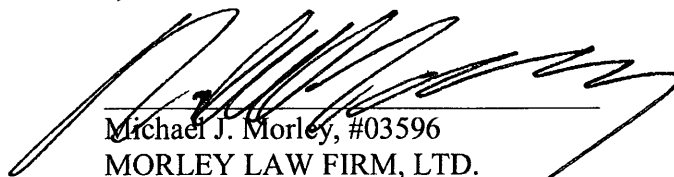
109. Based upon the above and foregoing argument and authority, Auto-Owners respectfully requests that the Court, in all things, accept and approve the Report and Recommendation of the PSC and order distribution to the claimant growers in accordance with the PSC report. By virtue of the Court's acceptance of the Report and Recommendation of the PSC, the Court must then order that this action against Auto-Owners be dismissed with prejudice and that Auto-Owners be exonerated and discharged from any duties or obligations under its surety bond issued to GF Bean, as its bond is not necessary to fund the existing GF Bean Trust as the existing Trust currently contains enough money to pay the growers their valid claims in full. See, N.D.C.C. § 60-04-09 providing that only "necessary" bond proceeds are added to the trust.

110. Alternatively, in the event that the Court accepts the position of Bremer Bank, this action must also be dismissed against Auto-Owners, with prejudice, and its surety bond discharged and exonerated.

111. Auto-Owners would also respectfully request that the Court award it its costs and disbursements incurred in this action.

[remainder left blank]

Respectfully submitted this 29th day of March, 2016.



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