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Notification of Service – Post-Trial Reply Brief

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

Public Service Commission,)	
)	
Petitioner,)	
)	
vs.)	CIVILNO. 18-2015-cv-00240
)	
Grand Forks Bean Company, Inc.,)	
Auto-Owner Insurance Company,)	POST-TRIAL REPLY BRIEF OF
)	RONALD ADAMS,
Respondents.)	NICHOLAS ADAMS, CHUCK NELSON,
)	AND WJS NELSON
vs.)	
)	
Bremer Bank, National Association,)	
)	
Applicant for Intervention,)	

PSC Case No. GE-15-36

[¶1] This is a simple story of the last days of a warehousemen going out of business after a four year decline in the commodity price of the commodity it deals in¹, whose owner succumbs and dies from a medical condition in August 2014. The central questions for determination are, 1) whether the Price Later Marketing Agreements credit sale contracts, and 2) when did GF Bean become insolvent.

[¶2] The arguments on the Price Later Marketing Agreement have been well developed. Bremer's contention that GF Bean's compliance with NDCC § 60-02-19.1 is not required, is contrary to statutory construction, legislative history, and existing case law. Ron Adams, Nick Adams and Chuck Nelson did not sign the Price Later Marketing Agreements.

[¶3] Many of the growers allege October 15, 2013 as the insolvency date for GF Bean, which equates to a bean price of \$38 /cwt. I do not dispute this date of October 15, 2013. However

¹ The testimony of Ron Adams established the price of beans was \$47 / cwt in 2010.

Bremer, Auto-Owners and the PSC ignore the significance of the WJS Nelson claim to the issue of determination of an insolvency date. On May 30, 2014 the price of beans was \$30/cwt. The trust fund proceeds are depleted by Growers' claims at a price of \$30/cwt for beans.

[¶4] Uncontroverted testimony showed that GF Bean was slow in paying off undisputed fixed price contracts with growers Amundson, B. Nelson, Alterndorf and Baldwin, in December of 2013 and January of 2014. These Growers had contracts at \$45/cwt for delivery of beans at harvest when the market was at \$38 /cwt. Baldwin testified he also had a deal to sell the surplus beans at a dollar above the market. GF Bean ultimately paid the \$45, but not the surplus beans.

[¶5] In April of 2014 McGurk on behalf of GF Bean solicits the purchase of beans from WJS Nelson for \$35 / cwt. WJS Nelson delivers three loads of beans out of its storage to GF Bean by April 15, 2014. Testimony indicated after that delivery WJS Nelson is again solicited by McGurk at GF Bean for delivery of more beans, to which WJS Nelson responded – pay for the ones you have first. (Steve Nelson testimony).

[¶6] The undisputed facts of the WJS Nelson case, present a failure by GF Bean to pay for beans it solicited for purchase. This failure to pay for WJS Nelson's beans meets the statutory definition of insolvency. This GF Bean failure to pay establishes the insolvency date of GF Bean.

[¶7] Insolvency is determined at the entity level, once for all. GF Bean breached the April 2014 deal it made with WJS Nelson no later than May 30, 2014, see the discussion in ¶9 below. There was no evidence of activity by GF Bean after April 2014 as a going concern: the death of the owner in August, 2014; the post death final financial statement from the fall of 2014; the surviving brother/manager/personal representative throws the keys on the banker's desk; by November 2014 growers were calling the PSC; and in December 2014 Growers submit written

claims to the PSC. There is simply no evidence of any commercial activity by GF Bean after April 15, 2014 that is indicative of viability.

[¶8] After April 15, 2014 **GF Bean was effectively done doing business.** GF Bean's failure to make payment to WJS Nelson within a reasonable time after this delivery, meets the statutory definition of insolvency for GF Bean.

[¶9] The statutes provide a 45 day post-delivery conversion date, which date should be found to be the end of a reasonable time to perform on a purchase. I submit that this date 45 days after delivery, in the case of an involuntary warehouse termination be used to fix **the date** for legal performance or breach for a failure to perform. Therefor it is a date upon which GF Bean crossed the statutory threshold of **insolvency under NDCC chap 60-04.** In WJS Nelson's case 45 days after April 15, 2014 is **May 30, 2014** and the price of beans on that date was \$30 / cwt.

[¶10] Much has been written about the issue of **conversion** contemplated by statute, and the need to harmonize it with the rest of the statutory provisions. Bremer and Auto Owners argue that conversion never occurred, with the result being that the Growers are not receipt holders and therefore not entitled to recover from the trust fund. The statute contemplates a metaphysical conversion which is **deemed to occur 45 days after delivery** of each load, without the need for any physical action or change whatsoever. There is no legal support for any required action, manifestation or confirmation of conversion. The statutes provide that a scale ticket is a warehouse receipt. See NDCC § 60-02-01(7). This conversion occurs 45 days after delivery, without anything more. I understand Bremer and Auto-Owners argument to be that neither warehouseman nor grower is charged with the obligation to mark this conversion in anyway. I argue that no physical change is required.

[¶11] Auto-Owners brings up NDCC § 60-02-04 in the discussion of statutory construction and harmony. **NDCC Sec. 60-02-04** contemplates a **voluntary insolvency**. This voluntary insolvency statute is not applicable to this case. This statute does mandate an insolvency date (of the warehouseman's choosing) while NDCC Chapter 60-04 leaves the date of insolvency open to the facts of the case.

[¶12] **Priority to the trust funds**² is a central issue in this case. The **Growers first** priority to the proceeds and bond is established by a priority statutory lien. The **PSC's** claim on the trust fund are statutory, but do not rise to the level of the Growers. The balance of the bean proceeds in the trust fund, if any, would be available to **Uniform Commercial Code claimants**.

[¶13] An Insolvency date of May 29, 2014, with a grower market price of \$30 / cwt. is supported by the WJS Nelson transaction, other facts of the case, the testimony of the witnesses and application of the law, without any contradictory evidence.

[¶14] The Amundson seed offset amount in question and the priority to its funds are at issue in this case. I point out that the seed **setoff amount** to be determined from the share of Curt Amundson is part of the trust fund and therefore such amount should be allocated among unsatisfied Growers in a manner that gives effect to the setoff among the Growers. Beans are not at issue anymore, but rather trust fund dollars and the priority of the claims thereto.

[¶15] The Growers are all entitled to **interest from the Insolvency date of May 29, 2014** at the Bank of ND prime rate to date of payment.

[¶16] While I perceive a storage/service fee to be inequitable under the circumstances, I submit that the Growers could arguably at most be responsible for **one month's storage/service fee** for the month of May 2014.

² I understand the bond amount (\$100,000) to be available to the Growers, but express no opinion on its availability to the PSC or UCC.

[¶17] It's my understanding of the statutory scheme that the trust funds should first be applied to satisfy the Growers' claims, before the PSC is allowed to recovery any part of the trust fund.

[¶18] It has been suggested that the Growers refused delivery of their beans in December of 2014. They did not. The Growers collectively sought redelivery after filing claims with the PSC, but GF Bean did not allow that redelivery to happen. Shortly thereafter the stipulation among the parties hereto was entered into for the sale of beans.

[¶19] In this case **pleading amendments** were made to fix typographical errors (WJS Nelson year), factual misunderstandings (Chuck Nelson did not sign a Price Later Contract) or in a reasonable effort to move towards dispute resolution.

[¶20] **WHEREFORE**, Ronald Adams, Nicholas Adams, Chuck Nelson, and WJS Nelson, state that the PSC Report should be approved by the Court subject to the following modifications:

- A. Confirm that the Price Later Contracts are not Credit Sale Contracts;
- B. Use an Insolvency date of May 30, 2014, and a price of \$30 / cwt.;
- C. Interest should accrue at the Bank of ND prime rate from the May 30, 2014;
- D. No storage or service fee should be allowed as a matter of equity;
- E. The seed setoff amount for Curt Amundson, should be reallocated among unsatisfied Growers;
- F. The Growers should be wholly satisfied prior to the PSC receiving anything from the Trust Fund; and
- E. The Grower claims be paid proportionately and immediately out of the monies held in trust and the proceeds of the bond provided by Auto-Owners Insurance Company.

Respectfully submitted and dated this 5th day of April, 2016.



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