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STATE OF NORTH DAKOTA
COUNTY OF GRAND FORKS

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 18-2015-cv-00240

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

**PUBLIC SERVICE COMMISSION'S
BRIEF IN SUPPORT OF MOTION FOR
ADDITIONS TO THE COURT'S MAY 3,
2016, ORDER, AND FOR DEPOSIT OF
BOND PROCEEDS**

I. INTRODUCTION

[¶1] On May 3, 2016, the Court issued its *Order Modifying Trustee's Report and Recommendations*. An *Order Correcting Clerical Mistake/Oversight* was issued on May 5, 2016. The PSC seeks the following additions to the Court's *Order* which will be discussed in greater detail below:

- a. An order establishing the amount payable to Curt Amundson for his credit-sale claim;
- b. An order establishing the payment/distribution of the PSC's fees, costs, and expenses between the credit-sale contract indemnity fund and the trust fund;
- c. An order for deposit of the bond proceeds; and
- d. An addition to the order provisions to allow any payments made to claimants to also include payment jointly to any lien holders.

II. ARGUMENT

A. The PSC Requests the Court Order the Amount to be Paid To Curt Amundson Under the Credit-Sale Contract Indemnity Fund.

[¶2] In its *Order*, the Court determined Curt Amundson entered into a credit-sale contract. *Order* at ¶¶ 38, 59, 86. The Court further indicated determination of an offset is not necessary because Amundson is not entitled to distribution from the trust fund. *Id.* at ¶ 86. In the summary and order, the Court directed payment from the trust fund to all claimants except Amundson. *Id.* at pp. 38-43. The PSC requests the Court add to its order a provision directing payment to Amundson from the credit-sale contract indemnity fund in order to resolve all outstanding claims.

[¶3] Pursuant to N.D.C.C. § 60-10-13, claims under the credit-sale contract indemnity fund are administered in a manner consistent with Chapter 60-04 (the insolvency trust fund). As a result, when a warehouse is insolvent, both credit-sale and noncredit-sale claims are evaluated consistent with N.D.C.C. ch. 60-04. Because the Court has determined Curt Amundson is a credit-sale contract claimant, the PSC requests an ordering provision regarding what amount he must be paid from the credit-sale contract indemnity fund to completely address all the claims in this case.

[¶4] A person is eligible to receive indemnity payments from the credit-sale contract indemnity fund if he sold grain to a licensed warehouse under the provisions of a credit-sale contract; the warehouse becomes insolvent; and the warehouse does not fully compensate the person in accordance with the credit-sale contract as a result of the insolvency. N.D.C.C. § 60-10-04. Based on the Court's *Order*, Amundson satisfies all of these criteria. Once the PSC is appointed as trustee of a licensed warehouse due to insolvency, the proceeds of the credit-sale contract indemnity fund are available for use in meeting the warehouseman's obligations of a credit-sale contract claimant. N.D.C.C. § 60-10-05. "The amount payable to any eligible person

from the credit-sale contract indemnity fund for each insolvency may not exceed the lesser of eighty percent of the amount owed to that eligible person in accordance with all of that person's unsatisfied credit-sale contracts or two hundred eighty thousand dollars." N.D.C.C. § 60-10-06. Accordingly, under the Court's *Order*, funds must be made available to Amundson under the credit-sale contract indemnity fund up to a maximum of \$280,000, and consistent with N.D.C.C. ch. 60-04. Thus, the PSC requests an ordering provision regarding the amount to pay Mr. Amundson from the credit-sale contract indemnity fund.

[¶5] The amount that must be paid to Mr. Amundson is the lesser of 80% of the "amount owed" to Amundson under his credit-sale contract or \$280,000. There was no dispute that Mr. Amundson was not paid for a remaining 12,128.28 cwt of beans. Hearing Exhibit 24a (Doc ID # 308) is the PLMA the Court determined was Mr. Amundson's credit-sale contract. For purposes of calculating the "amount owed" to Amundson under that contract, the PLMA indicated the beans would be priced before July 1, 2014, and a service fee of .00493 per day per cwt applies. The evidence at the hearing indicated the price of beans in June 2014 was \$30 per cwt.

[¶6] As a result of the foregoing, the PSC calculates the amount owed to Mr. Amundson under the Court's *Order* from the credit-sale contract indemnity fund as follows:

Amount of Beans	12,128.28 cwt	
Times Market Price in June 2014	\$30/cwt	Used price in June 2014 as Mr. Amundson's testimony was he was not operating under the PLMA, and therefore, there would have been no demand to price the beans prior to that time under the PLMA.
Amount of contract on June 30, 2014	\$363,848.40	\$30 times 12,128.28

Less Dry Bean Assessment (\$.10 per cwt)	(\$1,212.83)	10% of 12,128.28
Less Seed Offset	(\$45,093.80)	Amount Amundson agrees he owes for seed and which he testified would be taken out upon payment
Less Service fee of .00493 per day per cwt	(\$16,921.26)	Calculation -- 12,128.28 times .00493 times 283 days (Per Exs. 24b and 24c September 20, 2013, was the last day Amundson delivered beans to Grand Forks Bean through June 30, 2014)
Net Amount owed to Amundson on June 30, 2014	\$300,620.51	
Times 80% per N.D.C.C. § 60-10-06	\$240,496.41	

[¶7] Accordingly, the PSC requests it be ordered to pay \$240,496.41 to Mr. Amundson from the credit-sale contract indemnity fund because it is eighty percent of the amount he is owed under the credit-sale contract and is less than \$280,000. The PLMA did not contain a clause for payment of interest and there is no corresponding statute allowing payment of interest on a credit-sale contract indemnity fund payment. Therefore, the PSC is not aware of legal authority to pay interest on Mr. Amundson's credit-sale contract indemnity fund. If interest is awarded, the PSC has calculated interest as follows: \$300,620.51 (net amount owed to Amundson on June 30, 2014) times .000089 (*Order* at ¶ 92) times 672 (amount of days from July 1, 2014, to May 3, 2016) = \$17,979.51.

[¶8] As a result, the PSC requests the Court add to its order to include that the PSC will pay Curt Amundson \$240,496.41 from the credit-sale contract indemnity fund, with such payment

to be made jointly payable to Mr. Amundson and any relevant valid lienholders at the time the check is issued.

B. The PSC Requests the Court Order any Fees, Costs, and Expenses Incurred in Administering this Action be Split Equally Between the Trust Fund and the Credit-Sale Contract Indemnity Fund.

[¶9] The Court's *Order* allowed the PSC to recover its costs and expenses, including fees paid or payable to outside counsel. *Order* at ¶ 10. The PSC will be submitting its costs in accordance with the Court's *Order*. As the PSC's position in this insolvency was that all claimants were not credit-sale claimants, it previously has only addressed payment of its expenses from the trust fund. However, expenses incurred by the Commission are also reimbursable from the credit-sale contract indemnity fund. N.D.C.C. § 60-10-09. As a result of the Court's decision that the credit-sale contract indemnity fund is implicated, there is an issue regarding allocation of the PSC's expenses between the trust fund and the credit-sale contract indemnity fund.

[¶10] The primary time-consuming issue in this case as it related to the PSC's costs and expenses was the determination of whether the growers were credit-sale claimants or noncredit-sale claimants. Bremer Bank strongly argued the growers were credit-sale claimants and not entitled to participate in the trust fund. This included several briefs, numerous legal issues, fairly extensive written discovery requests directed toward the PSC, and depositions of Sue Richter, Tim Erdmann, and all claimants except WJS Nelson (which did not have an asserted PLMA). The vast bulk of work and time extended in this case (and as a result the expenses incurred) was dealing with the credit-sale versus noncredit-sale issue. Because the Court's decision on that issue ended up impacting and resulting in payments from both the trust fund and the credit-sale contract indemnity fund, the PSC believes the costs and expenses should be split equally between the two funds. As a result, the PSC recommends and requests the Court order that its fees, costs, and

expenses be apportioned 50/50 between the trust fund and the credit-sale contract indemnity fund. In addition, this is consistent with past practice of the Commission in cases where funds are paid from the indemnity fund and the trust fund as a result of an insolvency.

[¶11] Therefore, the PSC requests the Court add to its order to include that the PSC's costs and expenses associated with these proceedings, including fees paid or payable to outside counsel, be apportioned equally between the credit-sale contract indemnity fund and the trust fund and that the PSC is entitled to collect and apportion its expenses and costs, including fees to outside counsel until it is discharged as trustee.

C. The PSC Requests the Court Order the \$100,000 Bond be Deposited.

[¶12] Under the Court's *Order Correcting Clerical Mistake/Oversight*, the allowable claims to the trust fund are \$770,190. This is more than the current balance of the trust fund and implicates Auto-Owners' bond. With fees and expenses still to be attributed and paid, the potential for further motions or appeal, and accumulating interest it is not clear what amount of the bond will ultimately be required to satisfy the claims. Under N.D.C.C. § 60-04-03.3, "the court may order the surety to deposit the penal sum of the bond, or so much thereof as may be deemed necessary, into the trustee's trust account pending a final determination of the surety's liability under the bond." The PSC requests Auto Owners be required to deposit the entire amount of the bond-\$100,000-at this time. The PSC requests the Court order that any proceeds remaining in the trust account between \$0 and \$100,000 be returned to Auto Owners once the time for appeal has passed and all payments have been made.

[¶13] Presently, the Court has ordered that distribution of remaining trust assets jointly to Bremer and Grand Forks Bean. However, as indicated above, the trust fund assets will be extinguished by payment to the claimants and PSC's expenses, except for Auto Owner's bond.

Therefore, rather than payment of any remaining trust assets jointly to Bremer and Grand Forks Bean, the PSC requests the Court order that the full \$100,000 bond be deposited and after payment of all claimants, payment of the PSC's fees and expenses, that the remaining amount in the trust fund between \$0 and \$100,000 be distributed to Auto Owners. If the remaining amount in the trust exceeds \$100,000, any amount exceeding \$100,000 would be paid jointly to Bremer and Grand Forks Bean.

D. The PSC Requests the Court Include in its Order that Payments to the Claimants Include a Provision Regarding Lien Holders.

[¶14] On pages 41-42 (Order paragraphs 2-9) of the Court's *Order*, it directed distribution to the eight receiptholders. The PSC has also requested an ordering provision for payment to Curt Amundson above. Once the time for appeal has passed and this matter is final, the PSC will check for any outstanding liens for each claimant in order to make payment. In order to protect the PSC/trust and to allow for proper payment to be made in accordance with the Court's *Order*, the PSC requests the Court order that payment for each claim may be made jointly payable to the claimants and any relevant valid lien holders at the time payment is made.

III. CONCLUSION

[¶15] For the reasons described above, the PSC requests the following be added to the Court's *Order*:

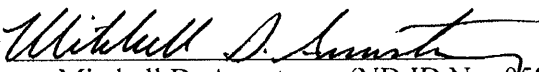
- a. The PSC shall pay to Curt Amundson \$240,496.41, from the credit-sale contract indemnity fund. Such payment may be made jointly payable to Curt Amundson and any relevant valid lien holder at the time payment is made.

b. The PSC's costs and expenses, including fees paid or payable to outside counsel, will be split equally between the trust fund and the credit-sale contract indemnity fund. The PSC is entitled to its costs and expenses, including fees to outside counsel, until this matter is final.

c. Auto Owners must deposit the penal sum of the bond—\$100,000.00—within ten days of this Order. Any amount remaining in the trust fund between \$0 and \$100,000 will be distributed to Auto Owners within fourteen days of final payment/distribution in accordance with the provisions of the Court's Order. Any amount remaining in the trust fund that is greater than \$100,000 will be distributed jointly to Bremer and Grand Forks Bean.

d. For each ordering provision 2-9, the PSC requests the Court add a sentence stating the following: "Such distribution may be made jointly payable to the claimant and any valid lien holder at the time payment is made."

Dated this 13th day of May, 2016.

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