

Richter, Susan K.

From: efilmingmail@tylerhost.net
Sent: Friday, May 20, 2016 3:53 PM
To: Richter, Susan K.
Subject: Notification of Service for Case No. 18-2015-CV-00240 (Public Service Commission, et al. vs. Grand Forks Bean Company, Inc.)

This is a service filing for Case No. 18-2015-CV-00240, Public Service Commission, et al. vs. Grand Forks Bean Company, Inc..

Date Submitted: 5/20/2016 3:50:16 PM CDT
Filing Code: Affidavit
Filing Desc: Affidavit on Behalf of Respondent AO in Support of Response

[Download Document](#)

The following are service contacts on this filing:
Public Service Commission:

Sara Forsberg (sforsberg@smithbakke.com)

Mitchell Armstrong (marmstrong@smithbakke.com)

Tiffany Knopik (tknopik@smithbakke.com)

Anna Heinen (aheinen@smithbakke.com)

Brian Schmidt (bschmidt@smithbakke.com)

Illona Jeffcoat-Sacco (ijs@nd.gov)

Casey Furey (cfurey@nd.gov)

Auto-Owners Insurance Company:

Michael Morley (mmorley@morleylawfirm.com)

Toni Nicolson (tnicolson@morleylawfirm.com)

Other Service Contacts not associated with a party on the case:

Sue Schaumburg (sschaumburg@camrudlaw.com)

Scott Knudsvig (sknudsvig@pringlend.com)

John Schroeder (jschroeder@northdakotalaw.net)

Daniel Gaustad (dan@grandforkslaw.com)

Russ Melland (rmelland@camrudlaw.com)

Tracy Kennedy (tracykennedy@northdakotalaw.net)

Susan Richter (srichter@nd.gov)

Jon Brakke (jbrakke@vogellaw.com)

Daniel Gaustad (dan@grandforkslaw.com)

Joel Arneson (jfamoose@gra.midco.net)

[Download Document](#)

If the link above is not accessible, copy this URL into your browser's address bar to view the document:
<http://northdakota.tylerhost.net/ViewServiceDocuments.aspx?ADMIN=0&SID=94fd0b73-5f69-40f5-b936-f633e222769f>

This message was automatically generated using Odyssey File & Serve; do not reply to this email.

For assistance, contact the North Dakota Court's Information Technology Department at 701.328.4218. Support is available 8 a.m. to 5 p.m. CT, Monday through Friday.

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.)

**AFFIDAVIT ON BEHALF OF RESPONDENT AUTO-OWNERS INSURANCE
COMPANY IN SUPPORT OF ITS 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**

STATE OF NORTH DAKOTA)

)ss

COUNTY OF GRAND FORKS)

Michael J. Morley, being first duly sworn on oath, deposes and states as follows:

1. That he is duly licensed to practice law in the State of North Dakota and has been at all times material hereto.

2. That this affiant has been, and remains, the attorney of record for respondent Auto-Owners Insurance Company ("Auto-Owners"), with respect to the proceedings in this action commencing with the time when Auto-Owners was included as a respondent in this action, through the current date.

3. That in the course of this affiant's representation of Auto-Owners in this action, this affiant has received and reviewed the motion of the petitioner, Public Service Commission ("PSC") for an Order from the Court directing the payment of the PSC's costs and expenses,

including fees paid or payable to outside counsel, from the Trust Fund litigated in this action, as well as from the Credit Sale Contract Indemnity Fund. The Court ordered that the latter fund is responsible to pay the claim of Curt Amundson, in this action.

4. As counsel for Auto-Owners, affiant informs the Court and counsel that Auto-Owners does **not** oppose the PSC's request that payment of its costs and expenses, including fees paid or payable to outside counsel, be split equally between the Trust Fund litigated in this action and the Credit Sale Contract Indemnity Fund which is responsible to pay the Curt Amundson claim.

5. As will be shown further in the attached brief in support of Auto-Owners' position, the Auto-Owners' Surety Bond does not accrue to the benefit of any person entering into a credit sale contract with a public warehouseman, in this case, Grand Forks Bean Company. See, N.D.C.C. § 60-02-09(7). See, also Trial Exhibit PSC-5, the Auto-Owners Surety Bond issued to Grand Forks Bean Company, as principal, in this action. In point of fact, the PSC is not contending that any part or portion of the Auto-Owners Surety Bond should be deposited into the Credit Sale Contract Indemnity Fund in payment of any part or portion of its fees, costs and expenses in this action, or otherwise.

6. Auto-Owners, however, does contest the attorney's fee rate of \$190.00 per hour sought by the PSC for Mitchell Armstrong, and \$150.00 per hour, for Brian D. Schmidt, both of the Smith, Bakke, Porsborg, Schweigert & Armstrong law firm. Auto-Owners contends this fee rate is excessive and substantially higher than the normal hourly rate that the North Dakota Attorney General's Office currently charges state agencies, such as the PSC, per hour, for legal services.

7. Attached hereto and incorporated by reference herein as Exhibit "A", is a copy of a memorandum to affiant from his law clerk, Kathryn DelZoppo, regarding a phone conversation she had with the North Dakota Attorney General's Office on May 19, 2016, with respect to the rate that their office charges government agencies, such as the PSC, in legal fees for legal work. As shown by this Memorandum, Ms. Michelle Metzger, an accounting/budget specialist in the Finance Department of the North Dakota Attorney General's Office, told the undersigned's law clerk that the North Dakota Attorney General's Office currently charges a rate of \$129.17 per hour for legal work for their attorneys in providing legal services to government agencies, such as the PSC.

8. Also attached to this Affidavit and incorporated by reference herein as Exhibit "B" is a copy of a newspaper article from the Fargo Forum dated April 8, 2016, regarding a pending litigation involving a North Dakota State Agency, namely the North Dakota Heritage Center. As this article states, the North Dakota Attorney General's Office currently bills state agencies \$129.00 per hour for legal services provided to state agencies, which is, of course, consistent with the information obtained by this affiant's office on May 19, 2016, pursuant to attached Exhibit "A".

9. According to the fifth paragraph on Page 1 of the attached Fargo Forum newspaper article, the North Dakota Attorney General's Office retaining outside counsel for litigation is "unusual, but not unprecedented." The justification put forward by the Attorney General's Office in the North Dakota Heritage Center case was that the Attorney General's Office lacks an in-house expert on construction litigation, thus justifying the use of outside counsel at a legal fee rate almost double the normal hourly rate charged by the Attorney General's Office.

10. However, in the present action, the PSC has not attempted to state any justification, to this affiant's knowledge, as to why it had to retain outside counsel, at a substantially higher rate than the North Dakota Attorney General's Office normally charges state agencies (such as the PSC) for legal services. To this affiant's knowledge, the PSC has not indicated anywhere in the record, that affiant is aware of, that the North Dakota Attorney General's Office was unable to handle or represent the PSC in this action because of its complexity or for any other reason that would justify utilizing outside legal counsel at a legal fee rate substantially higher than the Attorney General's Office typically charges state agencies for legal services.

11. In point of fact, based upon this affiant's involvement in this action, the issues in this action really were not very complex. The PSC conducted its investigation and analysis and prepared its report and findings, in the normal course of its statutory stewardship over insolvent public warehousemen and resolution of claims of creditors against insolvent public warehousemen.

12. This case was not overly complex, and was certainly within the normal course of operations of the PSC. To this affiant's knowledge, the PSC has never stated or indicated in this action that the issues in this action were too complex for any of the in-house attorneys in the Attorney General's Office, justifying a referral of this action to outside counsel at a substantially higher rate than that normally charged by the Attorney General's Office, to state agencies, for legal services.

13. In the absence of any justification, or even an attempt at such justification, for payment of legal services at a rate much higher than the normal hourly rate of the Attorney General's Office, and in the absence of any good cause support for a very significant upward

deviation of the normal hourly fee rate charged by the North Dakota Attorney General's Office for legal services provided to state agencies, it is Auto-Owners' position that the Court should reduce the hourly rate payable to the PSC's outside counsel, to \$129.17 per hour, for all of its attorneys, and reduce the total attorney's fee request of the PSC (again, with that reduced amount split equally between the Trust Fund and the Credit Sale Indemnity Fund), accordingly.

14. The Attorney General, and the State of North Dakota, obviously believes \$129.17 per hour is a reasonable fee rate for the attorneys in the Attorney General's Office to charge state agencies for legal services. The rate should be no different in this case simply because the work was referred to outside counsel.

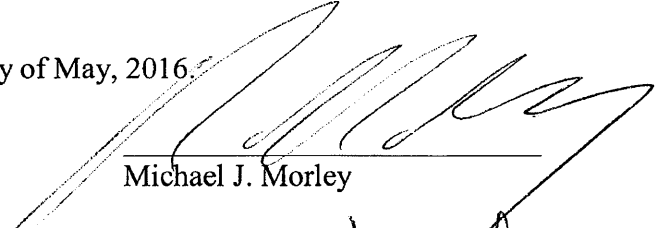
15. Additionally, in reviewing the attorney's fees submissions of the PSC's outside counsel, this affiant's office has calculated that the PSC's two outside attorneys have charged a total of 251 hours between them for the legal services they provided to the PSC in this action. This number of hours relates to approximately 6.2 weeks of work at a 40 hour week. That seems clearly excessive in this case, considering – again – that the issues in this case were not overly complex and that the PSC's outside counsel were essentially simply attempting to defend the Report and Recommendations prepared by employees of the PSC in this action. This was not overly complex work on the attorneys' parts. Certainly, in this affiant's opinion, this non-complex work would not require two lawyers to spend an aggregate of over six 40 hours weeks to handle.

16. Of course, the amount of attorney's fees – as well as the rate – are within the discretion of the Court. Affiant will not presume to tell the Court how many total hours should be allowed to the PSC's outside counsel, other than to suggest that this case could probably have been very easily handled by the PSC's lawyers with two less 40 hour work weeks because, again,

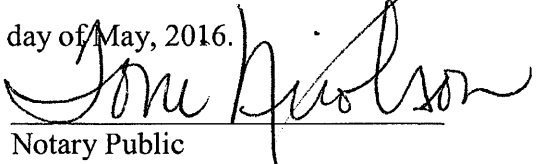
the Report and Recommendations were prepared by PSC employees, not their lawyers, and the PSC lawyers were essentially in a mode of simply attempting to defend the PSC Report throughout this litigation. Again, not overly complex work.

17. Finally, the PSC is requesting that the Court Order that Auto-Owners' entire penal Surety Bond of \$100,000.00 be deposited into the Trust Account and once this action is finalized, and claims and the fees and costs of the PSC paid, any amount remaining in the Trust Fund between zero and \$100,000.00 be returned to Auto-Owners. It is the position of Auto-Owners that this is not necessary and would serve to only delay the ultimate conclusion of this matter. Pending post-trial arguments, and any appeal, Auto-Owners would, of course, abide by the Court's decision and pay any part of its bond into the Trust Fund, that is necessary. This case has been in litigation for many months. The Auto-Owners' bond was never requested to be deposited earlier. There really is no need to now. In fact, it would speed up the ultimate resolution of this matter if Auto-Owners was simply required to pay any part of its Surety Bond, as necessary, into the Trust Fund to make up any shortage between the current amount of the Trust Fund, with appropriate interest, the claims of the creditors from the Trust Fund and the appropriate allocation of the PSC's costs, expenses and attorney's fees, in reasonable amounts, to the Trust Fund. One simple payment by Auto-Owners into the Trust Fund, at the end, would be more expeditious and cost and time effective, than requiring the entire amount to be placed in the Trust Fund, and then later seek a Court Order establishing the amount of the bond to be returned to Auto-Owners.

Respectfully submitted this 20th day of May, 2016.


Michael J. Morley

Subscribed and sworn to before me this 20th day of May, 2016.


Notary Public
My Commission Expires:

(S E A L)

