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December 13, 2016

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Re: *Public Service Commission v. Grand Forks Bean Company, Inc., et. al.*  
Supreme Court No.: 2016 0303  
GF County No.: 2015-cv-00240

Dear Ms. Miller:

Enclosed for filing please find the following document:

1. Brief of Appellant Auto-Owners Insurance Company.

Please let me know if you have any questions or need anything further.

Sincerely,

Michael J. Morley  
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MJM:tlm

pc: Counsel of Record ~ Via E-Mail

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SC APPEAL – Brief of Appellant  
Auto-Owners Insurance Company  
Michael Morley, Morley Law Firm, LTD.



IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Public Service Commission,            )  
  )  
  Petitioner,                    )  
  )  
  vs.                                    )  
  )  
  District Court No: 18-2015-cv-00240  
Grand Forks Bean Company, Inc.,)  
Auto-Owners Insurance Company,)  
  )  
  Respondents.                    )  
  )  
PSC Case No.: GE-15-36                )

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**Appeal from Order Modifying Trustee’s Report & Recommendation Dated May 3, 2016, From Order Correcting Clerical Mistake/Oversight Dated May 5, 2016, From Order for Judgment Dated July 22, 2016, From Judgment Dated and Entered July 22, 2016, and From Order Denying Post-Judgment Relief-Motion Filed August 24, 2016, by Auto-Owners Insurance Company, Dated September 15, 2016.**

**The District Court of Grand Forks County, North Dakota  
Northeast Central Judicial District  
The Honorable Jon J. Jensen, District Judge, Presiding**

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**BRIEF OF APPELLANT AUTO-OWNERS INSURANCE COMPANY**

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**STATEMENT OF THE ISSUES:**

¶1. Based upon the essentially uncontradicted trial testimony, whether the District Court erred in applying N.D.C.C. 60-04-02 as the governing statute to determine the insolvency date of Grand Forks Bean (“GF Bean”) and the market price to pay the growers from the GF Bean Trust in this action, instead of N.D.C.C. § 60-02-41, the latter statute being requested by Auto-Owners Insurance Company (“Auto-Owners”), with respect to the Public Service Commission’s (“PSC”) petition for approval of its Report and Recommendations in this action?

**STATEMENT OF THE CASE:**

¶2. Because of word limitation constraints, Auto-Owners will be very brief in this Statement of the Case. We anticipate that a more detailed statement of the case will be described in the briefs of other parties, including, but without limitation, the PSC. Moreover, the procedural and other background of this case is well developed in the trial court record.

¶3. After the PSC was appointed the Trustee of GF Bean in insolvency, it conducted its investigation and submitted to the District Court a petition for approval of its Report and Recommendations regarding payments it approved to the respondent growers from the GF Bean trust administered by the PSC. Doc. Id. Nos. 153, 154, 155, 330. A trial on the PSC’s petition for approval of its Report and Recommendation, and the various responses and objections thereto, was conducted in the District Court, without a jury on March 14 and 15, 2016.

¶4. Following trial and submission of written closing arguments by the parties, the District Court issued its Order modifying the PSC's Report and Recommendation, by Order dated May 3, 2016. Doc. Id. No. 377.

¶5. Following disposition by the District Court of several post-judgment motions, including Auto-Owners' timely motions for Amended Findings of Fact, Amended Judgment, To Alter or Amend Judgment, and For Relief From a Final Judgment Pursuant to Rules 52(b), 59(j), and 60(b), N.D.R.Civ.P., Auto-Owners' appeal to this Court followed. Doc. Id. No.: 470.

**STATEMENT OF THE FACTS**  
**RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW:**

¶6. Susan Richter, ("Richter"), Licensing Division, Director of the PSC, testified at trial. Her testimony regarding the issues with the growers and the involvement with the PSC in this action, are well laid out in her affidavit dated January 16, 2015, which is included within and a part of PSC Exhibit 16 at Doc. Id. No. 285, and therefore, is incorporated by reference herein.

¶7. Richter testified that the PSC had reason to believe, after discussions with counsel for the growers, that it was unlikely the issues with Grand Forks Bean could be resolved outside of a formal insolvency proceeding and, therefore, the PSC issued a Cease and Desist Order to GF Bean, dated January 16, 2015, to discontinue conducting its grain warehouse business. TR 20, 21; Doc. Id. No. 286 – PSC Exhibit 17 which includes the Richter affidavit and the PSC's Cease and Desist Order to GF Bean. Also pursuant to the Cease and Desist Order, Richter

testified that the PSC was going to apply to the District Court for appointment as Trustee of GF Bean in its insolvency. TR 20, 21; Doc. Id. No. 17.

¶8. Richter testified that while the PSC told GF Bean to discontinue operating their business as a public warehouseman in accordance with the December 23, 2014, stipulation between the PSC and GF Bean (contained within Doc. Id. No. 286 – PSC Exhibit 17), the Cease and Desist Order formally ordered GF Bean to discontinue operating their business and close their business as a public warehouseman. TR. 28, 29.

¶9. The PSC issued a formal suspension notice to GF Bean dated February 5, 2015, in furtherance of the previous Cease and Desist Order and stipulations agreed to by GF Bean to close their doors and cease doing business as a public warehouseman. TR. 30, 31; Doc. Id. No.: 286 which consists of PSC Exhibit 17 and which includes the stipulations to close the GF Bean business in December, 2014, and January, 2015, as well as the PSC's Cease and Desist Order to GF Bean, formally and officially requiring the same.

¶10. Richter testified that after GF Bean's license was suspended, it never requested that it be reinstated and in fact has not been. TR. 31, 32.

¶11. Richter testified that the effective date of GF Bean's discontinuation and closure of its business, due to its insolvency, was December 23, 2014, by virtue of the stipulation, which was followed up by and was more formalized by the PSC's *ex parte* Cease and Desist Order and formal suspension notice to GF Bean. TR. 32, 33 and 70.

¶12. Richter testified that GF Bean had enough beans in its warehouse, on November 19, 2014, as well as early December of 2014, to redeliver all of their beans to the growers. TR. 16, 26 and 27. However, because of the involvement of numerous attorneys for the growers and otherwise, and the filing of numerous claims against GF Bean with the PSC, the PSC determined that informal attempts to resolve the growers' claims against GF Bean would not be successful, necessitating the commencement of formal insolvency proceedings by the PSC against GF Bean in order to preserve the bean inventory assets, sell the same and maintain the proceeds in trust for payment to approved growers from the GF Bean trust fund. TR. 19 – 21; Doc. Id. No.: 286 – PSC Exhibit 17.

¶13. Tim Erdmann (“Erdmann”), former grain warehouse inspector of the PSC (who inspected the GF Bean warehouse as part of the insolvency proceedings and prepared Doc. Id. No. 330 [PSC Exhibit 32], upon which the PSC’s Report and Recommendation to the District Court was based), testified at trial.

¶14. Erdmann testified that based upon all of his visits and inspections of the GF Bean warehouse, including his last one in early December, 2014, GF Bean always had enough beans in inventory to cover and redeliver all their beans back to all of the growers. TR 81, 82. In short, Erdmann said that based upon all of his inspections, GF Bean was never short on beans that could be redelivered to all of the growers to cover and redeliver to all of the growers all beans that they previously delivered to GF Bean. TR. 143.

¶15. Erdmann prepared Doc. Id. No. 330, (PSC Exhibit 32), which was the spreadsheet specifying the identity and amount of claims payable to growers from the GF Bean trust. This spreadsheet was included in the PSC Report and Recommendations that it asked the District Court to approve regarding the growers' claims against the GF Bean trust. Erdmann's calculations and spreadsheet were received into evidence at trial without objection. TR. 105, Doc. Id. No. 330.

¶16. Erdmann's report and spreadsheet specifies an insolvency date of GF Bean of December 19, 2014. Doc. Id. No. 330. This was consistent with the dates that GF Bean was closed by the PSC because of insolvency.

¶17. Based upon his investigation, background and expertise, Erdmann disputed the growers' claim that October 15, 2013, was, instead, the insolvency date of GF Bean as he testified that GF Bean made a payment to one of the growers in December of 2013, at the rate of \$45.00 per c.w.t. Erdmann said that the growers could not claim an insolvency date of October, 2013, when payments were still being made to them by GF Bean more than two months later. TR. 117.

¶18. In fact, Erdmann testified that not only in early December, 2014, were there enough beans in the GF Bean warehouses to redeliver all beans to all of the growers, in the amounts that they had previously delivered, but that GF Bean, through its principal, wanted to make such redelivery to the growers, however the growers themselves refused to accept that redelivery at that time because GF Bean wanted to assess redelivery and storage charges against them for the redelivered

beans. TR. 120. Erdmann said that this was the heart of the dispute between GF Bean and the growers as to why the growers would never accept redelivery of their beans in November and December, 2014, even though there were plenty of beans at GF Bean to do so. TR. 120.

¶19. This testimony of Erdmann, as with Richter, was not challenged, contradicted or refuted by anyone or from any evidence at trial.

¶20. Kevin Bieto (“Bieto”) of respondent Bremer Bank testified. Bieto testified that Bremer was GF Bean’s financial institution lender, issuing a line of credit and other loans to GF Bean. TR 157. Bieto testified that as late as October 4, 2014, the “borrowing base” certificate supplied by GF Bean to Bremer, which represented inventory of GF Bean that it was free to pledge to Bremer as security for loans, was approximately \$1.28 million dollars worth of Beans. TR 161, 162. According to Bieto, obviously, GF Bean was still a viable business entity in early October, 2014, and was not insolvent then.

¶21. Bieto testified that GF Bean was performing satisfactorily until its principal owner/operator, Todd McGurk, died in August of 2014. TR 165. Bieto testified that Bremer had no financial problems with the GF Bean loan until November of 2014. TR 181.

¶22. Bieto testified that after Todd McGurk died, his brother, Tad McGurk, came into Bremer Bank sometime after that, said things were “not good” at GF Bean and tried to give Bremer the keys to the business. TR 185.

¶23. Therefore, according to the testimony of Bieto, GF Bean was satisfactorily operating as a going, viable business concern into and through October and early November, 2014, and that GF Bean was in sound financial condition as of that time. This testimony of Bieto was not challenged or contradicted at trial by anyone or any documentary evidence.

¶24. Duane Altendorf (“Altendorf”), a grower claimant testified. He received a payment from GF Bean on December 31, 2013, for \$45.00 per c.w.t. for his pinto beans. TR 197, 198. That belies and refutes his and the other growers’ contention that GF Bean was insolvent over two months earlier.

¶25. Altendorf admitted that GF Bean never refused payment to him, simply stating that there was no market for the beans at that time. TR 202, 203, 209. According to Altendorf, the first time he requested GF Bean to redeliver his beans to him was in November, 2014. This supports the PSC’s insolvency date and market price, which was right in that same timeframe.

¶26. Beth Nelson, the surviving spouse of her grower husband, Brad, testified. She simply asked GF Bean to sell her husband’s beans in order to clear up his estate. She never said that GF Bean refused to sell them or pay for them, but simply that they could not be sold at that time because there was no market for them. She was told by GF Bean that it was working on a market, but there simply was none at that time. Beth testified that she never asked GF Bean to redeliver the beans to her at any time. TR 247, 248, 251.

¶27. W.J.S. Nelson, through Steve Nelson, (“Nelson”), another grower, testified. They were simply always told by GF Bean that it was working on a sale of their beans. TR 260, 263. Nelson requested that GF Bean redeliver the beans to them in December of 2014. They had never requested redelivery before. They never requested that GF Bean give them their money back for their beans. TR 264. Nelson admitted that they changed the date of their claim in order to start interest running earlier and get a better market rate price for their beans. TR 265. The Nelson testimony does not support an insolvency date of GF Bean of October 15, 2013, as they never requested their money back from GF Bean, nor did they request the redelivery of their beans from GF Bean until December of 2014, for the first time.

¶28. Nick Adams, (“Adams”), another grower, testified. When he called GF Bean, they simply told him that they were working on getting his beans sold, but made no promises other than that they would work on getting the beans sold. TR 270. Adams testified that he did not request redelivery of his beans from GF Bean until November of 2014, and never before that date. TR 272.

¶29. Adams also changed his claims as well in order to attempt to get a better market price for his beans, and more interest, after he spoke to an attorney about it. TR 278.

¶30. Chuck Nelson (“Chuck”), another grower, delivered beans to GF Bean. He asked GF Bean in January of 2014 to market/sell his beans. TR 282. All GF Bean told him was that they would work on it. Chuck asked GF Bean one

or two more times after that to sell his beans and GF Bean's response always was that they were continuing to work on it to try to sell his beans. TR 282, 283. Chuck admitted that his first demand to GF Bean to redeliver his beans back to him was in November of 2014 and he had never made such a demand prior to that. TR 293. Like most of the others, Chuck also changed and amended his claim against the Trust Fund in an attempt to enlarge his claim after he submitted his initial claim to the PSC. TR 301.

¶31. Ron Adams, another grower, testified at trial. Essentially all he stated was that he brought beans to GF Bean on various occasions and at various times requested that they be sold and that GF Bean owed him money for his beans. Adams' testimony does not support an insolvency date of October 15, 2013, for GF Bean. Adams admitted in his testimony that he chose not to have his beans redelivered to him by GF Bean in February/March of 2013, nor did he in December 2014 after the PSC got involved. TR 315. In fact, Adams testified that he **never** requested GF Bean to redeliver his beans back to him. *Id.* Adams admitted that it often took time for GF Bean to sell his beans because of market fluctuations because, if the market price was down, beans would remain in storage longer until the market rose. TR 316. As with most of the other growers, Adams also changed the date of his claim as well, again, hoping for more interest and a better market price. TR 319, 320.

¶32. Brent Baldwin ("Brent") was the final grower who testified at trial. He delivered a load of 3000 c.w.t. of beans for which he requested \$45.00 per

c.w.t from GF Bean. He requested \$1.00 over market for his other load of 3000 c.w.t. of beans delivered to GF Bean. After he delivered his beans, he would call GF Bean to try to get paid for his beans. GF Bean told him they were working on it. TR 332.

¶33. What is extremely illuminating about Baldwin's testimony is that he admits he was paid by GF Bean for the one load of 3,000 c.w.t. of beans at \$45.00 per c.w.t. on December 27, 2013. On that date, GF Bean paid him \$134,700.00 for those beans. TR 332, 333; Doc. Id. No. 301 – PSC Exhibit 22(d).

¶34. Therefore, it defies logic that GF Bean could be considered insolvent on October 15, 2013, when over two months later it paid Baldwin over \$134,000.00 for some of his beans.

¶35. Baldwin admitted that he merely called GF Bean to see if his other beans were sold yet. He was always told by GF Bean that they were working on it. He admitted that GF Bean never made any promises to buy his other beans at \$38.00 c.w.t. or any other price. TR 342. Baldwin did not call GF Bean regarding redelivery of his beans to him until November, 2014. TR 333. It is also significant that Baldwin did not request redelivery of his beans from GF Bean at that time because he disputed his obligation to pay reloading and other charges as a condition to redelivery of his beans. TR 333.

¶36. This testimony does not support an October 15, 2013, insolvency date, only the later date in November of 2014.

## ARGUMENT

- I. **BASED UPON THE ESSENTIALLY UNCONTRADICTED TRIAL TESTIMONY, THE DISTRICT COURT ERRED IN APPLYING N.D.C.C. § 60-04-02 AS THE GOVERNING STATUTE TO DETERMINE THE INSOLVENCY DATE OF GF BEAN AND THE MARKET PRICE PAYABLE TO THE GROWER/CLAIMANTS AGAINST THE GF BEAN TRUST, INSTEAD OF N.D.C.C. § 60-02-41. (THE LATTER STATUTE REQUESTED BY AUTO-OWNERS), WITH RESPECT TO THE PSC'S PETITION FOR APPROVAL OF ITS REPORT AND RECOMMENDATIONS IN THIS ACTION?**

**Standard of Review:**

**This is an issue or question of law and, therefore, the standard of review is *de novo*.**

*Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804; *Wingerter v. North Dakota Department of Transportation*, 530 N.W.2d 362 (N.D. 1995); *Wheeler v. Gardner*, 2006 ND 24, 708 N.W.2d 908; *Halvorson v. Starr*, 2010 ND 133, 785 N.W.2d 248.

- A. **This Court's Review of the Trial Court's Decision to Apply N.D.C.C. § 60-04-02 to determine the insolvency date of GF Bean in this action.**

¶37. In the District Court's Order modifying the Trustee's (PSC's) Report and Recommendation, the Court concluded that the determination of the insolvency date of GF Bean is governed by N.D.C.C. § 60-04-02, which reads as follows:

**60-04-02. Insolvency of Warehouseman.** 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 re-delivery or payment for grain stored.

Doc. Id. No.: 377 at ¶ 56.

¶38. As a threshold matter, and so that this Court does not believe that Auto-Owners has waived this issue for appellate review, the District Court was incorrect in stating that “the parties all agree” that the determination of GF Bean’s insolvency date is governed by the above-statute. As Auto-Owners argued strenuously in its post trial written closing argument, that statute should not govern the issue of the insolvency date of GF Bean, but rather, N.D.C.C. § 60-02-41 should instead apply and govern the issue. Doc. Id. No.: 249 at ¶¶ 64-97. [Closing Argument of Auto-Owners].

¶39. Moreover, in the transcript of proceedings in the District Court, from the motion hearing dated July 1, 2016, regarding the PSC’s request for fees, costs and expenses, among other matters, counsel for Auto-Owners made it clear for the record, and the District Court acknowledged, that Auto-Owners did not agree that the above statute governs the insolvency date of GF Bean, but that instead N.D.C.C. § 60-02-41 does, and that the District Court was in error in stating that all parties agreed that the determination of GF Bean’s insolvency date was governed by N.D.C.C. § 60-04-02, when, in fact, Auto-Owners did not.

¶40. Additionally, Auto-Owners asserted this issue, again, in its post judgment motions for relief pursuant to Rules 52(b), 59(j) and 60(b), N.D.R.Civ.P. Doc. Id. Nos.: 436-438, inclusive.

¶41. Accordingly, Auto-Owners fully preserved in the District Court, and for its appeal, its argument that the District Court applied the incorrect North Dakota statute in order to determine the insolvency date of GF Bean for purposes

of ruling on the PSC's petition to approve its report and recommendations in this action.

¶42. Therefore, the issue of whether the District Court properly concluded that the determination of the insolvency date of GF Bean, with respect to the PSC's petition for approval of its Report and Recommendations was governed by N.D.C.C. § 60-04-02 (as it concluded), as opposed to N.D.C.C. § 60-02-41 (which Auto-Owners urged), is properly before this Court for review and determination, in accordance with the appeal of Auto-Owners.

¶43. Moreover, it is beyond dispute that the determination of which North Dakota state statute to apply in this case, regarding the insolvency date of GF Bean, as well as the interpretation of the statute, is a question of law. Accordingly, this Court reviews this issue fully, *de novo*, and therefore, gives no deference to the District Court's determination of which state statute applies and governs the determination of GF Bean's insolvency date. This Court does not have to find that the District Court abused its discretion or apply some other deferential standard of review of this issue, but rather, again, reviews this question fully, completely, from the beginning and anew. *Johnson v. Taliaferro*, *Wingerter v. North Dakota Department of Transportation*, *Wheeler v. Gardner*, and *Halvorson v. Starr*, *supra*.

¶44. When this Court reviews, *de novo*, the District Court's conclusion that N.D.C.C. § 60-04-02 governs the determination of the insolvency date of GF Bean, instead of N.D.C.C. § 60-02-41 (the latter statute being the one urged by

Auto-Owners), Auto-Owners contends that this Court will conclude that the District Court erred in doing so and that N.D.C.C. § 60-02-41 applies instead and governs the determination of the date of insolvency of GF Bean in this action.

**B. The Aforementioned Competing Warehouseman Insolvency Statutes.**

¶45. The District Court concluded that the determination of the insolvency date of GF Bean for purposes of the report and payment recommendations of the PSC is governed by N.D.C.C. § 60-04-02. Doc. Id. No.: 377 at ¶ 56.

¶46. N.D.C.C. § 60-04-02 reads as follows:

**60-04-02. Insolvency of Warehouseman.** 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 re-delivery or payment for grain stored.

¶47. The District Court applied N.D.C.C. § 60-04-02 to determine the insolvency date of GF Bean as respects the proceeding in the District Court below for approval of the report and payment recommendations of the PSC in this action pursuant to N.D.C.C. § 60-04-09.

¶48. Applying N.D.C.C. § 60-04-02 to this action, the District Court determined, following the trial, that the date of GF Bean's insolvency in this action was October 15, 2013. The District Court utilized the market rate of pinto beans on that date, of \$38.00 per c.w.t., to determine the amounts payable to the allowed growers against the GF Bean Trust in its analysis of whether to accept or modify the Report and Recommendations of the PSC. See, Doc. Id. No. 377, the

District Court Order Modifying the Trustee's Report and Recommendation at ¶¶55, 56, 73, and 74, et. al.

¶49. However, the reasoning and rationale utilized by the District Court is confusing, uncertain, contradictory, irrational, and unjust, and actually over compensates most of the growers as it allows them more recovery on their claims than they are entitled.

¶50. The District Court's decision to utilize an insolvency date of October 15, 2013, and a \$38.00 per c.w.t. market rate of pinto beans, for determination of the compensation due the growers that the District Court determined had valid claims against the GF Bean Trust, was inappropriate. In addition to the problems with utilizing the aforementioned date and market rate, application of § 60-04-02 in this action, provides no certainty, predictability or specificity regarding proceedings of this nature. It does not entail a reasonable interpretation and application of the statutory structure and system to be utilized in insolvency proceedings of this nature with respect to an insolvent public grain warehouse and payment of claims of those having unconverted/unpaid scale tickets or warehouse receipts issued by that warehouseman.

¶51. As this Court will readily note from the District Court's Decision and Order Modifying the PSC's (Trustee's) Report and Recommendation in this case (Doc. Id. No. 377), at ¶¶ 59 – 73 of the District Court's decision, the Court recognizes that there are various and numerous dates of insolvency, triggering the growers' rights of recovery from the GF Bean Trust Fund. For example, the

District Court noted that the claims of Brent Baldwin/Baldwin Farms, Inc., Chuck Nelson, Nicholas Adams and Ronald Adams, against the Trust Fund would dictate an insolvency date of November or December of 2014 for purposes of the market price for their beans to be paid to them out of the Trust. Doc. Id. No.: 377 at ¶ 64.

¶52. Regarding the claim of grower Brad Nelson against the Trust Fund in this action, the District Court determined that the date of GF Bean's insolvency, for purposes of determining the market price payable to him for his unpaid beans, was December of 2014. Doc. Id. No. 377 at ¶ 68.

¶53. Regarding the claim of W.J.S. Nelson, the District Court determined that the insolvency date measured by that claim, for purposes of the market price payable to W.J.S. Nelson from the GF Bean Trust would be May or early June of 2014. Doc. Id. No. 377 at ¶ 70.

¶54. The only claim of the eight growers that the District Court allowed to recover from the GF Bean Trust in this action, that came anywhere close to accruing on the October 15, 2013, insolvency date and market price date utilized by the District Court to pay all of the claimants from the Trust Fund, was the claim of Duane Altendorf. The District Court determined that Mr. Altendorf demanded full payment for his beans in October of 2013, which was initially refused, but for which he was subsequently paid a partial payment in December of 2013. Doc. Id. No. 377 at ¶ 71.

¶55. Therefore, because the District Court concluded that only one insolvency date should be utilized<sup>1</sup> to determine the value of the growers' claims against the GF Bean Trust Fund, the District Court determined that the earliest date that the GF Bean could be determined to have met the definition of insolvent, was in October of 2013 and arbitrarily selected that date to utilize as the date of the GF Bean insolvency for purposes of the PSC's Report and Recommendation. Doc. Id. No. 377 at ¶ 73. In fact, the District Court recognized that an exact date in October, 2013, was not even provided and, again, just arbitrarily selected the date of October 15, 2013, as the date of the GF Bean insolvency. Because the Market Price for beans in October, 2013, was \$38.00 per c.w.t., the District Court utilized that market price as the price to be paid to the growers whose claims against the trust fund were approved by the District Court for payment for their unconverted/unpaid scale tickets or warehouse receipts, from the Trust. Doc. Id. No. 277 at ¶¶ 73 and 74.

¶56. Therefore, again, it is absolutely clear that all of the growers whose claims were approved against the Trust Fund, with the exception of Duane Altendorf, were extremely overpaid for their beans, because, with respect to their claims, their claims did not ripen or mature until well after the date of October 15, 2013, when the market price for their beans was substantially lower than the \$38.00 per c.w.t. rate in October of 2013. The fact that that market price in October of 2013, was utilized to pay all of the growers for their beans, from the

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<sup>1</sup> Auto-Owners did not necessarily agree to this either.

trust fund, when their claims (with the exception of Altendorf) did not ripen or mature against the Trust Fund until much later than October of 2013; because GF Bean was not insolvent as respects their individual claims; and because the market price on the date of GF Bean's insolvency with respect to their individual claims was much lower than the October, 2013, market price, establishes conclusively that they were improperly and unjustly overpaid for their claims.

¶57. It appears that the District Court simply took the easiest and most convenient (to it) way out or method to determine the amounts payable to the grower from the Trust Fund and wanted to avoid the more difficult and time consuming job of having to determine separate insolvency dates and separate interest and offset calculations, etc., with respect to each individual grower's claim.

¶58. Auto-Owners submits that a concern for convenience and expediency is not a proper substitute for the District Court to do its job and properly apply a statutory scheme or process in an important proceeding such as this one.

¶59. Instead of providing certainty in a complicated process such as involved in this present proceeding, it is apparent that the District Court did just the opposite, that is, it created a process and system based upon speculation, conjecture, uncertainty, tactical maneuvering, and unfairness and overpayment, when a Court should strive to do the exact opposite.

¶60. Additionally, and to make matters worse, even though the District Court purported to utilize the date of October, 2013, to determine the insolvency date of GF Bean and a \$38.00 per c.w.t. market price for that date for the growers' claims (Doc. Id. No. 377 at ¶¶ 73 and 74), the District Court's discussion in its Order, is "all over the map" in selecting different market prices for the growers' respective claims. For example, the Court utilized a \$33.00 per c.w.t. market price for Brad Nelson's claim. (Doc. Id. No. 377, ¶ 79). Not to potentially look a gift horse in the mouth, but what happened to the \$38.00 per c.w.t. market price supposedly utilized by the District Court as the uniform date of GF Bean's October 15, 2013, insolvency?

¶61. The District Court determined that the W.J.S. Nelson claim must be valued using a rate of \$35.00 per c.w.t. Doc. Id. No. 377 at ¶ 80. Again, where did the earliest rate of \$38.00 per c.w.t. rate go?

¶62. The Court valued Duane Altendorf's claim at a rate of \$45.00 per c.w.t., notwithstanding that in the sentence just above that in the Court's Order, the Court noted that the market price during October of 2013 (the insolvency date selected by the Court) was \$38.00 per c.w.t. Doc. Id. No. 377 at ¶ 81.

¶63. The District Court then succinctly summarizes and memorializes its inconsistent and irrational application of the statutory insolvency process and system applicable to the GF Bean insolvency proceedings involved in this action, in the District Court's "summary" at ¶¶ 103-117 of its Order Modifying the Trustee's Report and Recommendation. Doc. Id. No. 377. Again, as this Court

can readily see from that summary, different market price payments were allowed to several different growers, other than the \$38.00 price that was established for October of 2013, the supposed date of GF Bean's insolvency) because these growers, as the Court had noted, established different dates to determine GF Bean's insolvency, by virtue of their individual claims.

¶64. Again, the question has to be asked, what happened to the District Court's purported utilization of one single insolvency date, and one market price (based upon that date), when it broke down and determined the individual claims of the growers whose claims were allowed against the GF Bean Trust?

¶65. The answer, unfortunately, is clear, and that is, the District Court did not apply the statutory insolvency process uniformly or properly in this action, or even within the confines of its own order.

¶66. Auto-Owners argued at trial, and asserts in this appeal, that the District Court should have applied N.D.C.C. § 60-02-41 to determine both the insolvency date of GF Bean and the market price payable to the growers whose claims the District Court approved against the GF Bean Trust. As Auto-Owners argued in the District Court below, and as it maintains now, application of that statute would provide surety, certainty, uniformity, specificity and fairness to all parties concerned. Application of that statute to determine the date of GF Bean's insolvency and the market price to be payable to the growers for their unpaid or undelivered pinto beans, would prevent the very uncertainty, speculation, unverifiability and in fact the inconsistency and contradiction contained not only

within the claims and amended claims of the growers, but also within the District Court's own Order modifying the PSC's Report and Recommendation, as outlined above.

¶67. It is a basic concept of statutory interpretation, and in fact, is codified by the North Dakota statutes, that the "particular controls general", meaning that whenever a general provision in a statute is in conflict with a special provision in the same or another statute, the two must be construed, if possible, so that effect may be given to both provisions. However, if the conflict between the two provisions is irreconcilable, the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provisions shall prevail. See, N.D.C.C. § 1-02-07.

¶68. In this case, Sections 60-04-02, the statute purportedly utilized by the District Court to determine the date of insolvency of GF Bean for purposes of determining the market price payable to the unpaid growers is a general provision when compared to N.D.C.C. § 60-02-41, the statute that Auto-Owners contends should have been applied by the District Court in this action.

¶69. N.D.C.C. § 60-04-02 is a general statute and is fraught with uncertainty, is wide open to speculation, interpretation, unverifiable subjective contention and other lack of objective clarity and specificity. For example, per N.D.C.C. § 60-04-02, when does a licensee refuse, neglect or is unable to make payment or redelivery for grain stored? Who determines those issues? If one

party claims a refusal, neglect or inability, but the other party refutes that, what objectivity or standard of proof does the Court require? Additionally, what is a “proper demand” to make repayment for grain purchased or redelivery for payment of grain stored? One party will contend that a proper demand was made, while the other party will refute that. How does the District Court resolve that issue or dispute? The statute certainly provides no objective guidance, certainty, specificity or particularity to determine the question of whether the warehouseman is insolvent and, if so, what date does that insolvency occur and what market price is to be utilized to compensate or repay the growers who have valid claims against the public warehouseman for their unpaid or undelivered beans.

¶70. Therefore, N.D.C.C. § 60-04-2 is very general, non-specific and non-particular, and offers absolutely no objective guidance, assistance or measure of the issue of whether the warehouseman is insolvent, and if so, when does that insolvency occur, and further, what market price is payable to the growers for their beans.

¶71. Moreover, notwithstanding the interpretation by the District Court, that statute does not provide for a “one for all” determination of when insolvency occurs, i.e., that if the warehouseman is deemed insolvent for one claim/grower, it is for all, regardless of when the latter claims accrue.

¶72. Moreover, N.D.C.C. § 60-04-09(5) adds no objective clarity or assistance to these complex issues because it simply, and generally, only refers to the “market price prevailing on the date of the insolvency”, again without

providing any objective guidance or instruction as to what that date of insolvency is. Again, that important date then becomes subject to wide open and unfettered speculation, subjective contention, tactical maneuvering and lawyering, amended and inconsistent contention and throws the whole issue up in the air for potential arbitrary and contradictory results, with absolutely no objective guidance, measurement or instruction as to how the District Court is to apply the statute and determine the date of insolvency in a proceeding of this nature.

¶73. On the other hand, N.D.C.C. § 60-02-41, the statute that Auto-Owners urged the District Court to apply in this proceeding, is much more specific than § 60-04-02 as to how to determine the date of insolvency of the warehouseman for purposes of redeeming/paying outstanding unconverted scale tickets or warehouse receipts in a proceeding involving the insolvency of a public warehouseman, such as GF Bean in this case. Granted, both statutes apply to paying or redeeming scale tickets and warehouse receipts and tie the redemption price for those scale tickets or warehouse receipts to the warehouseman's insolvency. However, N.D.C.C. § 60-02-41 goes further, is much more specific, and provides much greater objective certainty and clarity for the Court to utilize to determine first, what date to use as the date of insolvency of the public warehouseman, and then what market price to use for that insolvency date to pay the growers than does N.D.C.C. § 60-04-02, simply does not.

¶74. As clearly shown by § 60-02-41, the date of the warehouseman's insolvency, and therefore, the market price to be paid for the grower's beans, is the

date that the warehouse was closed or ceased to do business because of insolvency. It is this latter provision of § 60-02-41 that is more clear, particular and specific on the issue of what date to use for GF Bean's insolvency in this case, and therefore, what date to use for the market price to pay the growers for their unpaid/unconverted scale tickets or warehouse receipts for their beans. Application of the objective measuring instructions and guidance to the Court, as contained within this statute, prevents that very kind of strategical maneuvering, lawyering, and shifting claims and positions utilized by all of the growers in this case in amending their claims to select a market price for their beans that was most beneficial and advantageous to them.

¶75. As clearly shown by N.D.C.C. § 60-02-41, the date of insolvency, and therefore, the market price date payable for the growers' beans, is clearly, objectively and uniformly the date that the warehouse was closed or ceased to do business because of insolvency. It is this provision of § 60-02-41 that is more clear, particular, specific and objective on the issue of what date to use for GF Bean's insolvency in this action and, therefore, what date to use for the market price payable to the growers for their beans. Application of this statute prevents the very kind of strategical maneuvering and subjective tactics utilized by all of the growers in this case in amending their claims against the trust to select a market price date for their beans that is most financially beneficial to them. It must be remembered that eight of the nine claimants (not counting Curtis Amundson whose claim was rejected by the Court as not payable from the Trust

Fund), all amended their original claims back to October 15, 2013. This cannot be just a chance coincidence. It was measured, strategical, tactical and concerted to attempt to obtain the greatest price for their beans. It would be this type of subjective, tactical, unverifiable maneuvering that § 60-02-41 was no doubt intended to prevent.

¶76. Application of § 60-02-41 to the growers' claims against the Trust Fund in this case would allow a Court to determine, through objective, specific and verifiable evidence, what insolvency date to use for GF Bean and therefore, what market price to utilize for the claims of the unpaid growers against the GF Bean Trust. That statute gives clarity and certainty to a proceeding such as involved in the present case. It provides for objective analysis, scrutiny and determination for a Court to analyze and determine the appropriate date of insolvency and market price to be paid to growers having claims against the insolvent public warehouseman. It prevents the varied, amended, subjective, tactical and non-verifiable contentions allowed and in fact, almost invited by application of § 60-04-02 to determine the date of insolvency of GF Bean and the market price for the growers' beans.

¶77. Utilizing N.D.C.C. § 1-02-07 and this Court's *de novo* standard of review regarding what statute should apply in this case, mandates that this Court apply N.D.C.C. § 60-02-41 to the PSC's petition for approval of its Report and Recommendation in this action regarding proper payments from the GF Bean Trust. Section 60-02-41 is much more case specific, comprehensive, verifiable

and objective than § 60-04-02. There is no manifest legislative intent expressed in this statute that it should control over § 60-02-41.

¶78. As was clearly and undisputedly established in the District Court record of this case, and as will be argued *infra*, it is undisputed that GF Bean was forced to and did in fact close its public grain warehouse business and ceased doing business as a public warehouseman in either December of 2014 or January of 2015. There was no evidence presented by the growers, or anyone else, at trial, that disputed that. This closure date was clearly proven by the documentary evidence and testimony of the PSC and other testimony. Accordingly, pursuant to § 60-02-41, the market price that the growers were entitled to receive for their outstanding, unpaid, unconverted scale tickets or warehouse receipts for their beans, was the price prevailing on the date that GF Bean was closed and ceased doing business because of its insolvency. As the statute also clearly and objectively mandates, the holder of such receipts **must** accept this price and surrender their receipts for that price. *Id.*

¶79. At trial, the PSC, through documentary and testimonial evidence, clearly established that the market price of \$23.00 per c.w.t. was the prevailing market price for the growers' beans for the months of December, 2014, and January and February of 2015, which was the period of time during which GF Bean ceased doing business as a public warehouseman and was closed by the PSC because of insolvency. See the statement of facts portion of this brief, and the citation to the record therein. Neither the growers nor any other witnesses or

evidence refuted that business closure date or that market price during that timeframe. The market price of \$23.00 c.w.t. was the same throughout this timeframe. Accordingly, the market price of \$23.00 per c.w.t., for the time period during which GF Bean closed and ceased doing business because of its insolvency, is undisputed and was clearly established by the uncontradicted evidence at trial. The growers simply submitted or argued no other evidence to contradict either that closure date of GF Bean or that market price for beans at that time.

¶80. Finally, on this point, and as N.D.C.C. § 1-02-07 states, if §§ 60-02-41 and 60-04-2 can be reconciled with each other, then effect must be given to both statutes. Obviously, if § 60-02-41 trumps § 60-04-2, then the former statute prevails. However, even if both statutes apply, they can be reconciled, with the market price still determined as the date that the GF Bean warehouse closed in either December, 2014, or January/February, 2015, because of insolvency. In short, § 60-02-41 can be applied as an extension of or clarification of § 60-04-02 in order to determine the appropriate, objective date to use for both the date of insolvency of GF Bean and the market price payable to its grower creditors against the GF Bean Trust.

¶81. Whether applying only § 60-02-41, or both statutes, together, to determine the market price payable to the growers from the GF Bean Trust, it is clear that, putting aside the Curt Amundson claim (which Auto-Owners agrees with the District Court that that claim was not payable from the GF Bean Trust),

the PSC's Report and Recommendation was appropriate and the District Court should have approved it in the amounts payable to the growers as provided therein.

¶82. Finally, in the event that the growers argue that only Chapter 60-04, N.D.C.C., applies to this case, and not Chapter 60-02, N.D.C.C., this argument would be erroneous, particularly as concerns Auto-Owners. By way of example, and by no means intended to be exclusive, Auto-Owners' surety bond provides, in the last paragraph before signatures, that it is governed by the provisions of Chapters 60-02 and 60-04 of the North Dakota Century Code. Doc. Id. No. 275, PSC Exhibit 5.

¶83. Moreover, and again by way of example, the PSC's trial exhibits 15, 16 and 17 (Doc. Id. Nos. 285 and 286) all reference both Chapters as applying to this insolvency proceeding.

¶84. Accordingly, Auto-Owners respectfully requests that this Court, exercising its appropriate *de novo* standard of review in this action, determine that N.D.C.C. § 60-02-41 applies and establishes that, as a matter of law, the growers were required to accept the price of \$23.00 per c.w.t., from the GF Bean Trust involved in this action, for their unconverted scale tickets or warehouse receipts as that was the undisputed and uncontradicted market price prevailing on the date that the GF Bean warehouse was closed by the PSC because of insolvency. Utilizing and applying that statute would obligate this Court to reverse the District Court's Order and Judgment modifying the PSC's Report and Recommendation with instructions to the District Court to approve, in all things, the Report and

Recommendation of the PSC, with the exception of the Curt Amundson claim which the District Court properly excluded from this proceeding.

### CONCLUSION

¶85. Based upon the above and foregoing argument and authorities and also upon the anticipated brief and argument of the PSC in support of its Report and Recommendation submitted to the District Court for approval, Auto-Owners requests the following relief:

¶86. That this Court reverse the District Court's Order and Judgment modifying the Trustee's (PSC's) Report and Recommendation (with the exception of the District Court's Order and Judgment barring the Curt Amundson claim against the GF Bean Trust which Auto-Owners requests that the Court allow to stand) and order that the PSC Report and Recommendation be otherwise approved;

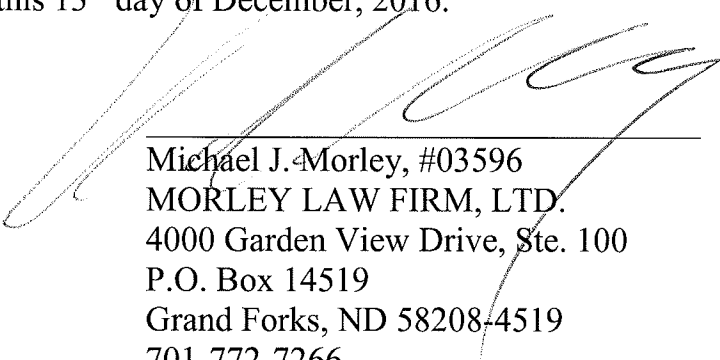
¶87. That the Court, upon its reversal of the District Court's Order and Judgment, as requested above, issue its mandate instructing the District Court, among the other relief requested by Auto-Owners above, to enter an Order and Judgment in favor of Auto-Owners for a dismissal, with prejudice, of all claims of the PSC, and others, against Auto-Owners and its surety bond as the GF Bean Trust, upon reversal, covers all approved growers' claims and the PSC's costs and attorneys' fees, without the surety bond;

¶88. For a mandate instructing the District Court to enter an Order directing the PSC to immediately return to Auto-Owners, the full amount of Auto-

Owners' surety bond of \$100,000.00, plus interest accrued thereon, from the date of its deposit at the Bank of North Dakota as a part of the GF Bean Trust in this action; and

¶89. For such other and further relief as this Court deems appropriate in this action.

Respectfully submitted this 13<sup>th</sup> day of December, 2016.



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