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Filing Desc: Claimant Bremer Bank, National Association's Post-Hearing Reply Brief in Support of Claimant Bremer Bank, National Association's Objection to Report and Recommendation of Trustee

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

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

Public Service Commission, )  
)  
Petitioner, )  
)  
vs. )  
)  
Grand Forks Bean Company, Inc., )  
Auto-Owners Insurance Company, )  
)  
Respondents, )  
)  
\_\_\_\_\_ )  
PSC Case No. GE-15-36 )

Civil No. 18-2015-CV-00240

**POST-HEARING REPLY  
BRIEF IN SUPPORT OF CLAIMANT  
BREMER BANK, NATIONAL  
ASSOCIATION'S OBJECTION TO  
REPORT AND RECOMMENDATION  
OF TRUSTEE**

¶1 COMES NOW Bremer Bank, National Association ("**Bremer Bank**"), by and through its undersigned counsel of record, and submits this Reply 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 to address the arguments of the various other litigants in this matter.

**LAW AND ARGUMENT**

I. THE PRICE LATER MARKETING AGREEMENTS ARE A VALID CREDIT-SALE CONTRACT.

¶2 The Commission and Growers argue that all the determination of a credit-sale contract is controlled by N.D.C.C. § 60-02-19.1. Their arguments fail to account for the well established rules of statutory construction. The Commission and the Growers ignore that by requiring every condition of § 60-02-19.1 contravenes the plain language of the statutes and renders the definition of credit-sale contract in §§ 60-02-01(2) and 60-04-01(2) wholly meaningless. It is well

established that “legislative intent is presumed clear from the face of the statute.” Kroschel v. Levi, 2015 ND 185, ¶ 9, 866 N.W.2d 109. Also, the North Dakota Supreme Court has held that in interpreting statutes, where there is a conflict in the provisions, the conflict should be resolved in order to give meaning to both provisions. Id., ¶ 18. “A cardinal rule of statutory construction requires interpretation of related provisions together, if possible, to harmonize and to give meaning to each provision.” Id. The purpose of harmonizing the statutes is so that there is “give[n] meaning to each [statute] without rendering one or the other useless.” BASF Corp. v. Symington, 512 N.W.2d 692, 696 (N.D. 1994).

¶3 Here, only the interpretation offered by Bremer Bank harmonizes and gives meaning to §§ 60-02-01(2) and 60-04-01(2) and § 60-02-19.1. The position of the Commission and the Growers would render the definitions in §§ 60-02-01(2) and 60-04-01(2) wholly meaningless. In interpreting statutes the North Dakota Supreme Court has directed the district courts to avoid such an interpretation, and the interpretation offered by Bremer Bank gives meaning to all provisions of §§s 60-02-01(2) and 60-04-01(2) and § 60-02-19.1. Accordingly, the Price Later Marketing Agreements at issue should be found to be credit-sale contracts, and the Growers who have such are not receiptholders entitled to any lien in the grain inventory of Grand Forks Bean.

## II. THE GROWERS ALL HAD WRITTEN AGREEMENTS THAT CONSTITUTE CREDIT SALES.

¶4 The Growers argue that there is insufficient evidence that any agreement was reached with or without the Price Later Marketing Agreements. First, there is an inference that the Growers, or someone authorized by them, executed the Agreements. Each of the Price Later Marketing Agreements in the Grand Forks Bean records was a duplicate copy. The evidence as to the Amundson and Baldwin Price Later Marketing Agreement was that a driver signed the agreement for the Grower and took the original signed agreement with him. It is a fair inference that the same

thing occurred with the other Growers. This would explain why there were no originals in the Grand Forks Bean records and why Grand Forks Bean would present these Price Later Marketing Agreements to the Commission at the inspection in February of 2014.

¶5 Second, the written postings at Grand Forks Bean, together with the scale tickets and usage of trade, should be sufficient to find the arrangements the Growers have with Grand Forks Bean is a credit-sale. The North Dakota Supreme Court has held that usage of trade can inform the proper classification of the credit-sale contract. See North Dakota Pub. Serv. Comm'n v. Central States Grain, Inc., 371 N.W.2d 767, 775-76 (N.D. 1985). Here, the postings constitute a course of dealing and usage of trade. None of the Growers claimed to hold or request a warehouse receipt. Each of these Growers desired to obtain a purchase agreement with Grand Forks Bean, but the documentary evidence indicates the terms on which Grand Forks Bean was willing to deal was on a credit-sale basis. The definition of "receipt" specifically excludes a "memorandum received as a result of a credit-sale contract." Here, the indication is that Grand Forks Bean only issued and accepted for delivery the scale tickets and beans at issue in this proceeding as a result of a credit-sale. Accordingly, the Growers should not be entitled to any receiptholder's lien superior to that of Bremer Bank.

III. THE EVIDENCE WAS CONFLICTED AS TO INSOLVENCY, AND A CORRECT DATE WOULD BE AS RECOMMENDED BY THE COMMISSION.

¶6 The Growers argue that insolvency is determined solely based on one instance of a warehouse becoming insolvent. This argument flies in the face of the statutory scheme wherein the Commission is intimately tied into the process of winding up the affairs of an insolvent warehouse. Upon a warehouse becoming insolvent, the Commission has a duty to institute an insolvency proceeding. N.D.C.C. § 60-04-03. The Commission necessarily must take action once the warehouse is determined to be insolvent. The Growers have proposed an insolvency date as

October 15, 2013. This proposed insolvency date is not credible and is contradicted specifically by the evidence of their prior claims. Several of the Growers assert that they did not know of an October insolvency date, but that is a specious claim. For instance, in Baldwin's and Altendorf's claim only discovery yielded their proposed date of October 15, 2013; yet they are the persons who claim to have made the demand on that date. The same can be said for Curt Amundson, who claims discovery only yielded a proposed October 15, 2013 insolvency date, yet at trial he testified he intended to make a demand for sale at that time. These prior inconsistencies should be used to weigh the credibility of these Growers. Further, while Curt Amundson claimed he kept meticulous records, it is incongruous to think that he would not have documented any demand on Grand Forks Bean. There is no documented claim filed with the Commission prior to the December 19, 2014 date as noted in the *Report and Recommendation*. There are no records of any of the Growers having contact with the Commission prior to that date noting there was any problem with Grand Forks Bean marketing or paying the Growers for beans sold to Grand Forks Bean. A claim now that over a year prior there was a demand is not credible. The Growers failed to take any action to obtain payment or otherwise attempt to collect in any verifiable manner. No lawsuit was started. No written demands were made. The correct insolvency date in this matter is December 19, 2014 as recommended by the Commission.

#### IV. BREMER BANK CAN RAISE AN ESTOPPEL ARGUMENT.

- a. Bremer Bank is in Privity with Grand Forks Bean due to the secured creditor relationship and the surrender of the collateral to Bremer Bank.

¶7 The Commission and Growers argue that Bremer Bank cannot argue that estoppel applies because estoppel would only run in favor of Grand Forks Bean. This is wrong because Bremer Bank is in privity with Grand Forks Bean on this issue.

¶8 Equitable estoppel is available to not only the party to a transaction, but also those in privity with that party. Brunsdale v. Bagge, 224 N.W.2d 384, 388 (N.D. 1974). The North Dakota Supreme Court “has adopted an ‘expanded’ version of privity for res judicata and collateral estoppel. . . . Privity exists if a person is so identified in interest with another that he represents the same legal right. . . . Fundamental fairness underlies any determination of privity.” Ungar v. North Dakota State Univ., 2006 ND 185, ¶ 12, 721 N.W.2d 16 (citations and quotations omitted). Additionally, the American Jurisprudence, originally relied upon in Brunsdale, describes privity for equitable estoppel purposes as follows:

“Privies” are persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of an actual contract between them. One person becomes “privity” of another, for the purposes of the law of estoppel, by succeeding to the position of the other as regards the subject of the estoppel or by holding in subordination to the other. “Privity” means a mutual or successive relationship to the same rights of property and is generally defined as a relationship in which a person is so identified in interest with another that he or she is said to represent the same legal right based upon a case-by-case examination.

28 Am. Jur. 2d Estoppel and Waiver § 119. Additionally, the North Dakota Supreme Court has recognized that a secured creditor is in privity with its debtor as far as the pledge property is concerned. Peabody v. Lloyds Bankers, 6 N.D. 27, 68 N.W. 92, 94 (1896) (“As Wilson [as debtor] himself would have been estopped from claiming title as against the attaching creditors, his pledgee stands in no better position. He [the secured creditor] is a privy, and as such is as fully bound by the estoppel as Wilson would be were he himself claiming the property.”).

¶9 Further indicating that as to the determination of the classification of the Price Later Marketing Agreements at issue, the Loan Workout Agreement between Bremer Bank and Grand Forks Bean indicate that Grand Forks Bean has surrendered to Bremer Bank all of its interest in the grain inventory. Thus, because Bremer Bank is in privity with Grand Forks Bean, any

reference to Bremer Bank's position as being derivative of Grand Forks Bean is wholly appropriate.

- b. Estoppel is proper because the evidence indicated the Commission represented the Price Later Marketing Agreements were credit-sale contracts, and the Commission should be bound by that determination.

¶10 The Growers and the Commission argue Bremer Bank cannot even meet the requirements of equitable estoppel. Here the evidence shows the requirements were met and that the Commission should be estopped from reversing its earlier administrative determination at the February 2014 inspection that these Price Later Marketing Agreements are credit-sale contracts. The testimony of Tim Erdmann indicated that he reviewed all of the Price Later Marketing Agreements in issue and communicated to Grand Forks Bean that there were properly classified as credit sale contracts. Mr. Erdmann even justified his classification on the stand under questioning from attorney Brakke. The evidence also indicates that Grand Forks Bean. The fact of this case fit squarely within the holding of Blocker Drilling Canada, Ltd. v. Conrad, 354 N.W.2d 912, 920 (N.D. 1984). Accordingly, the Commission should be estopped from denying the Price Later Marketing Agreements are not credit-sale contracts.

V. THE GROWERS' CLAIMS SHOULD BE OFFSET BY SERVICE FEES AND THE DRY BEAN ASSESSMENT.

¶11 The Growers object to the reduction of their claims by service fees as proposed by the Commission. The Growers do not cite any law in favor of their claims. Rather, the evidence showed that posted as part of the credit-sale contract at issue in this matter were a requirement that the persons delivering grain to Grand Forks Bean would pay service fees at the rate of \$0.15 per month per hundredweight while the beans were marketed through Grand Forks Bean. The evidence also indicated that several of the Growers would pay service fees to Grand Forks Bean over a multi-year period and when the beans actually were sold. The evidence and law also

indicates that the charging of service fees are not regulated by the Commission, and as such the service fees should accrue from when the beans were first delivered until the insolvency date of December 19, 2014.

VI. THE COMMISSION MAY BE ENTITLED TO ITS COSTS OUT OF TRUST ASSETS, BUT NOT IN DEROGATION OF BREMER BANK'S LIEN ON THE BEAN PROCEEDS.

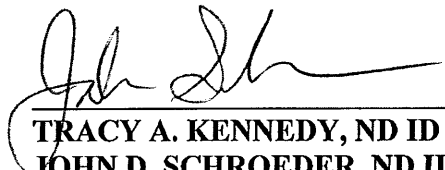
¶12 The Commission argues that it is entitled to collect its costs and expenses from the proceeds of the Grand Forks Bean inventory prior to any distribution to Bremer Bank. This argument is flawed for two reasons. First, the Commission does not claim any particular lien in the grain inventory of Grand Forks Bean, whereas the Growers, if they are receiptholders (which Bremer Bank disputes), would have a super-priority lien in the grain inventory and the proceeds thereof. The Commission has no such lien. The Commission cannot defeat the perfected security interest of Bremer Bank solely because the assets were collected by the Commission and placed into trust. The Commission has not cited any authority that by virtue of taking the proceeds of the grain inventory of Grand Forks Bean that the Commission has somehow gained a lien against those proceeds. Second, while the statutory scheme certainly permits the Commission to obtain payment of costs and expenses from the trust assets, the grain inventory proceeds are only one such source of the trust assets. In fact, other ready sources of trust assets could be available to pay the costs and expenses of the Commission, including the bond. N.D.C.C. § 60-04-03.1(2). The Commission can and should also properly have its costs and expenses reimbursed from the credit-sale contract indemnity fund as well. N.D.C.C. § 60-10-09. It would be inequitable for the Commission to be paid its costs and expenses over the perfected security interest of Bremer Bank out of the inventory proceeds of Grand Forks Bean when the Commission has other sources of repayment available to it that would not defeat and usurp Bremer Bank's legal lien rights.

## CONCLUSION

¶13 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* and Bremer Bank's *Post-Hearing 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, 228, and 255, 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 5 day of April, 2016.



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