

Richter, Susan K.

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The following are service contacts on this filing:

Public Service Commission:

Mitchell Armstrong (marmstrong@smithbakke.com)

Sara Forsberg (sforsberg@smithbakke.com)

Tiffany Knopik (tknopik@smithbakke.com)

Anna Heinen (aheinen@smithbakke.com)

Brian Schmidt (bschmidt@smithbakke.com)

Illona Jeffcoat-Sacco (ijs@nd.gov)

Casey Furey (cfurey@nd.gov)

Auto-Owners Insurance Company:

Michael Morley (mmorley@morleylawfirm.com)

Toni Nicolson (tnicolson@morleylawfirm.com)

Other Service Contacts not associated with a party on the case:

Sue Schaumburg (sschaumburg@camrudlaw.com)

Scott Knudsvig (sknudsvig@pringlend.com)

John Schroeder (jschroeder@northdakotalaw.net)

Daniel Gaustad (dan@grandforkslaw.com)

Russ Melland (rmelland@camrudlaw.com)

Tracy Kennedy (tracykennedy@northdakotalaw.net)

Susan Richter (srichter@nd.gov)

Jon Brakke (jbrakke@vogellaw.com)

Daniel Gaustad (dan@grandforkslaw.com)

Joel Arneson (jfamoose@gra.midco.net)

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

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

¶1 COMES NOW Bremer Bank, National Association (“**Bremer Bank**”), by and through its undersigned counsel of record, and submits this Post-Trial Brief pursuant to the Court’s directive at the close of evidence on March 15, 2016 in regards to the Report and Recommendation of the Trustee brought by the Petitioner Public Service Commission (hereinafter “Commission” or “PSC”) and the Objections filed. While this Brief serves as the argument and analysis of Bremer Bank following the hearing, Bremer Bank affirms and incorporates by reference herein those arguments and authority presented in its *Brief in Support of Claimant Bremer Bank, National Association’s Objection to Report and Recommendation of Trustee*, on file with the Court as Document Numbers 227 and 228. Bremer Bank respectfully requests the Court read and consider that Brief filed prior to the hearing (Doc. ## 227-228) in addition to this Brief.

FACTS

¶2 The testimony and exhibits introduced into evidence at the hearing on March 14 and 15, 2016 revealed the following and may be summarized as follows.

i. Susan Richter Testimony

¶3 Susan Richter is the Director of the Licensing Division of the Public Service Commission. She has been in that position since 2005, and prior to that had also worked in the Licensing Division. Ms. Richter has worked at the Commission since 1978. She oversees the operations of the PSC's work in licensing and regulating grain warehouses and licensed grain buyers. This work includes supervising inspectors who conduct warehouse inspections. As part of her work, Ms. Richter had interactions with Todd McGurk on behalf of Grand Forks Bean Company, Inc. (hereinafter "Grand Forks Bean"). This included the initial licensing of Grand Forks Bean and the filing of a delayed pricing grain purchase contract form. (Ex. 1, 2, 4, 5.). While Ms. Richter testified that a licensee is required to file all documents they will be using as a scale ticket, warehouse receipt, or credit sale contract, Ms. Richter and Mr. Erdmann also testified that the PSC was well aware that a different form than that at Exhibit 2 was being used by Grand Forks Bean as early as 2009. (Ex. 2, 128-129.). Under cross examination by attorney for Growers Mr. Amundson and Ms. Nelson, Ms. Richter testified that if use of a form that had not been approved the inspector would ask to submit the form to the PSC licensing division.

¶4 Ms. Richter also testified that in conducting inspections she will review the memorandum of adjustment that a PSC inspector produces after the inspection is completed. She also testified that the licensing division has the authority and ability to issue fines and otherwise seek to bring a licensee into compliance with the laws the licensing division administers. The inspections are a means to determine whether a licensee is in compliance with those laws.

¶5 Ms. Richter was the main point of contact with the claimants in this matter who had delivered beans to Grand Forks Bean (hereafter referred to as "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. The first contact Ms. Richter had with any of the Growers was with Curt Amundson on November 18, 2014. That contact was a phone call where Mr. Amundson was asking Ms. Richter if he took redelivery of beans whether he would have the gross amount or the net amount. Ms. Richter asked Mr. Amundson to send her the documents related to the beans he had delivered to Grand Forks Bean and Mr. Amundson sent her a copy of a Price Later Marketing Agreement entered into between Mr. Amundson and Grand Forks Bean. (Ex. 6.). Ms. Richter had other phone calls from other Growers and Mr. Amundson over the course of November and December 2014. (Ex. 6.).

¶6 Only on December 19, 2014, was Ms. Richter contacted by a Grower where the Grower asserted there was a refusal of Grand Forks Bean to market beans or pay the Grower for beans. (Ex. 7-14.). There is no writing prior to December 19, 2014 where any Grower notified the Commission that Grand Forks Bean was unable to market beans or pay the Growers.

¶7 The beans in the Grand Forks Bean facility were eventually sold under an agreement between the Commission, the Growers, and Bremer Bank, National Association (herein "Bremer Bank"). The disposition of the beans resulted in net proceeds, with interest after deposit of those proceeds, in the amount of \$768,053.24. (Ex. 17, 19.).

¶8 Ms. Richter in her duties as Director of the Licensing Division, also participated in the creation and dissemination of information related to credit sale contracts used in buying grain in North Dakota. (Ex. 110-114.). These materials emphasized that a definition of a credit sale contract under state law is determined by reference to N.D.C.C. § 60-02-01(2). (Ex. 110, 111, 113.). The materials emphasized that "Delayed price and deferred payment contracts are examples of credit-sale contracts. State law defines credit-sale contracts as written grain sale contracts that

provide the sale price may be paid more than 30 days after the delivery or release of the grain for sale.” (Ex. 113.). Also, the Commission stressed that in determining if a contract is a credit-sale, “the key is payment in more than 30 days.” (Ex. 110, QA4.). Also, the date actual payment is made determines if the agreement is a credit-sale. (Ex. 110, QA7.).

¶9 Ms. Richter also testified regarding the treatment of service fees or storage fees. Ms. Richter testified that storage fees are regulated under state law. Ms. Richter also testified that any service fees are any fees applicable between a warehouse and person delivering grain that are not a warehouse receipt storage fee. Service fees are not subject to any state regulation and thus are left entirely up to the terms of the warehouse and person delivering grain. This same information was communicated in the Commission’s educational materials. (Ex. 113.).

¶10 Ms. Richter also asked questions related to the assessment of a credit-sale contract indemnity fund assessment. These assessments are paid on credit-sale contracts to pay into the credit-sale contract indemnity fund under N.D.C.C. ch. 60-10. Ms. Richter was presented with the Price Later Marketing Agreement for Curt Amundson in this matter and testified that it would have been acceptable for Grand Forks Bean to remit a credit-sale contract fund assessment based on the Price Later Marketing Agreement. (Ex. 120.). Ms. Richter also testified that if a seller under the Price Later Marketing Agreement had applied for a refund on the assessment she was not sure how the Commission would handle that and would have sought guidance from legal counsel.

ii. Timothy Erdmann

¶11 Timothy Erdmann was a warehouse inspector for the Commission until his retirement at the end of 2015. He had been the inspector for Grand Forks Bean since it was first licensed in 2005. Mr. Erdmann had many years of experience as a grain warehouse inspector when he retired

at the end of 2015. When Mr. Erdmann was working as an inspector he would typically inspect 1 or 2 warehouses per week.

¶12 Mr. Erdmann conducted an inspection of Grand Forks Bean on February 26, 2014. At that time he reviewed all of the Price Later Marketing Agreements at issue in this matter. (Ex. 117-124.). In conducting that inspection Mr. Erdmann found all of the Price Later Marketing Agreements to have been in compliance with N.D.C.C. § 60-02-01(2) and § 60-02-19.1. Mr. Erdmann testified he found the Price Later Marketing Agreements to be proper credit-sale contracts at his inspection on February 26, 2014. Mr. Erdmann testified that he followed the PSC's Grain Warehouse Inspection and Safety Manual in conducting the inspection of Grand Forks Bean on February 26, 2014. (Ex. 115.). Mr. Erdmann testified that he reviewed the Price Later Marketing Agreements using the procedures outlined on in Exhibit VII to the Inspection Manual. (Ex. 115, p. PSC2228.). Mr. Erdmann also testified that if the Price Later Marketing Agreement was not a compliant credit-sale contract he would have noted that on a memorandum of adjustment following the inspection. Mr. Erdmann created a memorandum of adjustment following the February 26, 2014 inspection and testified there were no issues or noncompliance of Grand Forks Bean to note. (Ex. 116.).

¶13 At the February 26, 2014 inspection Mr. Erdmann also testified there were various posters present. (Ex. 31, 126.). Mr. Erdmann did not ever recall such postings being absent from the Grand Forks Bean facility since he began inspecting it. One of the written posters included a notation that "All bean are considered Price Later unless specified by grower." (Ex. 31.). Another of the written posters informed persons delivering grain that beans delivered under a credit-sale, including delayed price contracts, are not protected by the warehouse's bond. (Ex. 126.).

¶14 Mr. Erdmann also testified about a prior inspection of Grand Forks Bean in 2009. At this inspection Mr. Erdmann also reviewed the form of the Price Later Marketing Agreement and found it complied with state law as a credit-sale contract. (Ex. 127-129.). Thus, since 2009 the PSC had reviewed the form of the Price Later Marketing Agreement and approved its use by Grand Forks Bean as a credit-sale contract. Mr. Erdmann also testified that prior to his retirement he was aware of another licensee using the same or substantially similar form for its credit-sale contract.

¶15 Mr. Erdmann testified regarding the claims filed by the Growers in this matter. (Ex. 20-28.). Mr. Erdmann testified that the scale tickets that were in the records of Grand Forks Bean corresponded to the scale tickets claimed by the Growers to represent deliveries of beans to Grand Forks Bean in their submitted claim documents. (Ex. 20-28.). In reviewing the scale tickets Mr. Erdmann also testified that a failure to note the particular type of grain on a scale ticket did not invalidated the scale ticket despite its failure to include particular information required under the law.

¶16 Finally, Mr. Erdmann also testified regarding pricing that was recommended by the Commission in its Report. Mr. Erdmann testified that there is not a set market for pinto beans, and that the USDA historical pricing reports are the most appropriate data on which a price can be established. Mr. Erdmann testified that there are two prices noted on the USDA reports, a "Dealer" price and a "Grower" price. (Ex. 29.). Mr. Erdmann testified the Dealer price is the price that wholesalers obtain from the canners and other end users of the beans. The Dealer price is not the appropriate price to use in setting the value of grain in an insolvency. Mr. Erdmann testified that the "Grower" price is the price that warehouses and grain buyers would be purchasing at from producers and would be the appropriate price in setting value in an insolvency. Mr. Erdmann also testified that the appropriate locale for this instance would be the market data for pinto beans where

it is noted "N. Dakota/Minnesota". Mr. Erdmann testified that the appropriate price when looking at the span of October 7, 2014 through February 24, 2015 for pinto beans in North Dakota would be \$23.00 per hundredweight. (Ex. 29.).

iii. Kevin Beito

¶17 Kevin Beito is a senior lender for the Grand Forks region of Bremer Bank. Mr. Beito testified regarding the loan indebtedness that Grand Forks Bean owes to Bremer Bank. The loan is documented by various loan agreements, security agreements, and filed financing statements. (Ex. 101, 102, 133.). The amount owed to Bremer Bank as of March 14, 2016 (the first date of the hearing) was \$679,322.80, within interest to continue accruing at the rate provided for in the loan documents, in the daily amount of \$80.1838812. (Ex. 131.).

¶18 Mr. Beito also testified regarding matters regarding the reporting of collateral positions that Bremer Bank was receiving from its borrower Grand Forks Bean. Mr. Beito testified that there was a borrowing base for the loan, limited to a percentage of advances based on Bremer Bank having a first lien priority position in the pinto bean inventory of Grand Forks Bean. Several clauses of the loan agreement between Bremer Bank and Grand Forks Bean show these conditions. (Ex. 103.). For instance, on page 3 of the loan agreement, under the heading "Lien Priority", Grand Forks Bean promised Bremer Bank that Bremer Bank's security interest in its collateral would not be inferior to any other lien. (Ex. 103, p. 3.). The definition of "Eligible Inventory" as being the borrowing base also excluded any "Inventory which is not owned by Borrower free and clear of all security interests, liens, encumbrances, and claims of third parties." (Ex. 103, p. 8.).

¶19 Mr. Beito also testified regarding documentation that Grand Forks Bean supplied to Bremer Bank regarding its financial condition. Mr. Beito testified that Grand Forks Bean represented to Bremer Bank on a monthly basis the amount of Eligible Inventory Grand Forks Bean had on its

books. This reporting was in the form of a Borrowing Base Certificate. (Ex. 104). Mr. Beito also testified that financial statements were given to Bremer Bank by Grand Forks Bean. (Ex. 105-109.) These financial statements did not disclose to Bremer Bank any information to suggest that there was a storage liability against the pinto bean inventory of Grand Forks Bean. (e.g. Ex. 108, p. 8.). While on cross examination in response to the leading question, Mr. Beito may have testified that the financing statements do not distinguish between a storage liability or a credit-sale contract liability, the documents and re-direct questions show that the financial statements in fact do distinguish between those. (e.g. Ex. 108, p. 8.).

¶20 Overall, Mr. Beito's testimony established that Bremer Bank was relying on the reporting of Grand Forks Bean that inventory being reported to Bremer Bank was "Eligible Inventory" and free of any lien or claim of a third party. The financial statements and borrowing base certificates indicated that Grand Forks Bean was representing to Bremer Bank that the Price Later Marketing Agreements were sufficient for Grand Forks Bean to obtain title to the pinto beans being delivered to Grand Forks Bean free of any lien or claim of a farmer so delivering.

iv. Duane Altendorf

¶21 Duane Altendorf is one of the Growers who delivered pinto beans to Grand Forks Bean. Mr. Altendorf's beans were all delivered to Grand Forks Bean on September 23 and 24, 2013. (Ex. 23b, 23c.). Mr. Altendorf's pinto beans were delivered by Brent Baldwin's and Baldwin Farms Inc.'s employees. Mr. Altendorf testified that he had no written agreement with Grand Forks Bean for the sale of his pinto beans. Located in the records of Grand Forks Bean was a copy of a Price Later Marketing Agreement for Duane Altendorf. (Ex. 23a, Ex. 118-124.). Mr. Altendorf testified that he did not sign the agreement and had not seen the agreement prior to

having received a copy sent to him by Sue Richter in November of 2014. There was no original of the agreement in Grand Forks Bean's files, only a carbon copy. (Ex. 118-124.).

¶22 Mr. Altendorf testified that he was contacted by Todd McGurk of Grand Forks Bean and they negotiated the sale of 2,000 hundredweight of pintos at \$45.00 per hundredweight and that Grand Forks Bean would take another 2000 hundredweight at an open price. Mr. Altendorf testified he did receive payment from Grand Forks Bean for 2000 hundredweight at \$45.00 per hundredweight. On the stand, Mr. Altendorf asserted Grand Forks Bean was insolvent on October 15, 2013, because Grand Forks Bean refused to pay him for the remainder of the beans delivered. Mr. Altendorf agreed that he was asserting this date, despite having been partially paid after October 15, 2013 for the pinto beans delivered.

¶23 Mr. Altendorf acknowledged that he never asked Grand Forks Bean for a warehouse receipt. He also acknowledged that he did not obtain or ask for a written agreement for the sale of his pinto beans with Grand Forks Bean. He also testified that when asking to sell beans in October of 2013 that Mr. Todd McGurk would respond that he was seeking a market for the beans and that Mr. McGurk would work on it. Mr. Altendorf did not unequivocally testify he had an agreement with Grand Forks Bean to purchase any beans at \$38.00 per hundredweight. Mr. Altendorf testified that was the price he was seeking in October of 2013. Mr. Altendorf also did not submit any writing showing any efforts to obtain payment or redelivery from Grand Forks Bean. Mr. Altendorf testified he normally pays a service fee or a storage fee to warehouses through which he stores or markets his other crops.

v. *Curt Amundson*

¶24 Curt Amundson is one of the Growers who delivered pinto beans to Grand Forks Bean. Mr. Amundson testified that he did sign the Price Later Marketing Agreement contained in the

Grand Forks Bean records for him. (Ex. 24a, 118-124.). Mr. Amundson and Ms. Richter also both testified that in contacts Mr. Amundson had with Ms. Richter in November of 2014, Mr. Amundson referenced his beans as being tied to this Price Later Marketing Agreement and even sent Ms. Richter a copy of his agreement.

¶25 Mr. Amundson claimed that he attempted to market the pintos that he delivered in October of 2013. Mr. Amundson did not have any written documentation evidencing these requests. Mr. Amundson testified that when requested to sell beans that Grand Forks Bean would respond by stating they either did not have money to market beans or that they would work on finding a market. Despite allegations of repeated requests, Mr. Amundson was paid for 5,000 hundredweight in January of 2014 at \$35.00 per hundredweight. Mr. Amundson testified that he may have asked Grand Forks Bean to delay payment of this amount due to tax planning on the part of Mr. Amundson to determine what year to take that income. Thus, Mr. Amundson, like Mr. Altendorf, is also claiming that Grand Forks Bean was insolvent prior to being partially paid for his beans.

¶26 Mr. Amundson has also filed an initial claim in this proceeding asserting that he was owed \$30.00 per hundredweight on the beans he had delivered, and incorporated the Price Later Marketing Agreement into that claim. (Ex. 135, Doc. ## 59-60.). Mr. Amundson claimed that he never reviewed the posted notice at Grand Forks Bean that all beans are considered price later, despite having frequently been at the Grand Forks Bean facility. (Ex. 126.). Mr. Amundson also continued to do business with Grand Forks Bean in the spring of 2014 despite his claims that Grand Forks Bean owed him money. Mr. Amundson bought pinto bean seed from Grand Forks Bean in the spring of 2014.

¶27 The only records in Grand Forks Bean's records regarding the pinto bean seed is an invoice sent to Mr. Amundson by Grand Forks Bean in the amount of \$51,312.15. (Ex. 24d.). Mr. Erdmann testified that he asked Mr. Amundson to provide him documentation to substantiate the amount of the pinto seed at less than the amount on the invoice that is Exhibit 24d, and Mr. Amundson never provided those documents to the Commission. Only at the time of trial did Mr. Amundson claim to have written documents to relate to the amount of the seed purchase he owes to Grand Forks Bean, despite having been requested to turn those documents over by the Commission. The documents were only Mr. Amundson's written notations and there is nothing to indicate when the notes were created. Mr. Amundson testified that he owes Grand Forks Bean the amount of \$45,093.00 for bean seed that was sold to him in the spring of 2014.

¶28 Mr. Amundson testified that he made no demands on Grand Forks Bean to give him a warehouse receipt for any of the pinto beans delivered. He also testified he never asked to have the pinto beans redelivered until October or November of 2014. At the time he first contacted the Commission in November of 2014, Mr. Amundson was asking questions regarding re-delivery and redelivery fees.

vi. Beth Nelson

¶29 Beth Nelson is the personal representative and/or assignee of the Estate of Brad Nelson, who was a Grower that delivered beans to Grand Forks Bean. Brad Nelson was the spouse of Beth Nelson. Brad Nelson passed away in July of 2013. Brad Nelson worked with Curt Amundson prior to his death. After Brad Nelson's death Curt Amundson helped harvest and haul Brad Nelson's pinto beans. Beth Nelson testified she has never been paid for the pinto beans. Beth Nelson testified that she consulted with Curt Amundson about bringing the beans to Grand Forks Bean and that she ultimately decided where to bring them. Ms. Nelson testified she did not ever

ask for a warehouse receipt. She also testified she did not sign Brad Nelson's name to the Price Later Marketing Agreement in the files of Grand Forks Bean and did not know who did.

¶30 Ms. Nelson also testified regarding contacts she had with Grand Forks Bean. Ms. Nelson testified she contacted Todd McGurk of Grand Forks Bean only a couple of times, the last time being in August of 2014. In these conversations Ms. Nelson testified Mr. McGurk would tell her that there was not a market for the beans or that he was working on a market to get them sold.

¶31 Ms. Nelson was also asked about a prior claim she filed in this case. In May of 2015, Ms. Nelson filed a claim asking that she be paid \$30.00 per hundredweight for her pinto beans. (Ex. 136.). She testified she was not sure why that amount was stated.

vii. Steven Nelson (WJS Nelson)

¶32 WJS Nelson is one of the Growers who delivered beans to Grand Forks Bean. Steve Nelson is one of the partners in WJS Nelson and testified at the hearing. Steve Nelson testified WJS Nelson delivered beans to Grand Forks Bean for immediate sale at a price of \$35.00 per hundredweight. Steve Nelson testified that he never demanded a warehouse receipt, written sales agreement, or anything besides the scale tickets from Grand Forks Bean. Steve Nelson also indicated that WJS Nelson had originally filed a claim in this matter asking to be paid \$30.00 per hundredweight. (Doc. ## 62-63.). An Amended Claim was also filed by WJS Nelson, this time asserting a \$38.00 per hundredweight value. (Doc. ## 214-215.). He did not provide an explanation as to why the original demand or the amended demand did not correspond to the dollar amount he claimed in his testimony.

¶33 Steve Nelson also testified he had been to the facility in March of 2014. Despite being at the Grand Forks Bean facility, he testified he did not take notice of the postings that all beans are considered priced later. (Ex. 126.). Steve Nelson testified he did not seek any legal recourse

against Grand Forks Bean between the beans being delivered and contacting the Commission in December of 2014. Steve Nelson also testified WJS Nelson did not attempt to take redelivery of any beans prior to December of 2014. Steve Nelson also testified that the beans were stored in a suitable facility at Grand Forks Bean and that there was value to WJS Nelson for the beans having been protected while at Grand Forks Bean.

viii. Nick Adams

¶34 Nick Adams is one of the Growers who delivered beans to Grand Forks Bean in 2012. Nick Adams testified that he had no written agreement with Grand Forks Bean to sell his pinto beans. He testified that the signature on a Price Later Marketing Agreement for him in Grand Forks Bean's records is not his signature. Nick Adams claims he asked Grand Forks Bean to sell the pinto beans in the summer and fall of 2012. Despite the alleged demands, Nick Adams could produce no written documentation that he attempted any actions to collect from Grand Forks Bean until he contacted the Commission in December of 2014. Nick Adams acknowledged that he did not make any demand that beans be redelivered to him until November of 2014.

¶35 Nick Adams acknowledged that he filed an original claim in this proceeding asking to be paid \$33.00 per hundredweight on his claim. (Ex. 137.). Nick Adams acknowledged that he changed the date and price on his claim to attempt to be paid more for his beans. Nick Adams also acknowledged that he paid fees to Grand Forks Bean in the past. He acknowledged that the beans were protected and housed in appropriate facilities at Grand Forks Bean and that there was value added in having the beans adequately stored.

ix. Charles Nelson

¶36 Charles Nelson is one of the Growers who delivered beans to Grand Forks Bean in the fall of 2013. Mr. Nelson testified he had a contract to deliver 5000 hundredweight of beans to Grand

Forks Bean at a set price. (Ex. 25a.). He testified he was paid for the amount of 5000 hundredweight. At the hearing, Mr. Nelson claimed he had not signed the Price Later Marketing Agreement that was in the records of Grand Forks Bean. (Ex. 25b, 118-124.). However, when initially filing his claim, Mr. Nelson represented that his claim was based on the Price Later Marketing Agreement. (Ex. 139.). Mr. Nelson also had originally asserted that he was owed \$30.00 per hundredweight on his beans, but that he now asserted a different price to obtain a better value for his claim. (Ex. 139-140.). Further, Mr. Nelson had in the past accepted performance under a Price Later Marketing Agreement with Grand Forks Bean. (Ex. 128.). Further, the scale tickets representing all of the beans that would be the "overage" of the 5000 hundredweight all indicated that they were being accepted by Grand Forks Bean subject to marketability.

¶37 Mr. Nelson claimed to have requested that the beans he had delivered be marketed by Grand Forks Bean, and the response he would get from Grand Forks Bean is that they would work on it. There was never an affirmative acceptance of an order to market. Mr. Nelson testified that it was possible that his driver delivering beans to Grand Forks Bean signed the Price Later Marketing Agreement. He also agreed that his drivers have authority to accept scale tickets on his behalf and interact with Grand Forks Bean as to the delivery of those beans.

¶38 Mr. Nelson never unequivocally asked for re-delivery of the beans he had delivered. He also did not have any communications in writing with Grand Forks Bean where he ever claimed to have asked for payment or redelivery. He also did not ever ask Grand Forks Bean to issue him a warehouse receipt. Mr. Nelson also agreed that payment of a service or storage fee was appropriate after the beans had been sold.

x. *Ron Adams*

¶39 Ron Adams is one of the Growers, having delivered beans to Grand Forks Bean in the fall of 2010 and the fall of 2012. Ron Adams claimed that he delivered beans in 2010 for storage to Grand Forks Bean. He also claimed he requested those beans be sold in October of 2011 at \$47.00 per hundredweight. Despite these claims, Ron Adams admitted he delivered further beans to Grand Forks Bean in 2012. Ron Adams acknowledged being partially paid for the beans delivered in 2012. (Ex. 28d.). Mr. Adams agreed that in the past he would pay Grand Forks Bean service or storage fees over multiple years when the beans were sold by Grand Forks Bean. In 2010, Grand Forks Bean purchased beans from Mr. Adams from the 2008 and 2009 crop years, and service fees were deducted from the proceeds of that sale for both 2008 and 2009.

¶40 In the files of Grand Forks Bean were Price Later Marketing Agreements for the 2010 and 2012 Ron Adams beans. (Ex. 28a, 118-124.). Mr. Adams denied that his signature or initials were on the Price Later Marketing Agreements. Mr. Adams also claimed to have been present at the Grand Forks Bean facility frequently since delivering the beans in 2010 and 2012. He claimed that he asked to have beans redelivered in March of 2013, but did not want to pay a redelivery fee so he decided to keep the beans at Grand Forks Bean.

¶41 Mr. Adams acknowledged that he changed his claim amount over the course of the proceeding. In May of 2015, he requested that he be paid \$47.00 per hundredweight, later just months before the hearing he demanded \$38.00 per hundredweight, and on the stand he again asked for \$47.00 per hundredweight. Mr. Adams also acknowledged he decided to not seek redelivery of the beans in March 2013 and that in the past he paid storage or service fees when the beans were sold. He testified he did not feel he should have to pay any storage or service fees

because Grand Forks Bean did not sell his beans. He also agreed that the beans were protected and preserved while at the Grand Forks Bean facility.

xi. Brent Baldwin

¶42 Brent Baldwin and Baldwin Farms, Inc. are Growers who delivered beans to Grand Forks Bean in the fall of 2013. Brent Baldwin is an officer of Baldwin Farms, Inc. He testified that in dealing with the Brent Baldwin and Baldwin Farms, Inc. beans at Grand Forks Bean that, except as to title, the dealings were intended to be on behalf of both himself and Baldwin Farms, Inc.

¶43 Mr. Baldwin had contact with Grand Forks Bean in the fall of 2013. This was the first dealings Mr. Baldwin had had with Grand Forks Bean. Out of this contact, Mr. Baldwin claims to have entered an agreement with Grand Forks Bean that he would deliver 3000 hundredweight of beans at a contracted price of \$45.00 per hundredweight and an additional 3000 hundredweight at for sale at a price to be determined later. Mr. Baldwin testified that these negotiations took place over the phone with Todd McGurk and that issues other than price and quantity were not discussed. Mr. Baldwin testified that after the conversations and prior to beans being delivered he received the dry bean contracts shown at Exhibit 21a. Mr. Baldwin also acknowledged that payment was made to Baldwin Farms, Inc. for the amount of 3000 hundredweight at \$45.00 per hundredweight. (Ex. 22d.). The payment was made to Baldwin Farms, Inc. and not Brent Baldwin, despite only the reference to Brent Baldwin on the dry bean contract 1001 because the Baldwin beans were all contracted interchangeably. (Ex. 21a, 22d.). Mr. Baldwin acknowledged that he never signed either of the Dry Bean Contracts, despite the fact that they altered some of the terms discussed when on the phone with Todd McGurk. He also testified that despite having not signed them himself and there being differences in the terms previously negotiated he decided to deliver beans to Grand Forks Bean anyway.

¶44 Mr. Baldwin admitted that the Price Later Marketing Agreement that is Exhibit 22a is a part of Baldwin Farms, Inc.'s business records. He also admitted that the Price Later Marketing Agreement was signed by an employee of both Baldwin Farms, Inc. and Brent Baldwin, one Mr. Steve Hartje. (Ex. 22a.). Mr. Baldwin admitted that the Price Later Marketing Agreement was given to him by Steve Hartje on or about September 12, 2013, when beans were being delivered to Grand Forks Bean by the Baldwins. He also admitted that despite having knowledge that his employee had executed this agreement on his behalf that he continued to deliver beans to Grand Forks Bean. He also admitted that he never contacted Grand Forks Bean to repudiate or otherwise disavow the Price Later Marketing Agreement. The only agreement executed by both Grand Forks Bean and the Baldwins is the Price Later Marketing Agreement. (Ex. 21a, 22a.).

¶45 Mr. Baldwin acknowledged that the beans were kept in a suitable facility at Grand Forks Bean and that this was a benefit to protecting the beans that were delivered there by him. Mr. Baldwin also admitted that he has no written documentation that he ever requested that beans be sold. He also testified that when he requested beans be sold that the response was that Grand Forks Bean would work on marketing them; he did not get an unequivocal response that they would be sold. Mr. Baldwin also agreed that he did not start any type of legal proceeding against Grand Forks Bean prior to contacting the Commission in November of 2014. Mr. Baldwin testified that he never asked for redelivery of any beans until November of 2014 when he contacted the Commission.

ISSUES

- I. WHETHER THE PRICE LATER MARKETING AGREEMENTS ARE A VALID CREDIT-SALE CONTRACT.
- II. WHETHER ANY GROWER SHOULD BE ENTITLED TO A LIEN AGAINST THE INVENTORY OF GRAND FORKS BEAN SINCE NONE HAVE A RECEIPT.

- III. WHETHER THE PROPER DATE OF INSOLVENCY IS DECEMBER 19, 2014.
- IV. WHETHER GROWER CLAIMS ARE SUBJECT TO OFFSET FOR SERVICE FEES OWED TO GRAND FORKS BEAN FROM THE DATE OF DELIVERY THROUGH DECEMBER 19, 2014.
- V. WHETHER CURT AMUNDSON'S SEED OFFSET SHOULD BE BASED ON THE INVOICE FROM GRAND FORKS BEAN.
- VI. WHETHER ANY INVENTORY PROCEEDS SHOULD BE APPLIED TO PAY EXPENSES OF THE COMMISSION.

LAW AND ARGUMENT

- I. THE PRICE LATER MARKETING AGREEMENTS ARE A VALID CREDIT-SALE CONTRACT.
 - a. The Price Later Marketing Agreements Comply with N.D.C.C. Sections 60-02-01(2) and 60-04-01(2) and are thus proper credit-sale contracts.

¶46 The portions of Bremer Bank's *Brief in Support of Objection to Report and Recommendation*, (Doc. # 227), at paragraphs 12 to 31 and 39 are incorporated herein by reference. In addition, the evidence at the hearing showed that four Grower's claims unequivocally fall under the Price Later Marketing Agreement.

¶47 First, Curt Amundson testified that he signed the Price Later Marketing Agreement, filed the Price Later Marketing Agreement with his original claim in this proceeding, and referenced the Price Later Marketing Agreement with the Commission when he first had contacts with the Commission in November and December of 2014. This execution, along with the posted notice at Grand Forks Bean that all beans are price later unless otherwise specified are sufficient to find that the Curt Amundson claim is governed by the Price Later Marketing Agreement. Accordingly, Curt Amundson's claim is properly categorized as a credit-sale.

¶48 Second, Baldwin Farms, Inc.'s and Brent Baldwin's claim should be found to be under the Price Later Marketing Agreement. The evidence shows that Baldwin Farms, Inc. and Brent

Baldwin's beans and the treatment of those beans are to be considered one in the same. The only written agreement executed by both someone on behalf of the Baldwins and Grand Forks Bean is the Price Later Marketing Agreement that is Exhibit 22a. The Baldwins did nothing to repudiate this Price Later Marketing Agreement after its execution by his employee. A principal ratifies the conduct of his agent when the principal is aware of the act and fails to take action to repudiate the act. Matter of Mehus' Estate, 278 N.W.2d 625, 630 (N.D. 1979). The North Dakota Supreme Court has held that "when an agent is authorized to do an act but exceeds his authority and the rights of third persons are involved, the principal has a duty to repudiate the act as soon as he is fully informed of what has been done in his name or else he may be deemed to have ratified it by implication." Id. The North Dakota Supreme Court further held that in the case of an agent's power to bind the principal, "silence in most instances is evidence of an intent to ratify." Id.

¶49 In this case, the Baldwins ratified the execution of the Price Later Marketing Agreement on their behalf by their employee. The Baldwins were aware that the Price Later Marketing Agreement had been executed by its employee and failed to take any action to disavow that execution. The Baldwins should have known that Grand Forks Bean would rely on that execution for the beans being delivered when the bulk of the Baldwin beans were delivered after the execution of the Price Later Marketing Agreement, and given the posted notices at Grand Forks Bean. Had the Baldwins not wanted to be bound by their employee's execution of the Price Later Marketing Agreement, they had a duty to contact Grand Forks Bean and disclaim that agreement. Mr. Baldwin admitted that no one contacted Grand Forks Bean to disclaim the Price Later Marketing Agreement, and as such, under the law in North Dakota, such silence is evidence of an intent to ratify the agreement. Id.

¶50 Third, Charles Nelson's claim is properly analyzed as being under the Price Later Marketing Agreement due to past performance history with Grand Forks Bean and his adoption and ratification of the agreement in filing his original claim. On the stand, Mr. Charles Nelson admitted that he had previously testified in a deposition that he adopted the Price Later Marketing Agreement. The evidence also indicates that he previously accepted performance under a Price Later Marketing Agreement in the year 2009. Despite the testimony there is sufficient evidence to infer that the Price Later Marketing Agreement for Charles Nelson is binding in determining his claim. First, Grand Forks Bean considered the Price Later Marketing Agreement as binding on it in presenting it to the Commission at the inspection in February of 2014. Mr. Nelson, months after this case started, decided to file the Price Later Marketing Agreement as part of his original claim with the Commission. Finally, the evidence indicates that Charles Nelson had a history of using the Price Later Marketing Agreement to market beans through Grand Forks Bean, and this instance does not show any different.

b. The Commission should be estopped from denying the Price Later Marketing Agreements are not Credit-Sale Contracts.

¶51 The portions of Bremer Bank's *Brief in Support of Objection to Report and Recommendation*, (Doc. # 227), at paragraphs 32 to 38 are incorporated herein by reference. The evidence at the hearing indicated that the Commission, acting through its grain warehouse inspector Mr. Erdmann communicated to Grand Forks Bean that the Price Later Marketing Agreement form was a properly authorized form of credit-sale contract. The evidence indicates that the determination of proper documentation is not made in the filing of the licensing documents, but primarily through the review of the actual documentation by the warehouse inspectors. The evidence also indicates that Grand Forks Bean specifically relied on the determination that the Price Later Marketing Agreements were credit sale contracts. This is shown through the reporting

that Grand Forks Bean provided to Bremer Bank in its financial statements and its borrowing base certificates. There is a strong inference that Grand Forks Bean relied on the Commission designation in creating its financial information to report to Bremer Bank. While there was no evidence of a direct representation from the Commission to Bremer Bank concerning the Price Later Marketing Agreements such representations were made to and relied upon by Bremer Bank in the reporting of such by Grand Forks Bean.

II. NO GROWER SHOULD BE ENTITLED TO A LIEN AGAINST THE INVENTORY OF GRAND FORKS BEAN SINCE NONE HAVE A RECEIPT.

- a. The Growers all have Credit-Sale Contracts, even those who deny the Price Later Marketing Agreements.

¶52 As noted above, several of the Growers who unequivocally have signed Price Later Agreements have credit-sale contracts. Even those who claim that the signatures on the Price Later Marketing Agreements are not authorized by them should also be found to have a credit-sale contract. First, there is a strong inference that drivers who delivered beans to Grand Forks Bean executed the Price Later Marketing Agreements on behalf of their principals. This is particularly true with regard to Duane Altendorf, whose beans were delivered by Baldwin employees, and Beth Nelson, whose beans were delivered by Amundson employees. There were no "original" Price Later Marketing Agreements in the files of Grand Forks Bean, but rather only yellow duplicate copies. (Ex. 118-124.). This raises a strong inference that the Price Later Marketing Agreements were signed by and accepted by drivers on behalf of their employers. This inference is consistent with the actions regarding the Baldwins' claims and those of Curt Amundson who testified he was delivering beans himself.

¶53 Second, there is sufficient evidence to conclude a “written” agreement for a credit-sale was formed. The Growers all generally asserted that they had an agreement with Grand Forks Bean to sell beans that are the subject of their claims. There are written documentation that all indicates a credit sale arrangement. First, the posted notice at Grand Forks Bean is a writing that disclaims any bond coverage for a credit-sale contracts, including “Delayed Price Contracts”. (Ex. 126.). Further, the written posting at Grand Forks Bean indicated that all beans are considered as a form of delayed price contract, a “Price Later” unless specified by the Grower. (Ex. 31.). North Dakota law specifically requires a warehouse to post whether it will accept grain on 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 Here, the posting that all beans a considered a form of credit-sale, a “price later” complies with the statutes and is a writing that indicates the formation of a credit-sale with the Growers. Finally, none of the Growers indicated they ever asked for a warehouse receipt or other specific written agreement with Grand Forks Bean. 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 § 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

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.

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

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 postings at Grand Forks Bean, and the only other documentation besides scale tickets being the Price Later Marketing Agreements and/or the posted notices, there is sufficient evidence to find the subject claims 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.

¶54 Something to stress is that the requirements of § 60-02-01(2) and § 60-04-01(2) require a credit-sale to be in “writing”, not necessarily signed by any particular person.

b. All of the Growers Claim an Agreement with Grand Forks Bean to sell, which is not enforceable without a writing under UCC Article 2.

¶55 The statute of frauds for the sale of goods prevents the enforcement of an agreement for the sale of goods over \$500 “unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.” N.D.C.C. § 41-02-08(1). Here, the Growers are claiming an agreement with Grand Forks Bean to buy beans, but assert that they are not governed by the Price Later Marketing Agreements. The Growers are attempting to avoid the burdens of their decisions. Either they have valid written credit-sale contracts which are shown by the executed Price Later Marketing Agreements and posted notices, or there is not a written agreement with Grand Forks Bean and thus no requirement that Grand Forks Bean purchase any beans under N.D.C.C. § 41-02-08.

c. None of the Growers are Receiptholders.

¶56 The term “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). Only a “receiptholder” has a lien against the grain of a warehouse. N.D.C.C. § 60-02-25.1. Here, the evidence indicates that none of the Growers have any memoranda that was not received as a result of a credit-sale contract. As noted above, the postings at Grand Forks Bean, and the only other documentation besides scale tickets being the Price Later Marketing Agreements and/or the posted notices, there is sufficient evidence to find the only memoranda submitted by the Growers were all received from Grand Forks Bean as a result of a credit-sale contract. Thus, none of the Growers have a receipt, and having no receipts, are not receiptholders. Since none of the Growers are receiptholders they do not have any lien or claim on the proceeds of the bean inventory that was housed at Grand Forks Bean.

¶57 Additionally, the North Dakota Supreme Court has recently held that a statutory lien claimant “must demonstrate strict compliance with the statute.” Poppe v. Stockert, 2015 ND 252, ¶ 9, 870 N.W.2d 187. Thus, the burden to show that the Growers are entitled to any lien claim must fall on the Growers to demonstrate strict compliance with the statute. Here, the Growers all fail to do so. The evidence indicates none of the Growers ever attempted to obtain a warehouse receipt from Grand Forks Bean after delivering their beans. The Growers also failed to take any actions to seek payment from Grand Forks Bean. All of the documentation in this matter indicates that Grand Forks Bean was at all times accepting beans only on the terms of a credit sale arrangement. Thus, any of the documentation being put forward by the Growers does not demonstrate strict compliance with the statute. Rather, the prior inspections and Grand Forks

Bean's consistent behavior shows that only a credit-sale arrangement was contemplated in the acceptance of the beans being delivered. The Growers did not undertake any action to attempt to demonstrate strict compliance with obtaining a receipt from Grand Forks Bean, and accordingly, should not be granted the extreme remedy of defeating the prior perfected security interest of Bremer Bank through a statutory lien.

¶58 Accordingly, the proceeds of that inventory which is currently being held by the Commission must be ordered to be distributed to Bremer Bank in order to fully satisfy its claim as being the first priority lien creditors on the inventory and those proceeds.

III. THE PROPER DATE OF INSOLVENCY IS DECEMBER 19, 2014.

¶59 The portions of Bremer Bank's *Brief in Support of Objection to Report and Recommendation*, (Doc. # 227), at paragraphs 42 to 45 are incorporated herein by reference. There was no evidence presented at the hearing to indicate a proper demand which unequivocally required payment. First, it should be noted that the Price Later Marketing Agreement specifically stipulated that Grand Forks Bean was permitted to withdraw from the market if it decided to do so. Thus, when requests to sell beans were made to Grand Forks Bean, the response was that attempts to find a market would be made. Thus, while the Growers assert they would have liked to sell their beans at a particular time, such requests do not constitute a proper demand as contemplated by N.D.C.C. § 60-04-02. Further, minimal weight should be given to these farmer claims. The payment history indicates that several of the farmers accepted payment after the date they are claiming Grand Forks Bean was insolvent. They also have no written documentation to indicate any demand was made. They only have their oral statements and the other person to the conversation is deceased. There is nothing to indicate the Growers took any steps to demand or seek redelivery or make a proper demand for payment until the Growers contacted the Commission

on December 19, 2014. Accordingly, the recommended insolvency date of December 19, 2014, is appropriate in light of the evidence presented.

IV. GROWER CLAIMS ARE SUBJECT TO OFFSET FOR SERVICE FEES OWED TO GRAND FORKS BEAN FROM THE DATE OF DELIVERY THROUGH DECEMBER 19, 2014.

¶60 The portions of Bremer Bank's *Brief in Support of Objection to Report and Recommendation*, (Doc. # 227), at paragraphs 40 to 41, and Exhibit A thereto (Doc. # 228), are incorporated herein by reference. None of the Growers claim to have a warehouse receipt indicating a storage contract with Grand Forks Bean. Rather, the posted notices, Price Later Marketing Agreements all indicate that the beans were not being accepted by Grand Forks Bean as storage, but rather as being subject to a service fee. The evidence indicates that service fees in the warehousing industry are not subject to regulation, and solely subject to the agreement and posted policies of the warehouse. Storage fees are only applicable to a warehouse receipt, whereas a service fee is applicable to other arrangements a person delivering grain may have with the warehouse. (Ex. 113.).

¶61 Grand Forks Bean had a posted policy that beans were being accepted subject to a service fee equivalent to \$0.15 per month per hundredweight. Additionally, the Price Later Marketing Agreements also indicated that a service fee on that basis applied. The Commission in its *Report* cites to statutes that restrict or limit the time on which a storage fee can be accrued. However, the evidence in this case indicates that none of the Growers had a storage arrangement with Grand Forks Bean, and rather that the beans were all accepted by Grand Forks Bean subject to a service fee. Mr. Ron Adams also admitted that his practice was to pay multiple years of service fees when beans were sold through Grand Forks Bean. Accordingly, Bremer Bank submits the evidence indicates that each Grower owes to Grand Forks Bean service fees calculated from the date of

delivery through the date of insolvency at the rate of \$0.15 per hundredweight per month, and that these offsets should reduce the amount payable to the Grower herein.

V. CURT AMUNDSON'S SEED OFFSET SHOULD BE BASED ON THE INVOICE FROM GRAND FORKS BEAN.

¶62 Curt Amundson admits that he owes Grand Forks Bean for seed purchased by him from Grand Forks Bean. Mr. Amundson claimed that the amount owed is \$45,093.80. However, the written documentation indicates that the real amount was principal in the amount of \$51,312.15. (Ex. 24d.). Mr. Erdmann testified that he asked Mr. Amundson to provide him documentation to substantiate the amount of the pinto seed at less than the amount on the invoice that is Exhibit 24d, and Mr. Amundson never provided those documents to the Commission. Only at the time of trial did Mr. Amundson claim to have written documents to relate to the amount of the seed purchase he owes to Grand Forks Bean, despite having been requested to turn those documents over by the Commission. The documents were only Mr. Amundson's written notations and there is nothing to indicate when the notes were created.

¶63 Additionally, financial statements of Grand Forks Bean for the period ending September 30, 2014, indicate that the receivable for the seed was in the amount of \$51,312.15. (Ex. 108, p. 10.). Here, the only verifiable documented evidence indicates that the Commission was correct in categorizing the offset for the Amundson seed receivable.

VI. NONE OF THE BEAN INVENTORY PROCEEDS SHOULD BE APPLIED TO PAY EXPENSES OF THE COMMISSION.

¶64 The portions of Bremer Bank's *Brief in Support of Objection to Report and Recommendation*, (Doc. # 227), at paragraph 63 are incorporated herein by reference. The evidence indicates that the Commission is not claiming any lien against any of the proceeds of the Grand Forks Bean inventory. There is no evidence to support a finding that the Commission

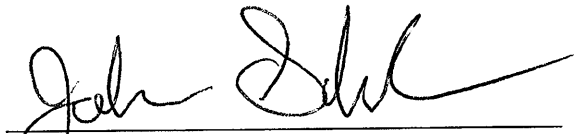
should be permitted to retain any of the inventory proceeds as and against Bremer Bank. Accordingly, any such inventory proceeds must be distributed to fully satisfy the claim of Bremer Bank prior to the payment of any expenses incurred by the Commission herein.

CONCLUSION

¶65 For the forgoing reasons, and those referred to and incorporated by reference herein presented in Bremer Bank's *Brief in Support of Claimant Bremer Bank, National Association's Objection to Report and Recommendation of Trustee*, on file with the Court as Document Number 227 and 228, Bremer Bank respectfully requests the court grant it the following relief:

- A. Finding that the Growers have no lien against any proceeds of the Grand Forks Bean inventory superior to the Bremer Bank security interest in the same;
- B. Ordering the Commission to distribute to Bremer Bank the proceeds of the Grand Forks Bean inventory an amount sufficient to fully satisfy Bremer Bank's claim;
- C. Finding that the Commission has no claim against any of the any proceeds of the Grand Forks Bean inventory superior to the Bremer Bank security interest in the same;
- D. Finding the date of insolvency of Grand Forks Bean to be December 19, 2014;
- E. Finding that the Growers' claims are all subject to offset in favor of Grand Forks Bean for service fees from the date of delivery of the beans through the date of insolvency at \$0.15 per month per hundredweight;
- F. Granting Bremer Bank's renewed motion to intervene as a party to assert its claims against the Commission as to equitable estoppel and related to expenses; and
- G. For such other and further relief deemed just and equitable.

Dated this 29 day of March 2016.



TRACY A. KENNEDY, ND ID # 05704
JOHN D. SCHROEDER, ND ID # 07147
Zimney Foster P.C.
3100 South Columbia Road, Suite 200
Grand Forks ND 58201
Telephone: (701) 772-8111/Fax: (701) 772-7328
tracykennedy@northdakotalaw.net
jschroeder@northdakotalaw.net
Attorneys for Bremer Bank, National
Association