IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Public Service Commission,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Supreme Court No. 20160303
	)	
Grand Forks Bean Company, Inc., Auto-Owners Insurance Company,	)	Grand Forks County District Court File No. 18-2015-CV-00240
Respondents,	)	
	)	
PSC Case No. GE-15-36	)	

BRIEF OF APPELLANT BREMER BANK, NATIONAL ASSOCIATION

APPEAL FROM JUDGMENT, DATED JULY 22, 2016, ORDER DENYING INTERVENTION BY ALLOWING FULL PARTICIPATION AS A CLAIMANT – BREMER BANK, DATED NOVEMBER 19, 2015, ORDER MODIFYING TRUSTEE'S REPORT AND RECOMMENDATION, DATED MAY 3, 2016, ORDER CORRECTING CLERICAL MISTAKE/OVERSIGHT, DATED MAY 5, 2016, ORDER RESOLVING POST-HEARING ISSUES, DATED JULY 5, 2016, AND ORDER FOR JUDGMENT, DATED JULY 22, 2016 AND ORDER DENYING POST-JUDGMENT RELIEF-MOTION FILED AUGUST 24, 2016, DATED SEPTEMBER 15, 2016

THE DISTRICT COURT OF GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JON J. JENSEN, PRESIDING

TRACY A. KENNEDY, ND ID # 05704
JOHN D. SCHROEDER, ND ID #07147
Zimney Foster P.C.
3100 South Columbia Road, Suite 200
Grand Forks ND 58201
Telephone: (701)772-8111/Fax: (701)772-7328
tracykennedy@northdakotalaw.net
jschroeder@northdakotalaw.net
Attorneys for Bremer Bank, National Association

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John Schroeder, Attorney, Bremer Bank

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Whether The District Court Erred In Refusing to Allow Bremer To Intervene As A Party To This Action.

ISSUE B:

Whether The District Court Erred In Concluding The Growers Possessed Claims To Trust Fund Assets Which Were Superior To Bremer's Claim To Trust Fund Assets.

ISSUE C:

Whether The District Court Erred In Determining The Amounts Payable From The Trust Assets To The Growers.

ISSUE D:

Whether The District Court Erred In Concluding That The PSC's Claim To Reimbursement For Expenses Was Superior To Bremer's Claim To Trust Fund Assets

I. Statement of the case and course of proceedings

¶1 This is an appeal by Bremer Bank, National Association (hereinafter "Bremer") from a Judgment dated July 22, 2016; an Order Denying Intervention by Allowing Full Participation as a Claimant-Bremer Bank, dated November 19, 2015; an Order Modifying Trustee's Report and Recommendation, dated May 3, 2016; an Order Correcting Clerical Mistake/Oversight, dated May 5, 2016; an Order Resolving Post-Hearing Issues, dated July 5, 2016; and an Order for Judgment, dated July 22, 2016.

¶2 The Public Service Commission (hereinafter "PSC") made an Application for Appointment as Trustee and for Ex Parte Order dated February 13, 2015. (Join Appendix [hereinafter "J.A."] at 14-22.) February 18, 2015, the PSC was appointed Trustee for proceeds resulting from the sale of the inventory of Grand Forks Bean Company, Inc. (hereinafter "GFB"). (J.A. at 25-26.) April 24, 2015, Bremer filed its claim to Trust assets. (J.A. at 29-75.) April 27, 2015, the Estate of Brad Nelson filed its claim to Trust assets. (J.A. at 76-80.) May 11, 2015, Brent Baldwin, Baldwin Farms, Inc. and Duane Altendorf filed their respective claims to trust assets. (J.A. at 81-115.) May 13, 2015, Curt Amundson filed his claim to trust assets. (J.A. at 116-130.) May 14, 2015, Chuck Nelson, WJS Nelson (partnership), Nicholas Adams and Ronald Adams each filed a claim to Trust assets. (J.A. at 131-170.) All claimants, except for Bremer, will be referred to collectively as "Growers".

¶3 August 20, 2015, the claim of the Estate of Bradley Nelson was assigned to Beth Nelson. (Doc. # 110.) September 9, 2015, Bremer moved to intervene as a party in this matter. (J.A. at 171-185.) That motion was denied by the Court by an *Order Denying*

Intervention But Allowing Full Participation as a Claimant-Bremer Bank on November 19, 2015. (J.A. at 219-221.)

¶4 January 26, 2016, Curt Amundson, Beth Nelson, Chuck Nelson, Nicholas Adams and Ronald Adams filed amended claims. (J.A. at 222-243, 279-316.) January 28, 2016, Baldwin Farms, Brent Baldwin and Duane Altendorf filed amended claims. (J.A. at 244-278.) February 25, 2016, WJS Nelson filed an amended claim. (J.A. at 317-319.)

¶5 September 30, 2015, the PSC filed its Report and Recommendation of Trustee and a Motion to Approve. (J.A. at 191-218.) March 3, 2016, Bremer and each Grower filed objections to the PSC's report. (Doc. ## 217, 219, 221, 223, and 227.)

¶6 March 14 and 15, 2016, an evidentiary hearing was held to consider the PSC report and the objections filed by claimants. May 3, 2016, the Court issued an Order Modifying Trustee's Report and Recommendation and May 5, 2016 entered an Order Correcting Clerical Mistake/Oversight. (J.A. at 492-536.) July 5, 2016, the Court entered an Order Resolving Post-Hearing Motions. (J.A. at 537-544.) July 22, 2016, the Court entered an Order for Judgment and Judgment. (J.A. at 545-552.) September 15, 2016, the Court entered an Order Denying Post-Judgment Relief-Motions Filed 8-24-16. (J.A. at 559-560.)

¶7 Bremer filed its Notice of Appeal in this matter September 2, 2016. (J.A. at 553-558.) September 16, 2016, the PSC filed a Notice of Appeal and Cross Appeal. (J.A. at 566-571.) September 20, 2016, Beth Nelson and Curt Amundson filed a Notice of Appeal. (J.A. at 561-565.) September 23, 2016, Auto-Owners filed a Notice of Appeal. (J.A. at 572-575.) September 23, 2016, Bremer filed an Amended Notice of Appeal. (J.A. at 576-581.)

II. Facts

¶8 This case involves claims to proceeds held in trust by the PSC. The PSC was appointed Trustee pursuant to an order of the District Court entered March 23, 2015, and amended by an amended order entered March 25, 2015. (J.A. at 25-28.) Respondent GFB is a North Dakota corporation that was licensed by the PSC as a grain warehouse. (Transcript of Hearing, March 14 & 15, 2016, [hereinafter "Tr."] at 10:5 to 11:22.) GFB purchased beans from farmers and re-sold them to processors or others in the supply chain. (Tr. at 28:3 to 29:24.) Respondent Auto-Owners Insurance Company (hereinafter "Auto Owners"), the surety of GFB, filed a bond with the PSC as required by law. (Doc. # 275; Tr. at 11:23 to 12:12.)

¶9 Bremer is a secured creditor of GFB. (J.A. at 29-756; Tr. at 154:1 to 157:25.) Bremer loaned money to GFB which had a payoff balance of $679,322.80 at the time of trial. (Tr. at 157:8-10; Doc. # 361.) GFB executed security agreements in favor of Bremer granting Bremer security interests in GFB's personal property, including inventory held by GFB. (J.A. at 34-57; Tr. 155:3-20.) The inventory held by GFB consisted of pinto beans purchased from local farmers. (*Id.*) Bremer perfected its security interest by filing a Financing Statement with the North Dakota Secretary of State's office. (J.A. at 58-62; Tr. at 154:9 to 156:23.) There was no evidence that any Grower or the PSC held a contractual lien or filed financing statements against GFB. (J.A. at 390-396.) Each Grower asserts a claim to the proceeds held in Trust under the grain warehouse insolvency proceedings found in Title 60 of the North Dakota Century Code. (J.A. at 76-170, 222-319.) Specific Grower claims will be addressed later in this brief.

¶10 Fessenden Cooperative Association (hereinafter "FCA") filed a claim with the Commission, based on alleged breach of contract by GFB. (Doc. ## 82-85.) FCA has not asserted any lien or other property interest in the beans that are the subject of this proceeding. (*Id.*)

¶11 GFB was subject to the regulatory authority of the PSC. The PSC regularly sent a warehouse inspector out to inspect GFB's facility and its records. (Tr. at 124:8 to 133:10; 135:9 to 137:11.) The PSC conducted an inspection of the GFB facility, including reviewing records of the facility, on February 26, 2014. (Tr. at 124:8 to 133:10.) As a part of the 2014 inspection, the PSC was presented with and reviewed all executed Price Later Marketing Agreements (hereinafter "PLMAs") in the files of GFB. (*Id.*) The PSC determined at that time that the PLMAs were credit-sale contracts. (*Id.*) GFB, by presenting to the PSC the PLMAs, showed GFB understood it had taken title to the beans in its facilities under the PLMAs. (*Id.*) At this inspection in February of 2014, the PSC observed a written notices posted by GFB in its facility one stating "All beans are considered Price Later unless specified by grower" and a separate written notice stating "the bond of this warehouse does not protect persons entering into deferred payment contracts, delayed payment contracts, delayed price contracts or other credit-sale type arrangements." (J.A. at 385, 491; Tr. at 133:15 to 135:7.)

¶12 November 18, 2014, the PSC received a telephone call from Grower Curt Amundson alleging GFB had not been able to market his beans in accordance with his PLMA with GFB. (Tr. at 14:7 to 15:3.) The PSC made inquiry of GFB as to current inventory and ability to make redelivery to Growers who had delivered beans to its warehouse in Grand Forks. (Tr. at 15:12 to 16:12.) Between December 19 and

December 23, 2014, eight Growers contacted the PSC alleging difficulties in securing either payment or marketing services from GFB. (J.A. at 320-327.) January 16, 2015, the PSC issued an ex parte cease and desist order requiring GFB to refrain from receiving additional grain and prohibiting it from moving any grain out of its Grand Forks facility. (J.A. at 342-344.) January 30, 2015 the PSC, GFB, the Growers and secured creditor Bremer, entered a stipulation to sell the inventory of GFB and place the proceeds into Trust for subsequent determination of the claims of Bremer and the Growers to those inventory proceeds. (J.A. at 329-352.) Pursuant to this stipulation, the beans in inventory were sold and the proceeds were placed in Trust; at the time of the March 14, 2016 hearing the proceeds, along with interest, totaled $768,053.24. (Tr. at 23:12 to 24:18.)

¶13 May 3, 2016, the District Court issued its *Order Modifying Trustee's Report and Recommendation.* (J.A. at 492-534.) Therein, among other things, the Court ordered that the Trust assets be distributed to each of the Growers, except Amundson; that, after payment to the Growers, payment should be made to the PSC for its costs and expenses in managing the Trust; and, finally, that any money left over after payment of the above-items should be paid jointly to Bremer and GFB. (J.A. at 492-534.)

III. Argument

ISSUE A: Whether The District Court Erred In Refusing To Allow Bremer To Intervene As A Party To This Action.

¶14 Bremer filed a claim to Trust assets May 26, 2015, asserting a property interest arising from its security agreements with GFB. (J.A. at 29-75.) September 10, 2015, Bremer moved to intervene as a party-respondent to litigate the priority of its security

interest in the proceeds. (J.A. at 171-185.) Bremer's motion to intervene was opposed by the PSC, by Auto-Owner's and by all Growers. (Doc. ## 135, 137, 143, and 146.) November 19, 2015, the Court issued its order holding that Bremer would not be allowed to intervene in this action as a party to litigate the priority of its security interest; however, Bremer could participate as a claimant and could "assert objections to any of the proposed distributions". (J.A. at 219-221.) The Court refused to consider the priority of Bremer's undisputed security interest in the bean proceeds, holding only noncredit-sale receiptholders of insolvent warehouseman could stake a claim to distribution from the Trust. The Court's refusal to allow Bremer to intervene and fully litigate its interests to the bean proceeds fundamentally denied Bremer's right to protect its property interests in the Trust assets.

1. Standard of Review for Motion to Intervene.

¶15 This Court reviews a district court's determinations on a motion to intervene pursuant to Rule 24(a), N.D.R.Civ.P., under both the clearly erroneous standard as to factual findings, and de novo, as to the ultimate conclusion as to whether intervention should be granted or denied. *Skogen v. Hemen Twp. Bd. of Twp. Sup'rs*, 2010 ND 92, ¶ 7, 782 N.W.2d 638, 642.

2. Bremer is entitled to intervene as a matter of right under Rule 24(a) of the North Dakota Rules of Civil Procedure.

¶16 Rule 24(a) of the North Dakota Rules of Civil Procedure provides as follows:

> "(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as

> a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

"Intervention has historically been liberally granted in North Dakota". *Brigham Oil and Gas, L.P. vs. Lario Oil and Gas Co.*, 2011 ND 154, ¶40, 801 N.W.2d 677, 689 (quoting *Eickhorn vs. Waldo Twp. Bd. Of Sup'rs, Cnty. Of Richland*, 2006 ND 214, ¶13, 723 N.W.2d 112, 116). Bremer asserted a property interest in the Trust assets and the Court's disposition of those assets without proper consideration of Bremer's claim impeded Bremer's ability to protect its interest.

(a) The District Court's factual findings were erroneous in that Bremer did not waive any counterclaim against the PSC.

¶17 The District Court's order denying Bremer's motion to intervene was premised on two erroneous factual findings. First, the Court erroneously found that Bremer had withdrawn its counterclaims. (J.A. at 220.) In seeking to intervene Bremer wished to plead two claims; first, against GFB for the contractual loan amount owed to Bremer by GFB and second a claim against the PSC for declaratory relief to determine that Bremer has a superior lien and interest as and against the PSC in the bean inventory of GFB. (J.A. at 174-185.) At the hearing on the Motion, Bremer agreed that it would withdraw the claim against GFB if that was the basis for the Court's denial of the motion to intervene. (Transcript of Hearing, dated November 19, 2015, at 11:21 to 12:23.) Bremer did not waive the claim against the PSC. (*Id.*) Further, prior to the evidentiary hearing on March 14, 2016, Bremer renewed the motion to intervene, noting that the PSC was seeking to limit or otherwise restrict Bremer's presentation of evidence related to a claim that the PSC's prior finding that the PLMAs were credit sale contracts. (Tr. at 7:6-20.)

In the Court's order denying intervention it said that it would grant intervention in the event any party attempted to restrict Bremer's participation. (J.A. at 221.)

(b) Failure to allow Bremer to join as a party impeded and impaired Bremer's interest in the Trust proceeds and was an error of law.

¶18 Bremer's interest in the Trust assets arises from its perfected security interest in the GFB's inventory and the proceeds resulting from the sale thereof. Bremer never asserted an interest in other Trust assets, such as the bond. Bremer never claimed to be a receiptholder nor to have an interest in the Trust as a receiptholder. Bremer sought to litigate its interest in the bean inventory as a secured creditor. The Court ordered Trust assets could be distributed only to receiptholders and ordered all assets of the Trust distributed to Growers. Bremer's property interest in the Trust assets was destroyed by the Court's refusal to allow Bremer to intervene to litigate its rights to the bean proceeds that were Trust assets.

¶19 Even if Bremer did not have an actual property interest in the actual Trust assets, which it absolutely did, intervention should have been allowed, as a practical matter, because the Court-ordered distribution of the Trust assets deprived Bremer of any opportunity to effectively seek redress. In *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 948-49 (8th Cir.1983), the Eighth Circuit ordered a lessor of airplanes be permitted to intervene in a Securities and Exchange Commission proceeding to seek recover for defrauded investors in the company that was leasing the airplanes. *Id.* at 945-46. The Eighth Circuit held, not allowing the lessor to intervene would destroy its property interest; "because virtually all [lessee]'s assets are in the hands of the receiver and may

be subject to an order of 'disgorgement' or constructive trust [in favor of defrauded investors] by the District Court, [lessor]'s interests may be foreclosed by the action." *Id.* at 948.

¶20 The District Court's refusal to allow Bremer to intervene foreclosed Bremer's interest in the bean inventory, because the Court did not consider anything outside of the insolvency statutes of Chapter 60-04 in determining Bremer's interests. (J.A. at 221.) The Court's order denying the motion to intervene indicated it would not consider other claims of Bremer unless those arose under an insolvency proceeding. (J.A. at 221.) In refusing to allow Bremer to participate as a party and bring claims outside of the insolvency statutes, the Court divested Bremer of its claimed property interest in the bean proceeds, and committed an error of law.

3. Bremer is entitled to permissive intervention under Rule 24(b) of the North Dakota Rules of Civil Procedure.

¶21 Alternatively, it is asserted the Trial Court erred in refusing Bremer permissive intervention in this matter under Rule 24(b). Rule 24(b) provides in part as follows:

> (b) Permissive Intervention.
> (1) In General. On timely motion, the court may permit anyone to intervene who:
> . . .
> (B) has a claim or defense that shares with the main action a common question of law or fact.
> . . .
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

"A district court's decision on permissive intervention will not be reversed on appeal absent a clear abuse of discretion." *White v. T.P. Motel, L.L.C.*, 2015 ND 118, ¶ 23, 863 N.W.2d 915, 921.

¶22 The Court abused its discretion by denying Bremer intervention and refusing to consider claims that Bremer was asserting as outside the scope of the insolvency statutes. The Court determined that the PSC had a superior interest in all of the Trust assets as against Bremer by virtue of the insolvency statutes, as shown later under Issue D, without properly allowing Bremer to present its claim. Such denial, particularly in the face of the renewed motion prior to the evidentiary hearing, is an abuse of discretion.

ISSUE B: Whether The District Court Erred In Concluding The Growers Possessed Claims To Trust Fund Assets Which Were Superior To Bremer's Claim To Trust Fund Assets.

1. Standard of Review.

¶23 "Issues involving the application and interpretation of statutes are questions of law fully reviewable by this Court". *Pub. Serv. Comm'n v. Wimbledon Grain Co.* 2003 ND 104 ¶ 20, 663 N.W.2d 186, 193.

2. The District Court erred as a matter of law in finding the Growers to be receiptholders.

¶24 The Court found each Grower, except Curt Amundson, was entitled to a first priority distribution from the Trust assets. Section 60-04-03.1(1)(a) of the North Dakota Century Code states the PSC must establish a trust fund "for the benefit of noncredit-sale receiptholders of the insolvent warehouseman", and Section 60-02-25.1 provides a first priority lien on grain contained in the warehouse in favor of "receiptholders".

¶25 Bremer argued the Growers had credit-sale contracts and none of the Growers were receiptholders.

¶26 The records of GFB included a Price Later Marketing Agreement ("PLMA") for each Grower, except WJS Nelson. (J.A. at 353, 256, 361, 362, 367, 369, 380, 381-384; Doc. # 349-356; Tr. at 129:3 to 133:11.) "Credit-sale contract" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale and which contains the notice provided in (subsection 7 of § 60-02-19.1). N.D.C.C. § 60-02-01(2) and § 60-04-01(2). Section 60-02-19.1(7) requires a warning "the sale is not protected by the bond coverage provided for in section 60-02-09." Section 60-02-19.1 lists several requirements, including signatures, on credit-sale contracts, but the definition of the credit-sale contract does not include all of the requirements of Section 60-02-19.1, only subsection 7, therefore the definition of a credit-sale contract does not require a signature. "In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another." *Sanderson v. Walsh County*, 2006 ND 83, ¶ 16, 712 N.W.2d 842 (citing *Zueger v. North Dakota Workers Compensation Bureau*, 1998 ND 175, ¶ 11, 584, N.W.2d 530).

¶27 The PLMAs state "[c]hecks for the pinto beans will be issued only on growers request." Because payment can be made at the Grower's request, it may be paid more than 30 days after the Grower delivered beans. (J.A. at 353, 256, 361, 362, 367, 369, 380, 381-384; Doc. # 349-356.) In fact, several Growers received partial payments under their PLMAs, and all those payments were made outside of the 30 days of delivery. (J.A. 366, 368, 380; Doc. # 309, 314.) According to the PLMAs, beans could have been paid after 30 days, and therefore the requirement under sections 60-02-01(2) and 60-04-01(2) has been met.

¶28 Each PLMA contained the warning: "THIS CONTRACT IS NOT PROTECTED BY STATUTORY BOND COVERAGE IN THE EVENT OF BUYER'S INSOLVENCY." (J.A. at 353, 256, 361, 362, 367, 369, 380, 381-384; Doc. # 349-356.) This warning satisfies sections 60-02-01(2) and 60-04-01(2).

¶29 There are only three requirements under the definition of a credit-sale contract: 1) it is in writing, 2) the sale price may be paid more than 30 days after the grain is delivered, and 3) a warning that no bond coverage applies. N.D.C.C. §§ 60-02-01(2), 60-04-01(2). The PLMA agreements between GFB and the Growers meet all three conditions.

¶30 One Grower acknowledged he signed the PLMA, others said the PLMAs were signed by their agents and Growers were aware of the contract by actual receipt of the contract. Curt Amundson admitted he signed the PLMA and the District Court held that his arrangement with GFB was a credit-sale contract. (Tr. at at 213:20-25.) Each Grower, except WJS Nelson and Ronald Adams, submitted a PLMA in support of their claim or amended claim. (J.A. at 88, 94, 99, 113, 117, 134-135, 140.)

¶31 Brent Baldwin on behalf of himself and Baldwin Farms, Inc. testified he knew that the PLMA had been executed by his employee but failed to take any action to disavow that contract, and delivered to GFB. (Tr. at 330:2-23; 339:20 to 341:16.) A principal ratifies the conduct of his agent when the principal is aware of the act and fails to act to repudiate the act. *Matter of Mehus' Estate*, 278 N.W.2d 625, 630 (N.D. 1979). This Court held "when an agent is authorized to do an act but exceeds his authority and the rights of third persons are involved, the principal has a duty to repudiate the act as soon as he is fully informed of what has been done in his name or else he may be deemed

to have ratified it by implication." *Id.* Furthermore, "silence in most instances is evidence of an intent to ratify." *Id.*

¶32 The Baldwins should have known that GFB would rely on the execution of the PLMA for the beans being delivered when the bulk of the Baldwin beans were delivered after the execution of the PLMA. Mr. Baldwin testified that no one contacted GFB to disclaim the PLMA executed by his driver. (Tr. at 330:2-23; 339:20 to 341:16.)

¶33 Charles Nelson also filed his 2013 PLMA as part of his original claim with the PSC. (J.A. at 134-135.)

¶34 Bremer argued none of the Growers were statutory receiptholders. A "receipt" is defined as "grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract." N.D.C.C. §§ 60-02-01(7), 60-04-01(6). Memoranda is defined as "a record (as a note) which is used by a party seeking to enforce an otherwise oral agreement in accordance with the Statute of Frauds to prove that the other party agreed to a contract and which need not contain all the terms of the contract itself." *Memorandum*, Merriam-Webster.com, (Dec. 13, 2016) <https://www.merriam-webster.com/dictionary/memorandum>. None of the Growers had warehouse receipts, and none of the Growers paid GFB for storage of their beans. (J.A. at 76-170.) PLMAs were found for each Grower, except WJS Nelson. (J.A. at 353, 256, 361, 362, 367, 369, 380, 381-384; Doc. # 349-356.) The PLMAs meet the statutory definition of a credit-sale contract or at least are memorandum evidencing a credit-sale contract.

¶35 The Growers received scale tickets when they delivered their beans. Section 60-02-11(1) of the North Dakota Century Code states "[a]ll scale tickets must be converted into cash, noncredit-sale contracts, credit-sale contracts, or warehouse receipts within forty-five days after the grain is delivered to the warehouse." The Growers failed to convert the scale tickets into warehouse receipts, cash or redelivery.

¶36 GFB, however, did document the nature of each transaction in the form of the PLMAs, and its posted policy, of accepting all beans only on credit-sale unless otherwise specified. (J.A. at 385, 491; Tr. at 133:15 to 135:7.) The posting stated that all beans delivered would be considered "Price Later" unless specified otherwise by the Grower. (*Id.*) The additional posted notice warned growers "THE BOND OF THIS WAREHOUSE DOES NOT PROTECT PERSONS ENTERING INTO DEFERRED PAYMENT CONTRACTS, DELAYED PRICE CONTRACTS OR OTHER CREDIT-SALE TYPE ARRANGEMENTS." (*Id.*) The postings comply with the law and also served as memoranda evidencing a credit-sale contract. "Nothing in this chapter requires a warehouseman to receive grain for storage. A warehouseman shall publish and post, in a conspicuous place in its warehouse, a publication identifying whether storage will be available to its patrons or whether grain will be accepted via cash or a credit-sale contract arrangement." N.D.C.C. § 60-02-11(2).

¶37 The postings comply with N.D.C.C. section 60-02-11(2) and meet the definition of a memoranda evidencing a credit-sale contract. In addition, the postings plus the scale tickets also meet the requirements of N.D.C.C. sections 60-02-01(2) and 60-04-01(2).

¶38 The Growers failed to convert their scale tickets pursuant to section 60-02-11(2) and therefore cannot claim a statutory lien under section 60-02-25.1. This Court in

Stockman Bank of Montana v. AGSCO, Inc. held that a statutory lien cannot be obtained or enforced unless there is substantial compliance with the statute. "In assessing whether there has been substantial compliance with the requirements for a statutory lien, other courts have considered the degree of noncompliance, the underlying policy of the statutory requirement, and the prejudice suffered by the owner of the property or third parties as a result of the noncompliance." *Stockman Bank of Montana v. AGSCO, Inc.*, 2007 ND 27, ¶11, ¶ 13, 727 N.W.2d 742.

¶39 Failure to enforce section 60-02-11 against the Growers makes section 60-02-11 meaningless and would create an inequitable result for future growers who do comply. "When several sections or subsections relate to the same subject, we should give meaningful effect to each without making one or the other useless. . . . Moreover, because NDCC 1-02-38(3) instructs us that a just and reasonable result is intended, we try to avoid an absurd or unjust result." *State v. One 1990 Chevrolet Pickup, VIN 1GCDK14K8LZ185153*, 523 N.W.2d 389, 393 (N.D. 1994) (citation omitted).

¶40 Section 60-02-11(2) was amended in 2015 to give further notice to growers and confirmed that failure to convert scale tickets within forty-five days leaves the grower uncovered by the bond or by the Credit Sale Indemnity Fund.

> "**Senator Wanzek** introduced SB 2291. There is a law in place which states that grain warehouses are responsible to put grain deliveries on a credit sale contract or a warehouse receipt within 45 days of issuing a ticket for grain. Many times when that 45 day window is up, farmers are not ready to make the decision. The problem is if there is ever an insolvency and enough of those receipts build up beyond the 45 day window, those operators are unsecure because they don't fall under the warehouse bond or the indemnity fund. Since many warehouse men do not want to infuriate their customers by putting pressure on them, this bill would establish an option where the farmer can keep their tickets without converting them but the farmer has to sign off stating that he understands

> he is at risk (no coverage under the ware house bond or the indemnity fund) by holding onto that ticket."
>
> "....In my mind this bill will make the farmer aware of the risk when he allows his tickets to go beyond those 45 days which will provide him with incentive to make a decision. If we let the tickets go beyond the 45 days and there is an instance of insolvency, it creates a huge problem where there a several farmers in an area who are not covered and you don't know what to do with them."
>
> "**Senator Oban:** So this really to ensure that the producer understands the law?"

Hearing on S.B. 2291 Before the Senate Agriculture Committee, 64th N.D. Legis. Sess. (Jan. 30, 2015).

¶41 The District Court erred in concluding any of the Growers were receiptholders, entitled to distribution from the Trust. PLMA are either credit-sale contracts or, memoranda evidencing a credit-sale contract. The GF Bean postings are also memoranda evidencing a credit-sale contract. The Growers failure to convert their scale tickets prohibits the Growers from being receiptholders entitled to a first priority lien.

ISSUE C: Whether The District Court Erred In Determining The Amounts Payable From The Trust Assets To The Growers.

¶42 If the Growers were receiptholders, the Court erred with respect to determining the amounts payable from the Trust to the Growers. First, the Court erred in determining the insolvency date of GFB, which it relied upon in determining the amount payable to Growers. Second, the Court erred in determining the pricing terms of the agreement between GFB and Grower Duane Altendorf. Third, the Court erred in calculating offsets.

1. Standard of Review.

¶43 "Issues involving the application and interpretation of statutes are questions of law fully reviewable by this Court." *Pub. Serv. Comm'n v. Wimbledon Grain Co.*, 2003 ND 104, ¶ 20, 663 N.W.2d 186, 193. Factual findings are subject to a clearly erroneous standard of review. *See State ex rel. Pub. Serv. Comm'n v. R. F. Gunkelman & Sons, Inc.*, 219 N.W.2d 853, 858 (N.D. 1974) (citing N.D.R.Civ.P. 52(a)).

2. The District Court erred as a matter of law in determining the insolvency date of GFB.

¶44 The insolvency date is important because it is the date on which the market price for the beans is determined. N.D.C.C. § 60-04-09. A warehouse is insolvent only when the warehouse "refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored." N.D.C.C. § 60-04-02. The key inquiries for determining the date of insolvency is whether there was proper demand by a Grower, and what date did GFB refuse to "make redelivery or payment". *Id.* The PSC, in its Report and Recommendation, determined GFB was insolvent on December 19, 2014. (J.A. at 213.) The Court found that GFB was insolvent on October 15, 2013. (J.A. at 514-520.) The Court erred in determining the insolvency date of GFB because it failed to properly apply the statutes for determining insolvency, and because it committed clear error in finding the facts.

¶45 The District Court committed an error of law in applying the insolvency statutes to this case. None of the Growers made a proper demand for payment or the return of beans until December of 2014. Further, the Court committed error in breaking down section 60-04-02 into two clauses, ignoring the interpretation that the PSC gave to this

section. The PSC argued, and attempted to avoid a formal insolvency proceeding by having the beans redelivered to the various Growers by GFB. The possibility of redelivery can avoid the triggering of an insolvency. The warehouse is insolvent when it "refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery . . . ." N.D.C.C. §60-04-02. The actions of the Growers showed specific attempts to obtain redelivery from GFB in November of 2014; indicating the Growers would have accepted redelivery of their beans and indicating GFB was not insolvent in October of 2013 as found by the District Court. (Tr. at 14:10 to 18:14; Tr. 59:16 to 60:2.)

¶46 There was no formal action taken by any of the Growers until December 19, 2014, when written claims were submitted to the PSC. (J.A. at 320-327.) The only communications with the PSC from any of the Growers concerning GFB prior to December 19, 2014 was first on November 18, 2014, when Curt Amundson called Susan Richter at the PSC and discussed the possibility of redelivery of beans. (Tr. at 14:7 to 16:24.) There is no physical evidence in this case that any of the Growers demanded that GFB either make payment or redeliver their beans prior to November/December of 2014. The Growers sought no remedy through the PSC until December 19, 2014, when their claims were filed.

¶47 Contact with the PSC is significant because under state law, it is the PSC that is charged with the obligation to act upon a warehouse being insolvent. North Dakota Century Code § 60-04-03 provides as follows:

> "Upon the insolvency of any warehouseman, the commission shall apply to the district court of a county in which the warehouseman operates a licensed warehouse for authority to take all action necessary and appropriate to secure and act as trustee of the trust fund described in section 60-04-03.1."

Persons delivering grain to a warehouse are not empowered to commence an insolvency proceeding unless the Commission neglects to take action, but are entitled to continue to enforce the obligations of the warehouse against the property of the warehouseman. N.D.C.C. § 60-04-05. This Court has also supported the interpretation that the determination of an insolvency date as of the PSC taking formal action is consistent with the insolvency statutes. *See Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n*, 365 N.W.2d 528, 548 (N.D. 1985) (holding interest payable from date of PSC's application for appointment as trustee proper). The insolvency statutes contemplate that an insolvency is not something that is commenced or determined solely by grower action. Because the PSC must act upon an insolvency, and persons delivering grain to a warehouse only have recourse if the PSC fails to act, there is necessarily a connection between the insolvency date and contact with the PSC.

¶48 The District Court also committed factual errors when it determined GFB became insolvent in October of 2013 based upon the testimony of Duane Altendorf. Altendorf testified that he and GFB agreed in September of 2013 that he would be paid $45 per cwt. for 2000 cwt. of beans delivered and the remainder would be at the open market. (Tr. at 191:23 to 192:6.) Altendorf testified he delivered beans approximately 4800 cwt. pursuant to his alleged agreement in September of 2013 and expected immediate payment. (*Id.*) He further testified that in October of 2013, he made a demand for payment, which was refused. (Tr. at 193:1 to 197:3; 202:6 to 203:6.) However, Altendorf received a partial payment in December of 2013 for the initial 2000 cwt. (Tr. at 197:23 to 198:5.) The other testimony also indicated that Mr. Altendorf farmed with the Baldwin claimants, and ultimately delivered beans to GFB because of his connections with the

Baldwins. 193:20 to 194:8; 200:2 to 201:24.) Altendorf also testified that he never requested redelivery of the beans. (Tr. at 202:6 to 203:6.) Based upon this testimony, the Court determined that GFB was insolvent in October of 2013 at the time it refused payment to Altendorf for the all of his beans, even though Altendorf did receive a partial payment after that date.

¶49 The Court's analysis of the insolvency date does not account for the balance of the evidence in this case. With respect to Altendorf, there is no evidence that he either made a proper demand for the return of his beans or that GFB ever refused to make redelivery of the beans to Altendorf in 2013 up until November of 2014. (Tr. at 202:6 to 203:6.) Altendorf received a partial payment after his demand and the record supports the fact there was sufficient inventory of beans to meet any demand for redelivery of his beans.

¶50 The Growers never contacted the PSC alleging insolvency prior to December of 2014 because GFB continued to operate as a solvent, on-going enterprise buying and selling beans up until that time. The PSC conducted a full, routine on-site inspection of the records and facilities of GFB in February of 2014 which revealed no conditions or errors. (J.A. at 489-490.) In December of 2014, after receiving initial complaints about GFB, the PSC conducted an inspection of the facility and determined that there were sufficient beans to make redelivery to the claimant Growers. (Tr. at 81:22 to 82:3.) It was not until December 19, 2014, following a refusal by GFB to redeliver beans, that any of the Growers filed a written claim with the PSC. (J.A. at 320-327.)

¶51 It is important to note that some of the beans involved in this case were delivered after the October 15, 2013. (J.A. at 131-133, 134-136.) The effect of the Court's

determination of an insolvency date some 14 months before GFB became insolvent is clear. The market price of beans on October 15, 2013 was $38 per cwt. The market price of beans on December 19, 2014 when the Growers filed claims following a refusal to redeliver the beans was $23 per cwt. Use of the former insolvency date operates to enrich the Growers beyond the benefit of their bargain with GFB at the expense of Bremer.

3. The Court erred in determining the terms of the agreement between GFB and Grower Altendorf

¶52 The Court erred in finding Altendorf was entitled to "a gross payable of $108,369.90; 2,408.22 cwt. multiplied by $45 per cwt." Altendorf testified he verbally negotiated with GFB the sale of 2,000 cwt. of beans at $45 per cwt. and that GFB agreed to accept another 2,000 cwt. of beans at an open price. (Tr. at 191:23 to 192:6.) Altendorf testified he received payment of $45 per cwt. for 2,000 cwt. of beans as per his agreement but did not receive payment for the additional 2,408.22 cwt. which he delivered and agreed to sell for an open price. (Tr. at 197:20 to 198:5.) Finally, Altendorf testified the amount he was seeking in this case for beans for which he had not been paid was the market price for beans in October of 2013, or $38 per cwt., the exact amount he claimed he asked for from GFB in October of 2013. (Tr. at 202:16 to 203:6.)

¶53 The Court clearly erred in finding Altendorf was entitled to payment of $45 per cwt. for the additional 2,408.22 cwt. which Altendorf agreed to sell at an open price. The open price which Altendorf agreed to is the price of beans on the date of insolvency. There is no evidence supporting a finding that Altendorf is entitled to payment at a rate of $45 per cwt. for the beans for which he has not yet been paid.

4. The District Court erred in failing to offset service fees.

¶54 The Court erred in failing to offset the services fees agreed upon between the Growers and GFB. GFB had a posted policy that beans were being accepted subject to a service fee equivalent to $0.15 per month per hundredweight. (J.A. at 385.) The PLMAs which document the transactions between the Growers and GFB also provide for a service fee equivalent to $0.15 per month per cwt. (J.A. at 353, 256, 361, 362, 367, 369, 380, 381-384; Doc. # 349-356.) Ron Adams testified his agreement with GFB was to pay multiple years of service fees when beans were sold. (Tr. at 2103:23 to 312:19.) Accordingly, Bremer argues the evidence supports a finding that each Grower owes to GFB service fees calculated from the date of delivery, through the date the beans were liquidated, at the rate of $0.15 per hundredweight per month, and those offsets should reduce the amount payable to the Grower. This issue should be remanded to the District Court for a calculation of the service fees as offset.

¶55 The Court found storage fees should be offset for each Grower's claim, but only up until May 1, 2014, due to the operation of North Dakota law. N.D.C.C. § 60-02-30. (J.A. at 523-524.) Section 60-02-30 provides that "storage contracts on dry edible beans . . . terminate on April thirtieth of each year" and unless the warehouse gives certain prior notice to the person storing the grain the warehouse forfeits "storage charges accrued for the grain during the previous twelve months." The storage contract is evidenced by warehouse receipts, N.D.C.C. § 60-02-17, which none of the Growers had in this case. The PSC argued that service fees are different from a storage fees, and no regulation prohibits the charging of service fees over a multi-year period or other restrictions that apply to storage fees. (J.A. at 487-488; Tr. at 51:24 to 53:4.) In this case, the Court

clearly erred in interpretation of the statutes to determine the service fees payable by the Growers were limited. The posted notice regarding service fees, the evidence regarding multiple years of service fees being deducted when in the past when Growers has sold beans through GFB, and the fact none of the Growers had a warehouse receipt indicates the District Court misapplied the law in restricting the offset of service fees payable by the Growers.

ISSUE D: Whether The District Court Erred In Concluding That The PSC's Claim To Reimbursement For Expenses Was Superior To Bremer's Claim To Trust Fund Assets

¶56 The District Court ordered the PSC, after distributions to Growers, was entitled to a distribution from the Trust to cover its costs and expenses associated with these proceedings. (J.A. at 524-526.) The Court further ordered Bremer and GFB were entitled to a distribution of remaining Trust assets after payment to the Growers and the PSC. (J.A. at 524-526; 545-552) There is no authority which would support this order. Bremer asserted a first priority security interest in the inventory of GFB and any proceeds resulting from the sale thereof. (J.A. at 29-75.) The PSC, Growers and Bremer entered into a stipulation wherein the parties agreed that Bremer's interest in that inventory would not be affected by the sale of the beans to a third party nor by the placement of the proceeds into the Trust. (J.A. at 329-352.) Bremer asserts a first priority security interest in the bean proceeds and attempted to intervene as a party to this litigation to litigate its security interest in the proceeds. There are other assets in the Trust, namely the bond, in which Bremer does not claim. (J.A. at 29-75.) PSC cannot take its costs and expenses

out of the bean proceeds held in the Trust because the PSC has no lien or interest that is given priority over Bremer's interest. As noted above, the Court refused to allow Bremer to intervene and refused to allow Bremer to litigate the priority of its security interest versus the Growers interests, and the interest of the PSC.

¶57 While Bremer undisputedly has a security interest in the Trust assets, the PSC can make no such claim. The PSC is not a receiptholder. The PSC does not possess any type of security interest in the assets. The PSC does not claim any type of lien against any of the proceeds of the GFB inventory. There can only be a lien in favor of receiptholders under Section 60-02-25.1, no lien granted in favor of the PSC. It is admitted that the PSC is statutorily entitled to payment of its expenses out of the trust fund. N.D.C.C. § 60-04-03.1. However, these provisions do not state that the PSC's right to payment of expenses contravenes the interest or rights of others in the funds held in Trust. The Trust fund consists of the proceeds received from the sale of the beans and the bond. There is no justification to distribution of any of the bean proceeds currently held by the PSC to pay the expenses of the PSC because doing so has the effect of destroying Bremer Bank's lien rights in the proceeds. There is no law or evidence to support a finding that the PSC should be permitted to retain any of the inventory proceeds as and against Bremer. The bean proceeds held in Trust must be distributed to fully satisfy the claim of Bremer before payment of any expenses incurred by the PSC herein.

IV. Conclusion

¶58 For the forgoing reasons, Bremer respectfully requests that this Court reverse the Judgment of the District Court, determine as a matter of law that the Growers are not

receiptholders, that Bremer has a first priority lien in the bean proceeds according to law, and remand this matter to the District Court with directions to permit Bremer to intervene as a matter of right under Rule 24(a).

Dated this 13 day of December, 2016.

TRACY A. KENNEDY, ND ID # 05704
JOHN D. SCHROEDER, ND ID #07147
Zimney Foster P.C.
3100 South Columbia Road, Suite 200
Grand Forks ND 58201
Telephone: (701) 772-8111
Fax: (701) 772-7328
tracykennedy@northdakotalaw.net
jschroeder@northdakotalaw.net
Attorneys for Bremer Bank, National Association

CERTIFICATE OF COMPLIANCE

¶59 The undersigned, as one of the attorneys representing Appellant Bremer Bank, National Association, and one of the authors of the above and foregoing Brief of Appellant, hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the Brief was prepared with proportionate typeface and that the total number of words does not exceed 8,000 from the portion of the Brief entitled Statement of the Case through the signature block on page 25 above at the end of the Brief. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

Dated this 13 day of December, 2016.

TRACY A. KENNEDY, ND ID # 05704
JOHN D. SCHROEDER, ND ID #07147
Zimney Foster P.C.
3100 South Columbia Road, Suite 200
Grand Forks ND 58201
Telephone: (701) 772-8111
Fax: (701) 772-7328
tracykennedy@northdakotalaw.net
jschroeder@northdakotalaw.net
Attorneys for Bremer Bank, National Association