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Subject: Notification of Service for Case No. 18-2015-CV-00240 (Public Service Commission, et al. vs. Grand Forks Bean Company, Inc.)

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Notification of Service – Brief in Support of Return and Resistance to Motion for Payment of Costs and Expenses
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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF GRAND FORKS

NORTHEAST CENTRAL JUDICIAL DISTRICT

Public Service Commission,)

Petitioner,)

Civil No.: 18-2015-cv-00240

vs.)

Grand Forks Bean Company, Inc., and)

Auto-Owners Insurance Company,)

Respondents.)

**BRIEF IN SUPPORT OF AUTO-OWNERS INSURANCE COMPANY'S
RETURN AND RESISTANCE (IN PART) TO THE PUBLIC SERVICE COMMISSION'S
MOTION FOR PAYMENT OF ITS COSTS AND EXPENSES,
INCLUDING FEES PAID OR PAYABLE TO OUTSIDE COUNSEL**

1. Petitioner, Public Service Commission ("PSC"), by its outside counsel, has filed a motion with the Court requesting that the Court Order that the PSC be entitled to recover costs, expenses, and attorney's fees in this action in the total sum of \$56,412.10.

2. The PSC requests that those fees and expenses be split or allocated equally between the Trust Fund (involved in this action) and the Credit Sale Contract Indemnity Fund.

3. Auto-Owners, by virtue of its bond and state law (N.D.C.C. § 60-02-09(7)), has no obligation with respect to the Credit Sale Contract Indemnity Fund and, therefore, under its bond, would not be required to pay any sums into that indemnity fund, nor any costs, expenses or attorney's fees to pursue any recovery under that indemnity fund.

4. Auto-Owners' sole obligation, if any, is to make payments into the Trust Fund involved in this litigation, as necessary or appropriate to pay claims from the Trust Fund. See, N.D.C.C. § 60-04-09.

5. Accordingly, Auto-Owners' return and resistance (in part) to the PSC's motion for payment of costs and attorney's fees is only with respect to the Trust Fund and the amount of that Trust Fund that the PSC requests Auto-Owners contribute to, to make up any shortage therein between the current value of the Trust Fund, the amount of claims the Court has approved for payment from that Trust Fund, and the amount of costs, expenses and fees the Court allows to be paid or reimbursed to the PSC from the Trust Fund.

6. Again, to be clear, Auto-Owners does not contest the PSC's equal split or "50-50" allocation of its statement of costs, expenses and attorney's fees as between the Trust Fund and the Credit Sale Contract Indemnity Fund, the latter fund for which Auto-Owners has no responsibility.

7. However, Auto-Owners does contest the reasonableness of the attorney fee rate that the PSC paid to its outside counsel, for which it seeks partial reimbursement from Auto-Owners as respects the Trust Fund. Auto-Owners also contests the total amount and hours of the attorney's fees requested by the PSC, paid to its outside counsel and again subject to the equal split or allocation between the two funds.

8. Of course, it goes without need for legal citation, that it rests within the Court's sound discretion in this action, the amount of attorney's fees and costs that the Court will allow the PSC to recover. *Ritter, Laber & Assoc., Inc. v. Koch Oil, Inc.*, 2007 ND 163, ¶ 28, 740 N.W.2d 67.

9. It is the position of Auto-Owners that the hourly fee rate that the PSC paid to its outside legal counsel and which it seeks to recover in this motion, is clearly excessive as that rate is indisputably, and very substantially, higher than the rate for legal fees currently charged by the Attorney General's Office for legal services provided to North Dakota state agencies.

10. As shown by the PSC's submissions, it is requesting that it be reimbursed for legal fees paid to attorney Mitchell Armstrong at the rate of \$190.00 per hour, and to Brian Schmidt at the rate of \$150.00 per hour.

11. However, as shown by the undersigned's affidavit, the normal and usual rate that the Attorney General's Office charges state agencies (such as the PSC) for legal services is \$129.17 per hour.

12. The PSC has not attempted to argue or show why there should be a very significant upward deviation in this case from the normal fee rate charged by the Attorney General's Office, to state agencies, for legal services. The PSC has not suggested or attempted to argue that the issues in this case were overly complex or could not have been handled by the very experienced attorneys in the Attorney General's Office. In point of fact, the issues in this case were not all that terribly complex. The PSC did the research and prepared the report that it sought to have the Court approve. The services of its outside counsel were essentially to lay the foundation for that report, at trial, and defend that report throughout this litigation, including trial. This was not overly complex work. The PSC has not argued that this was a matter that the in-house lawyers in the Attorney General's Office could not have handled. This was certainly within the normal and customary business operation and work of the PSC and the Attorney General's Office. No doubt, the PSC and the Attorney General's Office has been involved in this type of litigation many times in the past.

13. Again, this was not an overly complex matter. The PSC has not argued or even suggested that this matter was too complex for its regular in-house counsel to handle, at their regular hourly rate. For whatever reason, whether it was for simple convenience, or otherwise, the PSC had this matter referred to outside legal counsel for representation. Auto-Owners

submits that mere convenience is not a justification for an award of excessive attorney's fees, very substantially higher than the Attorney General's normal, customary, current rate.

14. Therefore, Auto-Owners respectfully requests, subject to the equal allocation of the PSC's legal costs, expenses and fees between the Trust Fund and the Credit Sale Contract Indemnity Fund, that the Court reduce the allowed legal fees to be reimbursed to the PSC, from the Trust Fund, to the rate of \$129.17, for each of its attorneys, which is the Attorney General's current normal, customary and usual rate for their legal services to state agencies.

15. The undersigned adopts and incorporates by reference herein, his affidavit in this regard.

16. Moreover, because, again, the issues in this case were not overly complex as respects the PSC, it is the position of Auto-Owners that a total of 251 hours of lawyer time, for the PSC's outside counsel, which is 6.2 40 hour weeks, is clearly excessive in this case, again, a case that was not overly complex particularly as far as the PSC and its lawyers were concerned.

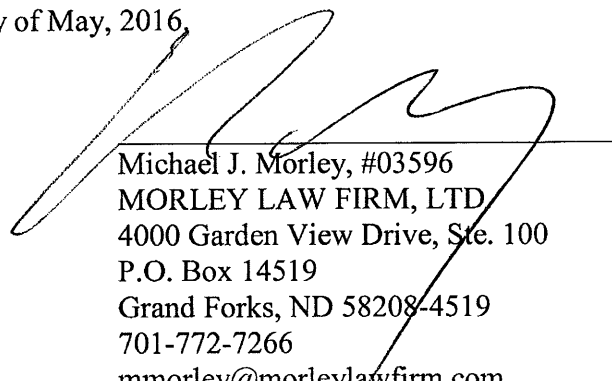
17. Again, consistent with the undersigned's affidavit, Auto-Owners would respectfully request that the Court not only reduce the hourly rate payable to the PSC's outside counsel, but also reduce the total number of the reimbursable lawyer hours (again subject to the lower rate and the equal split between the two funds), to a rate that – in the sound discretion of the Court – is more reasonable, realistic and consistent with the not-overly complex issues involved in this action.

18. Finally, as stated in the undersigned's affidavit, Auto-Owners respectfully requests that the Court not order that its entire bond be deposited into the Trust Fund at this time. Auto-Owners will certainly comply with any ultimate decision from this Court, or an appellate

court, regarding the ultimate amount of the Trust Fund and the amount of the Auto-Owners bond that is necessary to be paid into the Trust Fund.

19. Particularly in light of the fact that up until this time, no one ever requested that the Auto-Owners' bond be paid into the Trust Fund, there really seems no need or requirement at this time to do so. Auto-Owners' ultimate net payment, if any, into the Trust Fund can be determined at a later time and Auto-Owners would comply with a final judgment.

Respectfully submitted this 20th day of May, 2016.



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