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**Notification of Service – Post Hearing Reply Brief**

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS

NORTHEAST CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

-vs-

Grand Forks Bean Company, Inc.,

and

Auto-Owners Insurance Company

Respondents.

Civil No. 18-2015-CV-00240

**POST HEARING REPLY BRIEF OF  
BRENT BALDWIN, BALDWIN FARMS,  
INC., AND DUANE ALTENDORF**

PSC Case No. GE-15-36

**INTRODUCTION**

[¶1] Brent Baldwin (“Baldwin”), Baldwin Farms, Inc. (“Baldwin Farms”), and Duane Altendorf (“Altendorf”) file this post-hearing reply brief. Nothing presented by the other parties alters the conclusion that the priority claim for Baldwin is \$84,373.68, for Baldwin Farms is \$38,216.98, and for Altendorf is \$91,512.36, with each accruing interest from and after October 15, 2013 and to be paid from the funds held by the Petitioner and the bond of Auto-Owners Insurance Company (“Auto Owners”).

[¶2] At the outset, it is significant that the Petitioner, Auto-Owners, Baldwin, Baldwin Farms, Altendorf, and each of the other farmers having claims in this matter, agree that the farmers’ claims are based upon non-credit sale contracts that have priority over Bremer and should be paid from the funds held by the Petitioner. See Court Docs. Nos. 247, 249, 251, 253 and 257. The only substantive disagreement between these parties is the date of insolvency and whether

storage charges should offset the payment to the farmers.<sup>1</sup> *Id.* As explained in their opening brief, Baldwin, Baldwin Farms, and Altendorf have shown that the undisputed facts in this case, when applied to the statutory framework, warrant an insolvency date by October 15, 2013 and no storage charges being assessed.

[¶3] Bremer Bank (“Bremer”) stands alone when it declares the farmers’ claims are based upon credit sale contracts, and in turn it is Bremer that is entitled to the funds held by the Petitioner. Court Doc. No. 255. There is a reason Bremer stands alone because, as outlined below, Bremer’s conclusion can only be reached by ignoring the undisputed evidence and disregarding the law. Indeed, rather than cite to evidence or testimony, Bremer relies upon conjecture when it makes repeated reference to its self-described “strong inferences,” which Bremer necessarily had to do given the evidence contradicts its position. *See e.g.* Court Doc. 255, ¶ 52 (stating “there is a strong inference that drivers . . . executed the Price Later Marketing Agreements on behalf of their principals” . . . which is “particularly true with regard to Duane Altendorf” even though Mr. Altendorf testified he had no idea who signed the document, he had never seen the document until it was sent to him by the Petitioner in late 2014, and no driver or employee had ever been directed or authorized to sign a contract on his behalf).

## **LAW AND ARGUMENT**

### **A. Reply to Bremer Bank**

#### **(1) No ratification by Baldwin and Baldwin Farms**

[¶4] Bremer contends that Baldwin and Baldwin Farms somehow ratified a Price Later Marketing Agreement, even though the evidence in this case was clear – neither of these parties

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<sup>1</sup> There does exist the question of fees and costs that may be payable to the Petitioner, which was agreed would be addressed after the Court rules on the substantive distribution issues of GF Bean.

signed, negotiated, agreed upon, or even discussed such document with GF Bean. Court Doc. No. 255, ¶¶ 48-49. Bremer's analysis is both factually and legally flawed.

[¶5] In making this ratification argument, Bremer cited to and relied exclusively upon the following holding in Matter of Mehus' Estate, 278 N.W.2d 625 (N.D. 1979):

Also, 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.

Matter of Mehus' Estate, 278 N.W.2d 625, 630 (N.D. 1979) (emphasis added). Under Bremer's theory, the "acts" of a truck driver – which is to haul and drop off pinto beans and return to the field – are transformed into negotiating and signing binding contracts. Yet, Bremer ignores the undisputed evidence that no employee, including a truck driver, has ever been authorized or directed to sign or negotiate a contract for Baldwin or Baldwin Farms. Furthermore, there exists no evidence to support a finding that one dealing with a truck driver, such as GF Bean in this case, could conclude a truck driver had any authority to negotiate and sign contracts for Baldwin and Baldwin Farms. See Lagerquist v. Stergo, 2008 ND 138, ¶ 14, 752 N.W.2d 168. Indeed, the undisputed evidence leads to just the opposite conclusion because GF Bean had never had any dealings with Baldwin or Baldwin Farms before the fall of 2013, and the Price Later Marketing Agreement within the GF Bean records had been altered after the fact. Compare Ex. 21B and Ex. 22A with Ex. 22E; See Alerus Fin., N.A. v. W. State Bank, 2008 ND 104, ¶ 40, 750 N.W.2d 412 (to bind principal of acts of agent, one must act with good faith and without ordinary negligence, and make inquiry when having notice of facts that actions were outside scope of authority); Weinreis v. Hill, 2006 ND 170, ¶¶ 9-14, 719 N.W.2d 354. This alone negates Bremer's argument.

[¶6] Even if one can get past this frailty, the evidence demonstrates the principal of law relied upon by Bremer does not apply. First, the evidence, if any exists, is scant on whether Baldwin and Baldwin Farms were fully informed of what a purported truck driver may have signed. Rather, the evidence was this document was within a stack of scale tickets and there is no evidence any communication was made by the truck driver to Baldwin or Baldwin Farms regarding the execution of any Price Later Marketing Agreement. Moreover, it is eminently clear from the evidence that there was an alteration of the document, after the fact, because the document within the GF Bean files was different – again evincing a lack of evidence to find Baldwin and Baldwin Farms were fully informed. Compare Ex. 22A and 22E. Furthermore, the actions taken by Baldwin and Baldwin Farms shortly after their final delivery demonstrate they did repudiate any Price Later Marketing Agreement that may have existed. As already noted, approximately 2 weeks after the last pinto bean delivery (by the beginning or mid-October, 2013), Baldwin and Baldwin Farms were already making demand for payment from GF Bean – actions that are wholly inconsistent with, and in turn repudiating, a document that called for pricing months later. See e.g., Hodny v. Hoyt, 243 N.W.2d 350, 356 (N.D. 1976) (repudiation of trust status through acts plainly evincing repudiation so as to put beneficiary on notice of adverse position in the matter). Thus, even under Bremer’s strained interpretation, Baldwin and Baldwin Farms’ actions were anything but ratifying the purported Price Later Marketing Agreement but instead demonstrate repudiation in total.

[¶7] Finally, even if one can look past all of these flaws, Bremer’s entire argument is nullified by the undisputed testimony and evidence showing that neither Baldwin nor Baldwin Farms notified GF Bean that their delivered pinto beans were to be subject to or put under any Price

Later Marketing Agreement – a requirement specified in paragraph 5 of such agreement for the terms thereof to have any application whatsoever. See Ex. 22A, ¶ 5.

(2) Bremer’s estoppel argument fails

[¶8] Bremer only incorporated its prior estoppel arguments. Court Doc. No. 255, ¶ 51. This issue was fully addressed by Baldwin, Baldwin Farms, and Altendorf in their opening brief and to avoid unnecessary duplication, the undersigned refers the Court to this argument. See Court Doc. No. 247, ¶¶ 29-33.

(3) Baldwin, Baldwin Farms, and Altendorf do not have credit sale contracts

[¶9] Bremer argues that even those farmers that deny the Price Later Marketing Agreements are still credit sale contract claimants. Court Doc. No. 255, ¶¶ 52-54. In ending this argument, Bremer “stresses” that N.D.C.C. §§ 60-02-01(2) and 60-04-01(2) require only a writing, not necessarily signed by any particular person. Id. at ¶ 54. First, the assertion a credit sale contract does not need to be signed by any particular person is an incorrect statement of the law and would require this Court to disregard and render inoperative wholesale provisions of N.D.C.C. § 60-02-19.1, including the requirement that credit sale contracts be signed by both parties. Sandberg v. Am. Family Ins. Co., 2006 ND 198, ¶ 9, 722 N.W.2d 359 (interpretation of statutes is done so as not to render provisions useless, inoperative, or superfluous); Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403. Further, the logical conclusion of Bremer’s assertion – that no particular person need sign these contracts – is that anyone, even a total stranger to GF Bean or any farmer delivering beans, can sign a document that becomes binding on these parties. That is not the law.

[¶10] Bremer does correctly state that a credit sale contract must be in writing. While Baldwin and Baldwin Farms do have written contracts - the Dry Bean Contracts (Ex. 21A) and scale

tickets - neither the Dry Bean Contracts nor the scale tickets contain the required provisions, including the bond notice, to make them credit sale contracts. N.D.C.C. §§ 60-02-01(2), 60-02-19.1 and 60-04-01(2). Altendorf's writings consist of the scale tickets, which again do not come remotely close to satisfying the requirements for a credit sale contract. Id. Finally, the argument advanced by Bremer that a poster satisfies the writing requirement misconstrues the statute and more importantly such poster falls woefully short of complying with the statutory requirements for a credit sale contract. Compare Ex. 31 with N.D.C.C. §§ 60-02-01(2), 60-02-19.1 and 60-04-01(2).

(4) UCC Statute of Frauds Not Applicable

[¶11] Bremer argues the UCC statute of frauds (N.D.C.C. § 41-02-08(1)) provision somehow salvages their claim to the proceeds held by the Petitioner. Court Doc. No. 255, ¶ 55. This is a peculiar argument by Bremer because if one assumes, for argument purposes only, the statute of frauds applies, then the pinto beans and the proceeds therefrom were the assets of and exclusively owned by Baldwin, Baldwin Farms, and Altendorf, and were never encumbered, in any manner, by Bremer's purported security interest because GF Bean had an insufficient interest in them. N.D.C.C. § 41-09-13(2) and Ex. 103, p. 8 (excluding beans which are not owned by GF Bean free and clear of interests of third parties).

[¶12] Irrespective, Bremer's argument fails because Baldwin, Baldwin Farms, and Altendorf all have writings sufficient to indicate a contract for sale was made that was signed by GF Bean. As to Baldwin and Baldwin Farms, the writings are the Dry Bean Contracts and scale tickets, while the writings for Altendorf are the scale tickets. See Ex. 21A, 21D, 22C, and 23C. Furthermore, Bremer's argument ignores N.D.C.C. § 41-02-08(3), which renders the statute of frauds inoperative because the pinto beans were delivered and accepted by GF Bean, and there was at

least partial payment by GF Bean to Baldwin Farms and Altendorf. See Ex. 22D, N.D.C.C. § 41-02-08(3)(c); Hofmann v. Stoller, 320 N.W.2d 786, 791 (N.D. 1982) (“where there has been delivery of the goods by the seller and acceptance of the goods by the buyer, the bilateral performance of the contract evinces the assent of both parties”). In fact, Bremer even acknowledges delivery and acceptance by GF Bean of the pinto beans. See Court. Doc. No. 255, ¶ 61 (“the beans were all accepted by Grand Forks Bean”). Finally, Bremer’s argument must be rejected because it is not a party to the contracts and therefore has no standing to assert a statute of frauds defense. 37 C.J.S. Statute of Frauds § 172 (as general rule, statute of frauds is a personal privilege that cannot be interposed by third parties, non-parties, or strangers to the contract).

(5) Baldwin, Baldwin Farms, and Altendorf are receiptholders and entitled to lien priority

[¶13] Bremer argues no farmer is a “receiptholder” and not entitled to the lien priority. Court Doc. No. 255, ¶¶ 56-58. Baldwin, Baldwin Farms, and Altendorf fully addressed this issue in their opening brief and they refer the Court to their prior argument. Court Doc. No. 247, ¶¶ 34-38. It is noted, however, that Bremer argues the farmers “did not undertake any action to attempt to demonstrate strict compliance with obtaining a *receipt* from Grand Forks Bean.” Court Doc. No. 255, ¶ 57 (emphasis added). Contrary to this assertion, the farmers did in fact take all necessary action and comply because each obtained a scale ticket for the pinto beans delivered and the statute clearly defines a scale ticket as being a “*receipt*.” N.D.C.C. § 60-02-01(7); See also Ex. 21D, 22C, 23C.

(6) There is no basis for service fee offset

[¶14] Bremer argues that because there was a poster setting out a monthly service fee of \$0.15 per cwt, that such fee must be assessed. Court Doc. No. 255, ¶¶ 60-61. However, there is

absolutely no evidence that such fee was ever contemplated or applied to Baldwin, Baldwin Farms, or Altendorf. Indeed, the evidence shows GF Bean did not assess this service fee, despite its poster, because Baldwin Farms received a payment on 3,000 cwt at \$45.00 per cwt for a total gross payment of \$135,000. Ex. 22D. If, as Bremer argues, this service fee existed, then there would have been a deduction of \$1,350.00 (3,000 cwt x \$0.15 x 3 months from date of delivery to date of payment). There was no such amount deducted. The only fee that was deducted from the payment to Baldwin Farms was the \$0.10 edible bean promotion assessment – or \$300.00. Ex. 22D; N.D.C.C. § 4.1-06-12. Therefore, the argument advanced by Bremer to assess a service fee fails because evidence shows GF Bean did not apply this fee.

**B. Reply to Petitioner, Bremer, Auto-Owners: Date of Insolvency and Storage Fees**

(1) Date of Insolvency - Introduction

[¶15] The Petitioner, Bremer, and Auto-Owners all contend the date of insolvency of GF Bean must be determined to be December 19, 2014. Court Doc. No. 155, ¶ 77, Court Doc. No. 249, ¶¶ 59-104, Court Doc. No. 253, ¶¶ 21-29; Court Doc. No. 255, ¶ 59. The reasons provided by these parties do not justify this December, 2014 insolvency date.

(2) Date of Insolvency – demand for payment and refusal places GF Bean into insolvency by October, 2013

[¶16] The Petitioner, in its Report and Recommendation, recommended a December 19, 2014 insolvency date because that is the first date it was contacted. Court Doc. No. 155, ¶ 77. In its post-hearing brief, the Petitioner jumps on a different horse. The Petitioner no longer uses this contact date for the date of insolvency, but instead argues the December, 2014 date is justified through application of the latter part of the insolvency defining statute, concerning redelivery of grain stored. Compare Court Doc. No. 155, ¶ 77 to Court Doc. 253, ¶¶ 21-29.

[¶17] First, whether the PSC was contacted or not is not relevant to whether GF Bean was insolvent. There is a specific statute that sets out and defines insolvency:

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.

N.D.C.C. § 60-04-02. Nowhere in this statute does it condition insolvency on contact with the Petitioner. Yet, under the Petitioner's original view, this Court would be required to re-write the statute so as to read as follows:

- (a) 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; **and**
- (b) ***The grower has notified the North Dakota Public Service Commission of the refusal, neglect or inability of the licensee to make payment for grain purchased or marketed, or in the case of grain stored to make redelivery or payment.***

[¶18] Despite the invitation made by the Petitioner in its original Report and Recommendation, this Court is not empowered to legislate or rewrite statutes. Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 12, 829 N.W.2d 453 (when engaging in statutory interpretation, "it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed." (citations omitted)); Olson v. Workforce Safety & Ins., 2008 ND 59, ¶ 23, 747 N.W.2d 71 ("[t]he function of the courts is to interpret the law, not to legislate, 'regardless of how much we might desire to do so or how worthy an argument'").

[¶19] Evidently recognizing this frailty with its original position, the Petitioner now argues it is the failure of the farmers to demand redelivery until the latter part of 2014 that justifies the December 19, 2014 insolvency date. Court Doc. #253, ¶¶ 21-29. Bremer jumps on this same argument. Court Doc. No. 255, ¶ 59. However, this newly formulated argument, like Petitioner's original position, is flawed and ignores the evidence.

[¶20] It is recognized that when grain, liked the pinto beans in this case, is stored by a licensee insolvency arises when there has been demand for and refusal of redelivery or payment.

N.D.C.C. § 60-04-02 (a licensee is insolvent when a licensee refuses, neglects, or is unable upon proper demand . . . to make redelivery or payment *for grain stored* (emphasis added)).

However, when grain, like the pinto beans of Baldwin, Baldwin Farms, and Altendorf, is purchased, then insolvency does not require demand for redelivery but only that there has been a proper demand for payment and the licensee (here GF Bean) refuses, neglects or is unable to do so. *Id.* (“[a] licensee is insolvent when a licensee refuses, neglects, or is unable upon proper demand to make payment *for grain purchased or marketed* by the licensee . . .” (emphasis added)). The Petitioner recognizes this distinction of insolvency for grain stored versus grain purchased. Court Doc. No. 253, ¶ 22.

[¶21] Yet, the Petitioner, inexplicably when considering the evidence, asserts that Baldwin, Baldwin Farms, and Altendorf were storing grain, necessitating a demand for redelivery, because in the view of Petitioner, they had no right to require payment for their delivered beans. *Id.* at ¶ 26. The evidence does not support this conclusion. Instead the testimony and evidence from both Mr. Baldwin and Mr. Altendorf was very clear – they did not deliver the pinto beans for storage with GF Bean, but instead the beans were delivered for purchase by GF Bean, that GF Bean was required to make payment for the beans without condition upon their request, and that they attempted to receive payment within two weeks after delivery (being the beginning or middle of October, 2013), but GF Bean refused to do so. *See* Ex. 21A (for 3,000 cwt payment must be made at time of sale). These undisputed facts prove GF Bean was insolvent by at least October 15, 2013. N.D.C.C. § 60-04-02. Any attempt to re-characterize the transactions

between GF Bean and Baldwin, Baldwin Farms, and Altendorf as something other than purchases is a misconstruction of the evidence.

[¶22] Further, the fact payments – partial only – were made after this October, 2013 date of insolvency does not delay or otherwise extinguish GF Bean’s insolvency under N.D.C.C. § 60-04-02. There is nothing in the insolvency statute that creates an exception for a partial payment for what was demanded so as to disregard as a non-event the warehouse’s prior and continuing refusal to make payment. N.D.C.C. § 60-04-02. If that were the case, then any payment – regardless of amount – would suffice to delay the date of insolvency. Nothing in the statute supports such a result. The Petitioner also argues that the insolvency event proffered by the farmers in this case would “result in an interpretation from which any dispute between a farmer and the warehouse would result in the warehouse being deemed insolvent.” Court Doc. No. 253, ¶ 28. Yet, this concern for any dispute leading to insolvency likewise exists under what the Petitioner proffers for insolvency event – a farmer’s demand for redelivery and a warehouse’s refusal.

[¶23] The Petitioner’s original position on the date of insolvency was in error as is its newly formulated basis to justify a December, 2014 insolvency date. The undisputed evidence, when applied to the law, leads to the conclusion that GF Bean was insolvent by October, 2013.

N.D.C.C. § 60-04-02.

(3) Date of Insolvency – Not Changed with N.D.C.C. § 60-02-41 as offered by Auto-Owners

[¶24] Auto-Owners argues that the Court should “break the tie” on the date of insolvency by applying N.D.C.C. 60-02-41 and that then moves the date to December, 2014 or January, 2015. This statute does not break the tie. The very provision of the statute that Auto-Owners emphasizes and relies refers to insolvency. N.D.C.C. § 60-02-41. As already explained, the

term “insolvency” is defined by a specific statute. N.D.C.C. § 60-04-02. Further, and also by specific statute, payments are required to be made for those that have scale tickets or warehouse receipts in an amount equivalent to the market price prevailing on the date of insolvency.

N.D.C.C. § 60-04-09(5). Auto Owners states a basic tenet of statutory construction is the more specific statute controls the general statute. Court Doc. No. 249, ¶ 89. Here Baldwin, Baldwin Farms, and Altendorf simply seek to have this Court apply these specific statutes – that define insolvency and the amounts payable on the date of this insolvency. N.D.C.C. §§ 60-04-02 and 60-04-09(5) By doing so, the priority claim for Baldwin is \$84,373.68, for Baldwin Farms is \$38,216.98, and for Altendorf is \$91,512.36, with each accruing interest from and after October 15, 2013.

(4) Storage

[¶25] Baldwin, Baldwin Farms and Altendorf have fully addressed the issue of storage in their opening brief and refer the Court to this argument. Court Doc. No. 247, ¶¶ 27-28.

**CONCLUSION**

[¶26] **WHEREFORE**, Brent Baldwin, Baldwin Farms, Inc., and Duane Altendorf for the foregoing reasons and those previously provided, request that the Court find as follows:

1. The agreements of Brent Baldwin, Baldwin Farms, Inc., and Duane Altendorf with Grand Forks Bean Company, Inc. were noncredit-sale contracts;
2. The date of insolvency was October 15, 2013, the date that Grand Forks Bean Company, Inc. refused the payment demands of Brent Baldwin, Baldwin Farms, Inc., and Duane Altendorf;
3. The market price at the time of insolvency, October 15, 2013, was \$38.00/cwt;
4. Brent Baldwin is entitled to payment in the amount of \$84,373.68 for the 2,220.36

cwt of pinto beans delivered to Grand Forks Bean Company, Inc. for which payment has not been received;

5. Baldwin Farms, Inc. is entitled to payment in the amount of \$38,216.98 for the 1,005.71 cwt of pinto beans delivered to Grand Forks Bean Company, Inc. for which payment has not been received;

6. Duane Altendorf is entitled to payment in the amount of \$91,512.36 for the 2,408.22 cwt of pinto beans delivered to Grand Forks Bean Company, Inc. for which payment has not been received;

7. Brent Baldwin, Baldwin Farms, Inc., and Duane Altendorf are entitled to interest on the above stated amounts from October 15, 2013, the date of insolvency;

8. The claims of Baldwin, Baldwin Farms, and Altendorf have first priority over any claim by Bremer Bank or other non-farmer claimant; and

9. The claims of Baldwin, Baldwin Farms, and Altendorf are to be paid from the funds held by the Petitioner and the bond of Auto-Owners Insurance Company.

Dated this 5<sup>th</sup> day of April, 2016.

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