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STATE OF NORTH DAKOTA
COUNTY OF GRAND FORKS

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
CIVIL NO. 18-2015-cv-00240

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

**PUBLIC SERVICE COMMISSION'S
CLOSING BRIEF**

I. FACTUAL BACKGROUND

[¶1] Grand Forks Bean became a licensed bean warehouse in October 2005. Ex. 1 & *Richter Testimony*. As part of the licensure process, Grand Forks Bean was required to submit certain documents to the PSC. N.D. Admin. Code § 69-07-02-01. In April 2006, Todd McGurk faxed Sue Richter a copy of a *Delayed Pricing Grain Purchase Contract*. Ex. 2 & *Richter Testimony*. This was the only credit-sale contract ever submitted by Grand Forks Bean to the PSC. *Richter Testimony*. Timothy Erdmann has been a grain warehouse inspector at the PSC for many years. He conducted several inspections of Grand Forks Bean as part of his duties. In his 2006 inspection, he noted deficiencies on the *Memorandum of Adjustment* (“MOA”) relating to Grand Forks Bean’s use of unsigned priced later contracts on this form. See Exs. 3, 34 & *Erdmann Testimony*. At some point, Grand Forks Bean began using a different form that was titled “Price Later Marketing Agreement” (“PLMA”). It is not clear when this occurred, but in his 2009 and 2014 inspections, Erdmann did not note any deficiencies on the MOAs during his inspections. Exhibits 114, 116, 127, & *Erdmann Testimony*.

[¶2] On August 9, 2014, Todd McGurk died and his brother, Tad McGurk, took over the Grand Forks Bean operations. On November 18, 2014, Sue Richter received a phone call from Curt Amundson, in which he expressed concerns with beans he had delivered to Grand Forks Bean. *Richter Testimony* & Ex. 6. Mr. Amundson sent her a copy of a PLMA he had signed. *Id.* & Ex. 24a. Richter contacted Tad McGurk and received copies of assembly sheets and additional PLMAs related to other farmers whose beans were located at Grand Forks Bean. Subsequently, Richter had several calls from and with other farmers related to their beans at Grand Forks Bean. These calls primarily dealt with the farmers expressing concerns about getting paid and/or having questions about how to get their beans back from Grand Forks Bean.

[¶3] In December 2014, the farmers presented a written demand to Tad McGurk to return their beans. Ex. 35. It was known by this time that Grand Forks Bean had enough beans in its warehouse to fully redeliver the beans because Mr. Erdmann had measured Grand Forks Bean's inventory. This demand was unsuccessful and from December 19-22, the farmers submitted information to the PSC asserting claims against Grand Forks Bean. Exs. 7-14. In order to ensure the beans would remain properly stored at the Grand Forks Bean warehouse, the PSC and Grand Forks Bean entered a stipulation on December 23, 2014. *Stipulation* (Dec. 23, 2014) (attached to Ex. 17). As it became clear the issues could not be resolved outside of an insolvency proceeding, the PSC took the more formal action of issuing an *Ex Parte Cease and Desist Order* on January 16, 2015. Ex. 17. An agreement was ultimately reached between the farmers, Bremer Bank, the PSC, and Grand Forks Bean to sell the beans to Central Valley Bean. Ex. 17.

[¶4] On February 3-11, 2015, the beans at Grand Forks Bean's warehouse were sold to Central Valley Bean. Ex. 18. The net amount of beans sold was 33,439.68 cwt of pintos and 651.07 cwt of pinto splits. Ex. 18. The proceeds from the sale were deposited in the Bank of

North Dakota and the balance of the trust fund as of February 29, 2016, was \$768,053.24. Ex. 19. On February 13, 2015, the PSC moved for appointment as trustee, and the *Amended Order Appointing Trustee* was entered on March 25, 2015. Doc ID #'s 1-26. The PSC's Report and Recommendations was filed on September 30, 2015. Doc ID #'s 152-72.

[¶5] Bremer Bank objected to the report and filed a brief. Doc ID #'s 223 and 227. The farmers—Estate of Brad Nelson (assigned to Beth Nelson), Curt Amundson, Duane Altendorf, Brent Baldwin, Baldwin Farms, Inc., Ron Adams, Nick Adams, WJS Nelson, and Chuck Nelson—also objected to the report. Doc ID #'s 217, 219, and 221. The primary issues in the objections are the status of the PLMAs with respect to the farmers and the date of insolvency. Other disputed issues appear to be storage fees and an offset relating to Curt Amundson's claim.

[¶6] Uncontested issues appear to be the amount of beans claimed by each farmer. The evidence supports a total claimed amount of 31,175.79 cwt, divided as follows:

Estate of Brad Nelson (Beth Nelson)	1,810.44 cwt
Brent Baldwin	2,220.35 cwt
Baldwin Farms, Inc.	1,005.72 cwt
Duane Altendorf	2,408.22 cwt
Curt Amundson	12,128.28 cwt
Chuck Nelson	1,315.08 cwt
WJS Nelson	1,600.91 cwt
Nicholas E. Adams	908.55 cwt
Ronald E. Adams	7,778.24 cwt

In addition, while the insolvency date is disputed, the price applicable to each date was not contested. The evidence showed the market price applicable to the beans was \$38 on October 15, 2013; \$30 on May 31, 2014; and \$23 on December 19, 2014. Ex. 29 & *Erdmann Testimony*.

[¶7] The PSC asserts the evidence at the hearing supports its report and recommendations and requests it be approved.

II. APPLICABLE LAW AND ARGUMENT

A. The Price Later Marketing Agreements Are Not Credit-Sale Contracts.

[¶8] Bremer objected to the PSC's Report, requesting the Court order that sufficient assets be distributed to Bremer before the farmers in order to satisfy its claim in full. The primary basis for Bremer's objection is that the PLMAs are valid and enforceable credit-sale contracts. PLMAs exist for each farmer except WJS Nelson. However, the farmers deny they are bound by the PLMAs. Further, Curt Amundson is the only farmer who admits to signing a PLMA at any time. Brent Baldwin testified it appears one of his truck drivers signed the PLMA. All other farmers expressly deny signing the PLMA. The PSC recommends the PLMAs not be considered credit-sale contracts in this insolvency.

[¶9] Credit-sale contracts have never been paid under the trust fund established by N.D.C.C. ch. 60-04. Prior to 2003, farmers who had a credit-sale contract were simply outside the insolvency procedure. In 2003, a credit-sale contract indemnity fund was created under N.D.C.C. ch. 60-10. After 2003, upon insolvency of a grain warehouse, valid credit-sale contracts are paid from the credit-sale contract indemnity fund, and do not get paid from the insolvency trust fund. N.D.C.C. §§ 60-10-02, -04, -05, -06. Bremer asserts the PLMAs are valid credit-sale contracts, and therefore, to the extent there was a PLMA in connection with any farmer, that farmer does not have the preferred lien under N.D.C.C. § 60-02-25.1.

[¶10] As set out in N.D.C.C. §§ 60-02-01(2) and 60-04-01(2):

"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 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.

Any contract that does not meet the above criteria is a noncredit-sale contract. N.D.C.C. § 60-02-01(4). Section 60-02-19.1 sets out several conditions required of a credit-sale contract. These conditions include that all credit-sale contracts must be in writing and be consecutively numbered at the time of printing the contract, and must provide for all of the following:

1. The seller's name and address.
2. The conditions of delivery.
3. The amount and kind of grain delivered.
4. The price per unit or basis of value.
5. The date payment is to be made.
6. The duration of the credit-sale contract.
7. Notice in a clear and prominent manner that the sale is not protected by the bond coverage provided for in section 60-02-09. However, if the warehouseman has obtained bond coverage in addition to that required by section 60-02-09 and such coverage extends to the benefit of credit-sale contracts, the warehouseman may state the same in the credit-sale contract along with the extent of coverage.

A credit-sale contract must also be signed by both parties and executed in duplicate (with one copy retained by the warehouseman and the other delivered to the seller). N.D.C.C. § 60-02-19.1. In order to be a credit-sale contract, the foregoing conditions must be strictly followed. See Findings of Fact, Conclusions of Law, and Order, Public Service Comm'n v. Grabanski Grain, LLC, and Platte River Ins. Co., Northeast Judicial District Case No. 50-2011-CV-00029, at pp. 5-6 (copy previously filed as Doc ID # 156).

[¶11] The PSC has recommended in its Report that the PLMAs in this case not be considered credit-sale contracts. Bremer contends the requirements in N.D.C.C. § 60-02-19.1 do not apply to determine whether these are credit-sale contracts. The PSC has previously submitted the Grabanski decision, legislative history, and a federal court case discussed in the legislative

history in support of its recommendation. Doc ID #'s 156, 240, and 241. The PSC asserts there is no ambiguity with respect to the application of N.D.C.C. § 60-02-19.1. The statute only allows a warehouseman to purchase grain by a credit-sale contract as provided therein. 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”). In other words, complying with that statute is the only way to purchase grain under a credit-sale contract. Therefore, under the plain language of the statute, a credit-sale contract does not exist if all elements of N.D.C.C. § 60-02-19.1 are not satisfied.

[¶12] In Grabanski, the district court provided the following reasoning consistent with the PSC’s recommendation in this case:

In addition to the definition provided [in N.D.C.C. § 60-02-01(2)], NDCC 60-02-19.1 sets out several conditions required of a credit-sale contract. Not only must it be in writing, but the statute sets out seven requirements that must be present within the written contract. Further, the statute provides that, “*the contract must be signed by both parties . . .*” Id. From the language of NDCC 60-02-19.1, the absence of a signature by both of the parties to the contract precludes it from otherwise constituting a credit-sale contract. The statutory language requires that a credit-sale contract be manifested by not only written form but by the signature of both parties. To conclude otherwise requires this Court to disregard what the legislature set out as the requirements to create an enforceable credit-sale contract. So, any claim manifested by a document not signed by both parties can never constitute a credit-sale contract regardless of the language in the unsigned contract.

Grabanski, at ¶ 19, p. 6. Not only is the Grabanski decision consistent with the statutory interpretation, but the legislative history of the enactment of the credit-sale contract indemnity fund also indicates the requirements of N.D.C.C. § 60-02-19.1 must be satisfied in order to create a valid and enforceable credit-sale contract.

[¶13] The testimony for HB 1197, which enacted the credit-sale contract indemnity fund, includes the following:

REP. BELTER: A lot of farmers sell grain and 'the manager asks do you want a check or do you want to defer it. The farmer says I don't know. So it just sits there. Is that grain covered under those circumstances?

JON MIELKE. In that case it would be covered because for the credit sales contract to be valid, it must be signed. This is something that the PSC fought hard for in Federal Court In (sic) the Wembelton (sic) case. There were a number of contracts where that had been exactly that kind of a discussion between the warehouse and the farmer and the contracts had not been signed. We went to court. An unsigned contract is not a contract. It is open storage. Something that are (sic) warehouse inspectors look for when they go out and we advise the warehouseman. If the farmer dose (sic) not come in an (sic) sign a contract, the elevator should do one of two things. Either Put (sic) the grain on a warehouse receipt and start charging storage or cut a check to the farmer. So the farmer can't have the best of both worlds. Just hang out there in open storage indefinitely.

Something has to happen within thirty days.

REP. BELTER If it goes beyond those thirty days is it still covered by bond?

JON MIELKE: You are still covered until the contract is signed but at that time it is incumbent on the warehouseman to get back in touch with the farmer and say we have to do something with this. It can (sic) just sit there. Get a signed contract or issue a check. The warehouseman has to force the issue. If there is not a signed contract there is bond protection.

REP. BELTER: Why can (sic) we just run this under a bond or is there no bonding company that will do that. I have heard in the past it cost to (sic) much to do that but we are incurring the cost throughout this method.

JON MIELKE: That is exactly what the PSC proposed four years ago. We did have a larger bill that resulted in the passage in Chapter 1602.1 (sic) of the Century code. The PSC did have a section in there that would have required bond coverage on credit sale contracts. I believe the estimate at that time would cost the industry .06 cents per bushel. So it was very expensive insurance. The real down side with that proposal is that there would be a number of elevators that would not be able to get bonded. They would not be considered a solid enough risk to get a bond at any rice (sic). This would really weaken the overall structure of the industry.

Hearing on HB 1197 before the H. Agriculture Comm., 1/23/03, 58th Assembly (N.D. 2003)

(statements of Rep. Belter and Jon Mielke) at p. 5-6 (Doc ID # 240) (emphasis added).

[¶14] Neither N.D.C.C. § 60-04-01(2) nor § 60-02-01(2) contains an explicit signature requirement. The signature requirement for a credit-sale contract is found in N.D.C.C. § 60-02-19.1 as follows:

A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section. All credit-sale contracts must be in writing and must be consecutively numbered at the time of printing the contract. The warehouseman shall maintain an accurate record of all credit-sale contract numbers, including the disposition of each numbered form, whether by execution, destruction, or otherwise. Each credit-sale contract must contain or provide for all of the following:

1. The seller's name and address.
2. The conditions of delivery.
3. The amount and kind of grain delivered.
4. The price per unit or basis of value.
5. The date payment is to be made.
6. The duration of the credit-sale contract.
7. Notice in a clear and prominent manner that the sale is not protected by the bond coverage provided for in section 60-02-09. However, if the warehouseman has obtained bond coverage in addition to that required by section 60-02-09 and such coverage extends to the benefit of credit-sale contracts, the warehouseman may state the same in the credit-sale contract along with the extent of such coverage.

The contract must be signed by both parties and executed in duplicate. One copy shall be retained by the warehouseman and one copy shall be delivered to the seller. Upon revocation, termination, or cancellation of a warehouseman's license, the payment date for all credit-sale contracts shall, at the seller's option, be advanced to a date not later than thirty days after the effective date of the revocation, termination, or cancellation, and the purchase price for all unpriced grain shall be determined as of the effective date of revocation, termination, or cancellation in accordance with all other provisions of the contract. When a public warehouse is transferred under this chapter, credit-sale contracts may be assigned to another licensed public warehouseman or facility-based grain buyer.

N.D.C.C. § 60-02-19.1 (emphasis added). Further, it has been held under the pre-2003 law that a signature by a representative of the elevator is not sufficient. United States of America v. Wimbledon Grain Co. et al, Civil No. A3-02-46, (D.N.D. 2002) (Doc ID # 241). In Wimbledon Grain Co., the court determined the only means by which a contract can be classified as a credit-sale contract is when the actual seller, not a representative of the elevator, signs the contract. Id.

at pp. 1-2. Accordingly, it is clear the legislature said what it meant. In order to be considered a credit-sale contract and participate in the credit-sale contract indemnity fund, all of the requirements of N.D.C.C. § 60-02-19.1 must be met.

[¶15] In addition, and separate from the signature issue, the PLMAs do not meet the other requirements of N.D.C.C. § 60-02-19.1. The PLMAs contains the following terms:

1. The company [Grand Forks Bean Co., Inc.] will accept, to the extent of its plant capacity to handle them, U.S. No. 1 and U.S. No. 2 Pinto Beans with a moisture content not over 15% grown and delivered to it by grower. Upon delivery of the pinto beans to the company plant, a receiving ticket will be issued to the grower and the issuing of the ticket will thereupon transfer title of the pinto beans to the company.
2. The beans delivered will be priced before July 1, 2014. On those pintos on which to Grower Prices, the price will be the posted market price on the date of pricing.
3. The company reserves the right to withdraw from the market due to slow market conditions from time to time.
4. Checks for the pinto beans will be issued only on growers request.
5. Signing this agreement does not automatically put your beans under this Marketing agreement. It is necessary for you to notify the company at the time each truck is delivered.
6. [title warranty]
7. [non-assignability]
8. Service fee of [] per cwt applies.

Several provisions required to be a credit-sale contract are not included in these agreements, including a date on which payment is to be made, a duration, and a price per unit or basis of value. These missing requirements are necessary to administer any payments from the credit-sale contract indemnity fund. Payments under the credit-sale contract indemnity fund in an insolvency “may not exceed the lesser of eighty percent of the amount owed to that eligible person in accordance

with all of that person's unsatisfied credit-sale contracts or two hundred eighty thousand dollars." N.D.C.C. § 60-10-06. Given the missing terms from the PLMA form at issue, one cannot determine "eighty percent of the amount owed" under the alleged agreements. As a result, the PLMAs cannot be considered credit-sale contracts.

B. Bremer's Estoppel Argument Fails

[¶16] Bremer also asserts the PSC is estopped from asserting the PLMAs are not credit-sale contracts because of past inspections of Grand Forks Bean and presentations provided to industry groups. Even if the Court determines such evidence is relevant, the result is not estoppel. As an initial matter, Bremer's argument is overbroad. For instance, the materials in Exhibits 110, 111, and 113 certainly include information in addition to solely the definition of credit-sale contract under N.D.C.C. §§ 60-02-01(2) and 60-04-01(2). See Ex. 110 at p. 1 ("A credit-sale contract must be signed to be valid and enforceable"); 111 at p. 2 (specifically listing and including the requirements of N.D.C.C. § 60-02-19.1); & 113 at p. 2 ("a credit-sale contract must be signed to be valid and enforceable"). It is unclear how Bremer claims Exhibit 112 supports its position as the presentation is merely bullet points without providing specific information. Regardless, these presentations are certainly not intended to provide all-encompassing information to result in estoppel. With respect to the inspections, Tim Erdmann did not note any deficiencies on his inspections in 2009 and 2014. However, failing to note a deficiency does not establish these as valid credit-sale contracts for this insolvency. Bremer's argument also ignores that the farmers have not objected to the PSC's recommendation that these are not credit-sale contracts.

[¶17] Regardless, "[s]uccessfully claiming waiver or estoppel against a government entity is not an easy accomplishment. Estoppel against the government is available in limited circumstances and should be applied on a case-by-case basis with a careful weighing of the

inequities that would result if the doctrine is *not* applied versus the public interest at stake and the resulting harm to that interest if the doctrine *is* applied.” Miller v. Walsh County Water Resource Dist., 2012 ND 152, ¶ 28, 819 N.W.2d 526 (internal citations and quotations omitted).

To prove a claim of equitable estoppel, the plaintiff must show: (1) the defendant falsely represented or concealed material facts, or calculated to convey the impression that the facts are otherwise than those which the defendant attempted to assert; (2) the defendant intended, or at least expected, that such conduct would be acted upon by, or would influence, the plaintiff; and (3) the defendant had knowledge of the real facts. Tarnavsky v. Tarnavsky, 2003 ND 110, ¶ 10, 666 N.W.2d 444. The plaintiff must also show: (1) he lacked knowledge and the means of knowledge of the truth as to the facts in question; (2) he relied, in good faith, upon the conduct or statements of the defendant; and (3) he acted or failed to act on the basis of his reliance, so as to change his position or status, to his injury, detriment, or prejudice. *Id.*

J.P. v. Stark Cty. Soc. Servs. Bd., 2007 ND 140, ¶ 20, 737 N.W.2d 627, 635. There is no evidence the PSC ever affirmatively communicated to Bremer or Grand Forks Bean that the Price Later Marketing Agreement was a valid credit-sale contract. At most, it can be said Mr. Erdmann failed to note a deficiency on a memorandum of adjustment. Regardless, the evidence shows Todd McGurk knew he was required to submit his credit-sale contract forms to the commission, but never submitted the PLMA form at issue. Further, he was informed of the specific requirements necessary during the 2006 inspection. See Ex. 34. While no deficiencies were noted in subsequent inspections, it does not follow that a credit-sale contract is created by the lack of a noted deficiency on the memorandum of adjustment.

[¶18] Most importantly, Bremer itself has no basis to assert estoppel. Estoppel is not available to a third party who is not intended to be influenced by a representation. Farmers' State Bank of Gladstone v. Anton, 199 N.W. 582, 585 (N.D. 1924). There is no evidence the PSC's inspections were intended to influence Bremer. Mr. Beito, Bremer's witness, testified he was not aware of any communication between Bremer and the PSC, of Bremer reviewing any PSC documents, or otherwise relying on anything from the PSC when it loaned money to Grand Forks

Bean. Bremer's argument asks this Court to presume it was relying on the PSC in loaning money to Grand Forks Bean, when in fact Bremer did not even contact the PSC or consider anything in the PSC's file. As a result, Bremer's estoppel argument should be rejected.

C. Bremer's Objection that WJS Nelson is Not a Receiptholders Misapplies the Law.

[¶19] Bremer's objection also asserts WJS Nelson is not a "receiptholder" because it failed to convert its scale tickets into cash, a credit-sale contract or a warehouse receipt. Doc ID # 227 (¶ 62). Conversion is not a requirement for a claim to the trust. Rather, the issue is whether the claimant is a receiptholder. A "receipt" includes "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. § 60-04-01(6). The trust fund is "established for the benefit of noncredit-sale receiptholders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of" chapter 60-04.

[¶20] WJS Nelson is a receiptholder by nature of having scale tickets pursuant to these statutes. Further, at the hearing, Bremer seemed to question whether some of the farmers had valid scale tickets because the kind of grain was not specified. To the extent this argument is pursued by Bremer, the alleged "incomplete" scale tickets would qualify as "other memoranda" given by Grand Forks Bean "for, or as evidence of, the receipt, storage, or sale of grain." As a result, all of the farmers are valid receiptholders. On the other hand, Bremer is not a valid receiptholder as it never delivered any grain to Grand Forks Bean. See Public Service Comm'n v. Valley Farmers Bean Assoc'n, 365 N.W.2d 528, 540 (concluding the legislature did not intend that the trust provisions could be defeated by a lender taking a security interest in a grain warehouseman's inventory and that valid receiptholders have priority). Further, "[g]rain contained in a warehouse,

including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receipt holders storing, selling, or depositing grain in the warehouse.” N.D.C.C. § 60-02-25.1. The farmers’ claims, including WJS Nelson, have priority over Bremer’s security interest under the applicable statutes and case law.

D. The Insolvency Date is December 19, 2014.

[¶21] The farmers all object to the insolvency date recommended in the PSC’s report. WJS Nelson asserts an insolvency date of May 31, 2014, while all the other farmers assert an insolvency date of October 15, 2013. Doc. ID ##’s 217, 219, and 221. The farmers assert insolvency exists at an earlier date based upon phone calls made by them to Grand Forks Bean requesting their respective beans be sold. However, such requests are insufficient to establish insolvency. While there may be some factual dispute regarding the underlying circumstances of this issue, the PSC believes this issue is primarily based on interpretation of the relevant statute.

[¶22] Pursuant to N.D.C.C. § 60-04-02, “A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored.” As can be seen, this statute addresses two situations, one where the warehouse does not pay for grain that has been purchased/marketed and one where the grain is being stored. The PSC asserts the latter part of the statute is applicable here because Grand Forks Bean did not purchase or market the farmers’ beans. Therefore, the statutory language applicable to the analysis in this case is, “A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand . . . to make redelivery or payment for grain stored.”

[¶23] Under this language, the warehouseman can redeliver or make payment for grain stored to avoid being insolvent. At all times in this case, Grand Forks Bean had enough beans at

its warehouse to make redelivery. In fact, the amount of beans sold to Central Valley Bean exceeded the amount of beans claimed by the farmers. Under the language of the statute, after a proper demand, the warehouse can either redeliver or make payment for stored grain. The farmers' testimony was that each of them called and requested their beans be sold at various different times and at various different intervals. Of all the farmers, the testimony of Ron Adams was the earliest such call. He testified requesting his 2010 beans be sold sometime in 2011 along with his 2008 and 2009 beans that were being stored. Yet, he then delivered beans in 2012.

[¶24] It is not clear exactly what significance is placed by the farmers on the October 15, 2013, date and why that is the precise date chosen by eight of the farmers as the insolvency date. However, by October 15, 2013, all eight of these farmers had delivered the beans at issue. On the other hand, several farmers also received payments for beans in December 2013 and January 2014, and WJS Nelson delivered beans to Grand Forks Bean in April 2014. It would be contrary to the statute to conclude Grand Forks Bean was insolvent at a time before the farmers were still getting paid and before all the farmers delivered beans.

[¶25] The PSC asserts the statute provides for one insolvency date. At a point in time, a licensee is insolvent or it is not. A warehouseman's solvency or insolvency does not hinge upon what a customer may call and request at any particular moment. Rather, the statute envisions insolvency as a point where a "proper demand" is made and the warehouseman neglects, is unable, or refuses to meet its obligation, rather than a customer's desire. A proper demand would include a demand for something the person is actually entitled to and the warehouseman is bound to accomplish. In this case, there is no support for an insolvency date prior to December 19, 2014.

[¶26] The importance of that date is established by the evidence. While many of the farmers may have called Grand Forks Bean and made various requests to have their beans sold

and/or get paid, the testimony and other evidence does not support an entitlement of the farmers' or an obligation of Grand Forks Bean with respect to these requests. The farmers have not pointed to any agreement requiring Grand Forks Bean to act upon the asserted requests to sell or pay for their beans. Further, even if they had been entitled to payment, the statute provides the warehouseman with the option of redelivery to avoid insolvency. In this case, the farmers did not request, and therefore Grand Forks Bean did not refuse, to have the beans redelivered until late 2014. The farmers began calling the PSC on November 18, 2014, and asking questions about redelivery as well as getting paid for their beans. Ultimately, the farmers presented Grand Forks Bean with a written demand. Ex. 35. In this demand, the farmers sought to obtain their beans and transfer them to another receiving station. Id.

[¶27] The farmers requested signatures from Grand Forks Bean, Todd McGurk's estate, Tad McGurk, and a "Lending Institution." Id. The testimony indicated Tad McGurk initially indicated a willingness to return the beans to the farmers. However, after the farmers' demand, he apparently turned the warehouse keys over to the bank and Bremer became involved. At that point, given Bremer's claim to the inventory, Grand Forks Bean refused to redeliver or make payment for the beans, making it insolvent. The evidence shows this occurred at the time the farmers began submitting written claims to the PSC on December 19, 2014. See Ex. 7-14. In addition, December 19, 2014, was the first date a claim was filed with the Commission related to Grand Forks Bean. Ex. 7. Using this date is consistent with other provisions of N.D.C.C. ch. 60-04 which envision the filing of a claim precipitating an insolvency. See N.D.C.C. § 60-04-03.1(2) (including the proceeds from any grain sold "from the time of filing of the claim that precipitated an insolvency").

[¶28] Further, to the extent the insolvency date is unclear, the North Dakota Supreme Court has upheld an interest award (which is based on the insolvency date) from the date the PSC

filed an application for appointment as trustee. North Dakota Public Service Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d. 528, 548 (N.D. 1985) (holding the district court did not err in directing interest to accrue from the date of filing when "it is unclear when VFBA first failed to redeem a receipt, it was not later than the date the PSC filed an application for appointment as trustee along with supporting documents indicating VFBA's insolvent status.) It would be inconsistent with the statutory language in this case to establish two different insolvency dates as requested by the farmers. Further, both of the insolvency dates requested by the farmers would result in an interpretation from which any dispute between a farmer and the warehouse would result in the warehouse being deemed insolvent.

[¶29] In this case, Grand Forks Bean became insolvent under the language of the statute when it was unable/refused to redeliver the beans to the farmers in December 2014. The PSC requests the Court determine Grand Forks Bean was insolvent on or about December 19, 2014.

E. Storage

[¶30] The farmers also object to assessment of any storage charges in this case. Bremer asserts more storage should be applied. In this case, where conversion of the scale tickets did not take place, the beans can only be considered to be held at Grand Forks Bean under open storage. Grand Forks Bean had a storage policy posted at its warehouse. Ex. 31. Pursuant to N.D.C.C. § 60-02-30, all storage contracts terminate for dry edible beans on April 30 of each year. If a public warehouseman does not notify a receipt holder by mail of an intention to terminate a storage contract as required, storage charges for the preceding twelve months are forfeited. N.D.C.C. § 60-02-30(4). There is no indication Grand Forks Bean provided any notification in this case, and therefore, any storage prior to April 30, 2014, was forfeited. Accordingly, the Commission recommends applying a storage rate of \$00.15/cwt/month from May 1, 2014, through December

18, 2014, for a total amount of storage charges on the 31,175.79 cwt of beans at issue of \$35,540.40 and as applied in Exhibit 32.

F. Amundson's Offset

[¶31] There is a dispute whether Curt Amundson's offset for seed he purchased is \$45,093.80 rather than \$51,312.15 as recommended in the PSC's Report. Like several issues in this case, this matter is complicated due to vague records as well as Todd McGurk's death. There was no invoice or any other document reflecting the seed offset in Grand Forks Bean's files until December 2014. Ex. 24d. Amundson provided some information regarding his calculations in his initial testimony and after reviewing additional documents that night. Ex. 145 and 146. It remains unclear to the PSC whether Amundson's calculation or the invoice is accurate. However, the PSC believes Mr. Amundson's testimony and the invoice can be reconciled. Mr. Amundson's testimony was regarding seed he planted plus freight. The invoice appears to reflect seed Mr. Amundson received plus freight.

G. Costs

[¶32] It was agreed at the conclusion of the hearing that evidence regarding the costs the PSC has incurred will be addressed post-hearing. However, Bremer and the farmers have raised the cost issue in their objections. Therefore, the PSC will outline the legal standard entitling it to recover its costs.

[¶33] Section 60-04-10, N.D.C.C., is clear that the PSC is entitled to recover its costs and expenses in this action from the trust fund. It provides in relevant part:

The attorney general may employ outside legal services to assist the commission in the prosecution of such action as in the attorney general's judgment may be necessary and may deduct the expense of the same from the trust fund. All other necessary expenses incurred by the commission in carrying out the provisions of this chapter, including adequate insurance to protect the commission, its

employees, and others engaged in carrying out the provisions of this chapter, may be deducted from the trust fund.

(emphasis added). Further, N.D.C.C. § 60-04-03.1 provides the “trust fund shall be established 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.” (emphasis added).

[¶34] In their objection to the PSC’s report, the farmers reserved the right to object to the amount, reasonableness, or necessity of any expenses by the PSC. Doc ID #'s 217 (¶ 9), 219 (¶ 9), and 221 (¶ 10). Therefore, it does not appear the farmers contest that the PSC is entitled to its expenses from the trust fund, but merely reserve the right to challenge the amount of those expenses.

[¶35] On the other hand, Bremer objects to the distribution of any proceeds prior to payment in full of its claim. Bremer asserts “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.” Doc ID # 227 (¶ 63). However, the plain language of N.D.C.C. § 60-04-10 establishes that the expenses of the Commission are to be deducted from the trust fund. See also N.D.C.C. § 60-04-03.1 (indicating the trust fund is established for noncredit-sale receiptholders and to pay the costs of the commission, and including proceeds from any grain sold as part of the trust fund); and N.D.C.C. § 60-04-09 (providing the PSC’s report must contain a proposed distribution of the trust fund assets “less expenses incurred by the commission in the administration of this chapter”). As explained above, Bremer is not a receiptholder, and therefore does not have a claim to the trust fund. A plain reading of the statute supports that the PSC’s cost and expenses must be taken from the trust regardless of Bremer’s lien position.

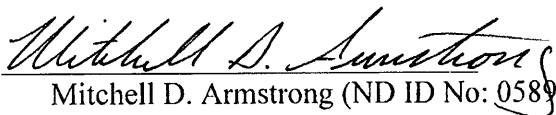
[¶36] The PSC requests the Court order the PSC be reimbursed for its costs and expenses incurred in this matter. The PSC requests that if the amount cannot be stipulated between the PSC,

Bremer, the farmers, and the bonding company then it will file a statement of those expenses by affidavit in sufficient detail to allow Bremer, the farmers, and the bonding company to respond to it within 45 days of the Court's order. Thereafter, the PSC proposes that Bremer, the farmers, and/or the bonding company have thirty days to respond. See Grabanski at p. 16 (¶ 3).

III. CONCLUSION

[¶37] The PSC requests its report and recommendations be approved.

Dated this 29th day of March, 2016.

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