

## Jeffcoat-Sacco, Illona

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**Subject:** Public Service Commission v. Grand Forks Bean Company, Inc., et al Supreme Court No. 20160303 - Grand Forks Civil No. 2015-CV-00240  
**Attachments:** Letter to Clerk of ND Supreme Court.pdf; Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission.pdf; Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission.doc

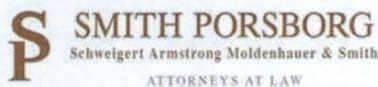
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Dear Clerk:

Attached please find the Brief of Petition, Appellee, and Cross-Appellant Public Service Commission in Word and PDF format along with a letter to the clerk with regard to the above-captioned matter. If you need anything further, please let me know. Thank you.

*Tiffany Knopik*

*Paralegal to Mitchell D. Armstrong and Scott K. Porsborg*



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\*\*\* NOTE \*\*\*

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462 GE-15-36 Filed 01/05/2017 Pages: 37  
SC APPEAL - Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission  
Public Service Commission  
Mitchell Armstrong, SAAG



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ATTORNEYS AT LAW

January 5, 2017

**VIA E-FILING: [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)**

Clerk of ND Supreme Court  
State Capitol Building  
Judicial Wing, First Floor  
600 East Boulevard Avenue  
Department 180  
Bismarck, ND 58505-0530

In re: Public Service Commission v. Grand Forks Bean Company, Inc., et al.  
Supreme Court No. 20160303  
Civil No. 18-2015-CV-00240

Dear Ms. Miller:

Attached for e-filing and the Court's consideration is Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission with regard to the above-captioned matter:

The filing fee in the amount of \$25.00 will follow via U.S. Mail.

Thank you for your assistance in this matter.

Respectfully,  
*/s/ Mitchell D. Armstrong*  
Mitchell D. Armstrong

tmk  
enclosures

cc: Daniel Gaustad (via email) (w/ enc.)  
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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Public Service Commission, )  
)  
    Petitioner, Appellee )  
    and Cross-Appellant, )  
v. )  
)  
Grand Forks Bean Company, Inc., )  
)  
    Respondent and Appellee, )  
)  
and )  
)  
Auto-Owners Insurance Company, )  
)  
    Respondent, Appellee )  
    and Cross-Appellant, )  
)  
and )  
)  
Bremer Bank, National Association, )  
)  
    Interested Party and Appellant, )  
)  
and )  
)  
Curt Amundson, )  
)  
    Interested Party, Appellee, )  
    and Cross-Appellant )  
)  
and )  
)  
Brent Baldwin, Duane Altendorf, )  
Ronald Adams, Nicholas Adams, Chuck )  
Nelson, and WJS Nelson, )  
)  
    Interested Parties and )  
    Appellees. )  
)

Supreme Court No.: 20160303  
Grand Forks Co. No.: 18-2015-CV-00240

**APPEAL FROM 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, ORDER FOR  
JUDGMENT DATED JULY 22, 2016, AND JUDGMENT DATED JULY 22, 2016**

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

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**BRIEF OF PETITIONER, APPELLEE, AND CROSS-APPELLANT PUBLIC  
SERVICE COMMISSION**

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## STATEMENT OF THE ISSUES

- I. Whether the district court erred in modifying the PSC's Report and Recommendations.
- II. Whether the district court erred in determining the status of the growers' claims.
- III. Whether the district court erred in determining the insolvency date of Grand Forks Bean Company, Inc.
- IV. Whether the district court erred in determining the amount payable to the claimants.
- V. Whether the district court erred by not determining the amount owing for Curt Amundson's claim.
- VI. Whether the district court erred by denying Bremer Bank's motion to intervene.

## I. STATEMENT OF THE CASE

[¶1] The *Judgment* arises from the insolvency proceedings of Grand Forks Bean Company, Inc. (“GFB”). App. at 549-52. The Public Service Commission (“PSC”) was appointed trustee of GFB. *Id.* at 1-28. Notice of appointment and notice to file claims was issued on March 27, 2015. Doc ID# 28. Claims were timely filed by Bremer Bank (“Bremer”), nine bean growers (Estate of Brad Nelson, WJS Nelson, Nicholas Adams, Ronald Adams, Duane Altendorf, Brent Baldwin, Baldwin Farms, Inc., and Chuck Nelson) (collectively “growers”), and Fessenden Cooperative Association on or before May 22, 2015. App. at 29-170; Doc ID# 82. Auto-Owners, as GFB’s surety, was added to the proceedings. Doc ID# 114.

[¶2] The PSC filed its Report and Recommendations on September 30, 2015. App. at 186-218. Bremer sought to intervene in the proceedings. *Id.* at 171-185. The district court denied intervention because it was unnecessary and all interested parties acknowledged Bremer’s ability to participate fully. *Id.* at 221; *see also Intervention Hearing Tr.* at 14:17-15:8 (Nov. 19, 2015). Bremer also objected to the PSC’s report. Doc ID# 223. The growers filed amended claims and objections to the PSC’s report. App. at 222-319; Doc ID## 217, 219, 221. A hearing on the PSC’s report occurred on March 14-15, 2016. *Evidentiary Hearing Tr.* (Mar. 14-15, 2016). Following the hearing, the district court issued its *Order Modifying Trustee’s Report and Recommendations*, *Order Correcting Clerical Mistake/Oversight*, and *Order Resolving Post-Hearing Issues*. App. at 492-544. *Judgment* was entered, and the district court denied Auto-Owner’s motion for post-judgment relief. *Id.* at 549-552, 559-560. The PSC requests the *Judgment* be reversed insofar as it modified the PSC’s report.

## II. STATEMENT OF FACTS

### A. Introduction

[¶3] The two most impactful issues on appeal are: 1) whether the growers had credit-sale contracts with GFB; and 2) what is the insolvency date. The first issue affects whether the claims are paid from the insolvency trust fund under N.D.C.C. ch. 60-04 (“trust fund”) or the credit-sale contract indemnity fund under N.D.C.C. ch. 60-10 (“indemnity fund”). The insolvency date affects the price for the growers’ beans to the extent a claim is paid from the trust fund. The PSC’s report recommended all growers be considered receiptholders paid from the trust fund, and an insolvency date of December 19, 2014, with a corresponding price for the growers’ beans of \$23 per hundredweight (“cwt”). App. at 203-17. The *Judgment* determined eight of the growers were receiptholders and one grower, Amundson, had a credit-sale contract. *Id.* at 549-51. The district court concluded it did not have subject matter jurisdiction to determine the amount of Amundson’s indemnity fund claim. *Id.* at 551 (¶12).

[¶4] The district court concluded the insolvency date was October 15, 2013, resulting in a price for the beans of \$38 per cwt. *Id.* at 520-23. Despite this, the district court made several adjustments to the pricing of the respective growers’ beans, and as a result, some growers received less than \$38 per cwt and Altendorf received \$45 per cwt. *Id.* The ultimate effect of the district court’s decision is that \$770,190.00 plus accumulating interest and half the PSC’s expenses is to be paid from the trust fund. *Id.* at 549-50. The PSC had recommended \$652,747.92 plus fees and expenses be paid from the trust fund, which included a recommended payment to Curt Amundson. *Id.* at 388;

537-544. Through February 2016, there was \$768,053.24 in the trust fund. Doc ID# 228.

[¶5] Other issues on appeal include the district court's decision not to determine the value of Amundson's claim and the district court's ruling on Bremer's motion to intervene. As these issues are more procedural, the relevant facts relating to these issues will be included in the argument section as applicable, and the PSC's statement of facts below will focus primarily on the status of the growers' claims and insolvency date/price issues.

**B. Background of Grand Forks Bean Company, Inc.**

[¶6] GFB became a licensed grain<sup>1</sup> warehouse in October 2005, and was operated by Todd McGurk. Doc ID# 271 & *Tr.* at 10:8-9 (Mar. 14, 2016). As part of the licensure process, GFB was required to submit certain documents to the PSC, including copies of any credit-sale contract used. N.D. Admin. Code § 69-07-02-01. In April 2006, Todd McGurk faxed a copy of a *Delayed Pricing Grain Purchase Contract* to the PSC. *Tr.* at 13:6-14:6 & Doc ID# 272. This was the only credit-sale contract form ever submitted by GFB to the PSC. *Tr.* at 14:4-6.

[¶7] At some point, GFB began using a different form that was titled "*Price Later Marketing Agreement*" ("PLMA"). See, e.g., App. at 353; *Tr.* at 115:17-25. In relevant part, the PLMA form contains the following terms:

1. The company [GFB] will accept, to the extent of its plant capacity to handle them, U.S. No. 1 and U.S. No. 2 Pinto Beans with a moisture content not over 15% grown and delivered to it by

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<sup>1</sup> "Grain" includes "beans" and as discussed in this brief the two will be synonymous. N.D.C.C. § 60-02-01(3).

grower. Upon delivery of the pinto beans to the company plant, a receiving ticket will be issued to the grower and the issuing of the ticket will thereupon transfer title of the pinto beans to the company.

2. The beans delivered will be priced before July 1, 2014. On those pintos on which to Grower Prices, the price will be the posted market price on the date of pricing.
3. The company reserves the right to withdraw from the market due to slow market conditions from time to time.
4. Checks for the pinto beans will be issued only on growers request.
5. Signing this agreement does not automatically put your beans under this Marketing agreement. It is necessary for you to notify the company at the time each truck is delivered.
6. [title warranty]
7. [non-assignability]
8. Service fee of [] per cwt applies.

See, e.g., App. at 117.

[¶8] In August 2014, Todd McGurk died and his brother, Tad, took over GFB's operations. *Tr.* at 12:22-13:5. On November 18, 2014, the PSC's Licensing Division Director, Sue Richter, received a phone call from Amundson in which he expressed concerns with GFB. *Tr.* at 14:7-18 & Doc ID# 276. Amundson sent Richter a copy of a PLMA he signed. *Tr.* at 14:21-15:3; App. at 117. Richter contacted Tad McGurk and received copies of assembly sheets and additional PLMAs related to other growers whose beans were at GFB. *Tr.* at 15:12-24. Subsequently, Richter had several conversations with the growers related to GFB, which primarily involved the growers expressing concerns about getting paid and/or getting their beans from GFB. *Tr.* at 16:18:18 & Doc ID# 276.

[¶9] In December 2014, the growers presented a written demand to Tad McGurk to return their beans. App. at 389. It was known by this time that GFB had enough beans in its warehouse to fully redeliver beans to all the growers. Tr. at 16:3-10. The growers' beans were not redelivered, and beginning December 19, 2014, the growers submitted written claims to the PSC against GFB. Id. at 18:15-19:1; App. at 320-27. In order to ensure the beans would remain properly stored at GFB's warehouse, the PSC and GFB entered a stipulation. App. at 349-51; Tr. at 19:8-14. As it became clear the issues could not be resolved outside of an insolvency proceeding, the PSC took the more formal action of issuing an *Ex Parte Cease and Desist Order* on January 16, 2015. App. at 328; Tr. at 20:15-23. An agreement was ultimately reached between the growers, Bremer, the PSC, and GFB to sell the beans. App. at 329-52.

[¶10] In February 2015, the beans were sold to Central Valley Bean. Tr. at 22:2-24:1; Doc ID# 287. The net amount of beans sold was 33,439.68 cwt of pintos and 651.07 cwt of pinto splits. Id. & Tr. at 23:10-14. The proceeds from the sale were deposited in the Bank of North Dakota and the balance of the trust fund as of February 29, 2016, was \$768,053.24. Id. at 23:23-24:18; Doc ID# 228.

### C. Insolvency Proceedings

[¶11] On February 13, 2015, the PSC moved for appointment as trustee, and the *Amended Order Appointing Trustee* was entered on March 25, 2015. App. at 14-28. The PSC's report was filed on September 30, 2015. App. at 191-218. Bremer and the growers objected to the PSC's report. The primary issues in the objections were the status of the PLMAs with respect to the growers and the date of insolvency/price for the beans.

[¶12] The unpaid beans at issue were delivered to GFB between September 2010 (App. at 144) and April 15, 2014 (App. at 132). The total claimed amount of beans delivered by the growers to GFB was 31,175.79 cwt, divided as follows:

Estate of Brad Nelson (Beth Nelson)	1,810.44 cwt
Brent Baldwin	2,220.35 cwt
Baldwin Farms, Inc.	1,005.72 cwt
Duane Altendorf	2,408.22 cwt
Curt Amundson	12,128.28 cwt
Chuck Nelson	1,315.08 cwt
WJS Nelson	1,600.91 cwt
Nicholas Adams	908.55 cwt
Ronald Adams	7,778.24 cwt

It was undisputed the market price of the beans was \$38 on October 15, 2013; \$30 on May 31, 2014; and \$23 on December 19, 2014. At the hearing, testimony was presented from Richter and Tim Erdmann of the PSC, all of the growers, and a Bremer representative. All of the growers except WJS Nelson had a PLMA associated with them on file with GFB. However, the growers disagreed that the PLMAs applied to their claims because, with the exception of Amundson, the growers had not signed the PLMAs or otherwise agreed to the terms of the respective PLMA.

[¶13] The district court concluded all of the growers except Amundson were receiptholders entitled to payment from the trust fund. App. at 503-14. The district court determined Amundson was a credit-sale claimant because he signed a PLMA. Id. at 508. The district court held the insolvency date of GFB was October 15, 2013, based on Altendorf's claim. Id. at 514-20. The district court concluded Altendorf demanded full payment for his beans sometime in October 2013, and because GFB did not pay him at that time, October 15, 2013, was the insolvency date. Id. at 519-20. Based on this insolvency date, the price for the beans on the insolvency date was \$38 per cwt. Id. However, the district court concluded the price for Brad Nelson's beans was \$33 per cwt

based on a dry bean contract; WJS Nelson's beans were \$35 per cwt based on the testimony of Steve Nelson that the beans were sold to GFB for that price; and Duane Altendorf's beans were priced at \$45 per cwt. *Id.* at 522-23. The remaining growers' beans were priced at \$38 per cwt. *Id.* at 530-32.

[¶14] After the district court's decision, the PSC requested it to determine the amount owed to Amundson from the indemnity fund. Doc ID## 381-83. At the hearing on the PSC's motion, the district court stated it had determined the amount of Amundson's claim to be \$243,175.11 but was not sure whether the amount of Amundson's credit-sale claim could be decided in these proceedings. *Tr.* at 4-5 (July 1, 2016). In its subsequent written order, the district court concluded it did not have subject matter jurisdiction to determine the amount of Amundson's credit-sale claim. *App.* at 538-42. The PSC requests the *Judgment* be reversed as explained below.

### III. APPLICABLE LAW AND ARGUMENT

#### A. Whether the district court erred in determining the status of the growers' claims.

[¶15] The PSC and the growers asserted the growers' claims were as receipt holders and not credit-sale claimants. The growers' claims were all supported by scale tickets, which had not been converted to cash, noncredit-sale contracts, credit-sale contracts, or warehouse receipts within forty-five days after the beans were delivered to GFB. *See* N.D.C.C. § 60-02-11(1) (2013).<sup>2</sup> The PSC and growers asserted the PLMAs at issue were not credit-sale contracts. This position was partially based on N.D.C.C. §

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<sup>2</sup> All beans at issue in this case were delivered to GFB prior to statutory changes to N.D.C.C. § 60-02-11 effective August 1, 2015.

60-02-19.1 and a district court decision in another insolvency. See Doc. ID# 156 (*Findings of Fact, Conclusions of Law, and Order, Public Service Comm'n v. Grabanski Grain, LLC, and Platte River Ins. Co.*, Case No. 50-2011-CV-00029). Bremer argued the growers were credit-sale claimants, and the requirements of N.D.C.C. § 60-02-19.1 were regulatory and not requirements for determining whether a claimant is a receipt holder or credit-sale claimant in an insolvency. The district court accepted Bremer's legal argument, but concluded Amundson was the only credit-sale claimant because the other growers with PLMAs did not satisfy the writing and signature requirements of the UCC. App. at 494-514.

[¶16] The district court's decision creates a split between the two district courts which have addressed this issue. If the district court in this case is correct, the PSC does not contest its determination that eight of the growers are receipt holders entitled to payment from the trust fund, while Curt Amundson is a credit-sale claimant entitled to payment from the indemnity fund. On the other hand, if the Grabanski court's analysis is correct, all of the growers would be receipt holders entitled to payment from the trust fund. In his appeal, Amundson urges the Court to adopt the position in Grabanski. While the PSC's position below was consistent with the Grabanski decision, it also recognizes the issues discussed by the district court regarding strict application of N.D.C.C. § 60-02-19.1. See App. at 497-500. Overall, the PSC's position is that, regardless of which legal analysis is correct, the evidence did not demonstrate that any of the growers validly entered into a credit-sale contract entitling them to payment from the indemnity fund with the possible exception of Curt Amundson based on the fact that he signed a PLMA with GFB.

1. Whether all of the N.D.C.C. § 60-02-19.1 requirements must be met in order to have a credit-sale contract that falls outside the insolvency trust fund.

[¶17] The crux of the different legal positions on this issue is the application of N.D.C.C. § 60-02-19.1 to the determination of whether a claimant has a credit-sale contract in an insolvency. With the exception of WJS Nelson, all of the growers had PLMAs associated with them found in GFB's records. Bremer's objection was that the PLMAs created valid and enforceable credit-sale contracts. The growers denied entering into the PLMAs and asserted they were receiptholders. Curt Amundson was the only grower who acknowledged ever signing a PLMA with GFB at any time. *Tr.* at 213:20-22; *App.* at 380. Brent Baldwin testified it appeared one of his truck drivers signed the PLMAs for him and Baldwin Farms without his authorization. *Tr.* at 330:13-334:1; *App.* at 361, 367.

[¶18] Credit-sale contracts have never been paid under the trust fund established by N.D.C.C. ch. 60-04. Prior to 2003, growers who had credit-sale contracts were simply outside any insolvency procedure. In 2003, the credit-sale contract indemnity fund was created under N.D.C.C. ch. 60-10. After 2003, upon insolvency of a grain warehouse, valid credit-sale contracts are paid from the credit-sale contract indemnity fund. N.D.C.C. §§ 60-10-02, -04, -05, -06. Bremer asserts the growers had credit-sale contracts, and therefore, to the extent there was a PLMA in connection with any grower, that grower does not have the preferred lien as a receiptholder under N.D.C.C. § 60-02-25.1.

[¶19] As set out in N.D.C.C. §§ 60-02-01(2) and 60-04-01(2):

“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. If a part of the sale price of a contract for the sale of grain is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract.

Any contract that does not meet the above criteria is a noncredit-sale contract. N.D.C.C. § 60-02-01(4).

[¶20] Section 60-02-19.1, N.D.C.C., sets out several conditions required of a credit-sale contract. These conditions include that all credit-sale contracts must be in writing, consecutively numbered at the time of printing the contract, and include the following:

1. The seller's name and address.
2. The conditions of delivery.
3. The amount and kind of grain delivered.
4. The price per unit or basis of value.
5. The date payment is to be made.
6. The duration of the credit-sale contract.
7. Notice in a clear and prominent manner that the sale is not protected by the bond coverage provided for in section 60-02-09. However, if the warehouseman has obtained bond coverage in addition to that required by section 60-02-09 and such coverage extends to the benefit of credit-sale contracts, the warehouseman may state the same in the credit-sale contract along with the extent of coverage.

N.D.C.C. § 60-02-19.1. A credit-sale contract must also be signed by both parties and executed in duplicate (with one copy retained by the warehouseman and the other delivered to the seller). *Id.* In Grabanski, the district court held the foregoing conditions must be strictly followed in order to have a valid credit-sale contract. *See Findings of*

*Fact, Conclusions of Law, and Order, Public Service Comm'n v. Grabanski Grain, LLC, and Platte River Ins. Co.*, Northeast Judicial District Case No. 50-2011-CV-00029, at pp. 5-6 (Doc ID# 156).

[¶21] Section 60-02-19.1 provides, “[a] warehouseman shall not purchase grain by a credit-sale contract except as provided in this section.” In other words, complying with that statute is the only way to purchase grain under a credit-sale contract. Therefore, under the plain language of the statute, a credit-sale contract does not exist if all elements of N.D.C.C. § 60-02-19.1 are not satisfied. In Grabanski, the district court provided the following reasoning consistent with the PSC’s recommendation in this case:

In addition to the definition provided [in N.D.C.C. § 60-02-01(2)], NDCC 60-02-19.1 sets out several conditions required of a credit-sale contract. Not only must it be in writing, but the statute sets out seven requirements that must be present within the written contract. Further, the statute provides that, “*the contract must be signed by both parties . . .*” Id. From the language of NDCC 60-02-19.1, the absence of a signature by both of the parties to the contract precludes it from otherwise constituting a credit-sale contract. The statutory language requires that a credit-sale contract be manifested by not only written form but by the signature of both parties. To conclude otherwise requires this Court to disregard what the legislature set out as the requirements to create an enforceable credit-sale contract. So, any claim manifested by a document not signed by both parties can never constitute a credit-sale contract regardless of the language in the unsigned contract.

Grabanski, at ¶ 19, p. 6. The PSC’s report took into consideration the Grabanski decision as well as the legislative history of the creation of the credit-sale contract indemnity fund.

[¶22] The testimony for HB 1197, which enacted the credit-sale contract indemnity fund, includes the following:

REP. BELTER: A lot of farmers sell grain and 'the manager asks do you want a check or do you want to defer it. The farmer says I don't know. So it just sits there. Is that grain covered under those circumstances?

JON MIELKE. In that case it would be covered because for the credit sales contract to be valid, it must be signed. This is something that the PSC fought hard for in Federal Court In (sic) the Wembelton (sic) case. There were a number of contracts where that had been exactly that kind of a discussion between the warehouse and the farmer and the contracts had not been signed. We went to court. An unsigned contract is not a contract. It is open storage. Something that are (sic) warehouse inspectors look for when they go out and we advise the warehouseman. If the farmer dose (sic) not come in an (sic) sign a contract, the elevator should do one of two things. Either Put (sic) the grain on a warehouse receipt and start charging storage or cut a check to the farmer. So the farmer can't have the best of both worlds. Just hang out there in open storage indefinitely.

Something has to happen within thirty days.

REP. BELTER If it goes beyond those thirty days is it still covered by bond?

JON MIELKE: You are still covered until the contract is signed but at that time it is incumbent on the warehouseman to get back in touch with the farmer and say we have to do something with this. It can (sic) just sit there. Get a signed contract or issue a check. The warehouseman has to force the issue. If there is not a signed contract there is bond protection.

REP. BELTER: Why can (sic) we just run this under a bond or is there no bonding company that will do that. I have heard in the past it cost to (sic) much to do that but we are incurring the cost throughout this method.

JON MIELKE: That is exactly what the PSC proposed four years ago. We did have a larger bill that resulted in the passage in Chapter 1602.1 (sic) of the Century code. The PSC did have a section in there that would have required bond coverage on credit sale contracts. I believe the estimate at that time would cost the industry .06 cents per bushel. So it was very expensive insurance. The real down side with that proposal is that there would be a number of elevators that would not be able to get bonded. They would not be considered a solid enough risk to get a bond at any rice (sic). This would really weaken the overall structure of the industry.

Hearing on HB 1197 before the H. Agriculture Comm., 1/23/03, 58th Assembly (N.D. 2003) (statements of Rep. Belter and Jon Mielke) at p. 5-6 (Doc ID# 240) (emphasis added).

[¶23] Neither N.D.C.C. § 60-04-01(2) nor § 60-02-01(2) contains an explicit signature requirement. The signature requirement for a credit-sale contract is found in N.D.C.C. § 60-02-19.1, which provides the “contract must be signed by both parties.” Further, it was held under the pre-2003 law that a signature by a representative of the elevator is not sufficient. United States of America v. Wimbledon Grain Co. et al, Civil No. A3-02-46, (D.N.D. 2002) (Doc ID# 241). In Wimbledon Grain Co., the court determined the only means by which a contract can be classified as a credit-sale contract is when the actual seller, not a representative of the elevator, signs the contract. Id. at pp. 1-2. As a result, the PSC recommended that in order to be considered a credit-sale contract and participate in the credit-sale contract indemnity fund, all of the requirements of N.D.C.C. § 60-02-19.1 must be met.

[¶24] The PLMAs at issue here do not meet the requirements of N.D.C.C. § 60-02-19.1. Several provisions are not included in these agreements, including a date on which payment is to be made, a duration, and a price per unit or basis of value. Below, no party really contested whether these requirements were met. As a result, if the requirements of N.D.C.C. § 60-02-19.1 apply, then there were no credit-sale contracts in this case.

[¶25] On the other hand, the district court agreed with Bremer’s legal argument that the requirements of N.D.C.C. § 60-02-19.1 were not necessary to establish a credit-sale contract in an insolvency. App. at 494-500. Instead, the district court concluded only the requirements of N.D.C.C. § 60-04-01(2) need be satisfied. Id. at 500 (¶¶ 19-20). The district court then evaluated each claim and concluded seven growers with associated PLMAs did not have credit-sale contracts because there was not an exception to the UCC

statute of frauds. *Id.* at 503 (¶26–Estate of Nelson), 506 (¶32–Brent Baldwin/Baldwin Farms), 507 (¶35–Duane Altendorf), 510 (¶44–Chuck Nelson), 511–12 (¶48–Nicholas Adams), and 512 (¶51–Ron Adams). WJS Nelson’s beans were only documented by scale tickets, which the district court concluded did not satisfy the requirements of a credit-sale contract. *Id.* at 511 (¶45). For Amundson, the district court concluded the PLMA satisfied the requirements of N.D.C.C. § 60-04-01(2), was signed by him, and was specifically referenced when he made his claim. *Id.* at 500 (¶¶ 19-20) & 508 (¶¶ 37-38).

2. Whether the district court correctly determined the status of the growers’ claims and the PSC’s expenses in relation to Bremer’s security interest.

[¶26] The PSC does not contest the district court’s determinations on which claimants were credit-sale claimants if the district court was correct that the requirements of N.D.C.C. § 60-02-19.1 do not apply. If the district court’s legal analysis was correct, then those determinations are fact questions from which the PSC believes there was evidence supporting the district court’s decision whether the growers were credit-sale claimants or receiptholders. If the district court’s legal analysis was incorrect and the requirements of N.D.C.C. § 60-02-19.1 are required in order to be considered a credit-sale claimant, then all of the growers should have been determined to be receiptholders as the PLMAs did not satisfy the N.D.C.C. § 60-02-19.1 requirements. Therefore, if the Court determines the requirements of N.D.C.C. § 60-02-19.1 must be met in order to be a credit-sale claimant, the *Judgment* must be reversed to recognize Curt Amundson is also a receiptholder. The issue remains, however, what relationship those claims have with respect to Bremer’s security interest.

[¶27] Bremer argues its security interest is superior to the growers' interest in the beans. Bremer's argument is directly contrary to the applicable law. "Grain contained in a warehouse, including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receiptholders storing, selling, or depositing grain in the warehouse." N.D.C.C. § 60-02-25.1. A "receipt" includes "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. § 60-04-01(6). The trust fund is "established for the benefit of noncredit-sale receiptholders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of" chapter 60-04. Bremer is not a valid receiptholder as it never delivered any grain to GFB. See Public Service Comm'n v. Valley Farmers Bean Assoc'n, 365 N.W.2d 528, 540 (N.D. 1985) (concluding the legislature did not intend that the trust provisions could be defeated by a lender taking a security interest in a grain warehouseman's inventory and that valid receiptholders have priority). Under the law, any grower that is not a credit-sale claimant has first priority as a receiptholder to the trust fund over Bremer.

[¶28] Likewise, Bremer's argument that its security interest supersedes any claim by the PSC to its expenses for administering the trust is also flawed. Section 60-04-10, N.D.C.C., is clear that the PSC is entitled to recover its costs and expenses in this action from the trust fund. It provides in relevant part:

The attorney general may employ outside legal services to assist the commission in the prosecution of such action as in the attorney general's judgment may be necessary and may deduct the expense of the same from the trust fund. All other necessary expenses incurred by the commission in carrying out the provisions of this chapter, including adequate insurance

to protect the commission, its employees, and others engaged in carrying out the provisions of this chapter, may be deducted from the trust fund.

(emphasis added). Further, N.D.C.C. § 60-04-03.1 provides the “trust fund shall be established for the benefit of noncredit-sale receiptholders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of this chapter.”

(emphasis added). The plain language of N.D.C.C. § 60-04-10 establishes the expenses of the Commission are to be deducted from the trust fund. See also N.D.C.C. § 60-04-09 (providing the PSC’s report must contain a proposed distribution of the trust fund assets “less expenses incurred by the commission in the administration of this chapter”). As explained above, Bremer is not a receiptholder, and therefore does not have a claim to the trust fund. A plain reading of the statute supports that the PSC’s cost and expenses must be taken from the trust regardless of Bremer’s lien position.

[¶29] Overall, the law is clear that Bremer’s security interest has lower priority than claims of any valid receiptholders, which the growers in this case are. Further, the administration of the trust fund is paid from the trust. It is only after the trust is concluded, that Bremer would have a claim to anything remaining.

**B. Whether the district court erred in determining the insolvency date and the amount of the growers’ claims.**

[¶30] The district court determined October 15, 2013, was the date GFB was insolvent. App. at 514-20 (¶¶55-74). The court reached this conclusion by evaluating each claim and an insolvency date based on each claim. Id. The court determined the insolvency date would be November or December 2014 based on the claims of Baldwin/Baldwin Farms, Chuck Nelson, Nicholas Adams, Ronald Adams, and Brad Nelson’s estate. Id. at 516-18 (¶¶62-68). The court determined the insolvency date

would be May/June 2014 for WJS Nelson. Id. at 518-19 (¶70). However, the court chose October 15, 2013, as the applicable insolvency date based on Duane Altendorf's claim. Id. at 519-20 (¶¶ 71-74). In doing so, the court misapplied the law and made erroneous findings of fact.

[¶31] Pursuant to N.D.C.C. § 60-04-02, “[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 redelivery or payment for grain stored.” The statute addresses two situations, one where the warehouse does not pay for grain that has been purchased/marketed and one where the grain is being stored. The PSC asserts the latter part of the statute is applicable here because GFB never purchased or marketed the growers' beans. The beans at issue can only be considered held as open storage because conversion had not taken place. See N.D.C.C. § 60-02-11(1) (2013); see also *Tr.* at 59:21-60:1; 68:11-21; 118:2-11; 308:12-13. Therefore, the statutory language applicable to the analysis in this case is, “A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand . . . to make redelivery or payment for grain stored.”

[¶32] Under this language, the warehouseman can redeliver or make payment for grain stored to avoid being insolvent. At all times in this case, GFB had enough beans to make redelivery. In fact, the amount of beans sold to Central Valley Bean exceeded the amount of beans claimed by the growers. Under the language of the statute, after a proper demand, the warehouseman can either redeliver or make payment for stored grain. The growers' testimony was that each of them called and requested their beans be sold at various different times and at various different intervals. Of all the

growers, the testimony of Ron Adams was the earliest such call. He testified that he requested his 2010 beans be sold sometime in October 2011 along with his 2008 and 2009 beans that were being stored. *Tr.* at 308:21-309:15. Yet, he then delivered beans in 2012 and was paid for those beans. Id.

[¶33] By October 15, 2013, eight of the nine growers had delivered the beans at issue. Several growers subsequently received payments for beans in December 2013 and January 2014 under dry bean contracts. WJS Nelson then delivered beans to GFB in April 2014. It is contrary to the insolvency statute to conclude GFB was insolvent at a time before the growers were still getting paid and before all the growers delivered beans. It is also contrary to the statute to establish an insolvency date when, at all times, there were sufficient beans to accomplish redelivery.

[¶34] The PSC agrees with the district court that the statute provides for one insolvency date. At a point in time, a licensee is insolvent or it is not. A warehouseman's solvency or insolvency does not hinge upon what a customer may call and request at any particular moment. Rather, the statute envisions insolvency as a point where a "proper demand" is made and the warehouseman neglects, is unable, or refuses to meet its obligation, rather than a customer's desire to get paid a certain price on a certain date. A proper demand would include a demand for something the person is actually entitled to and the warehouseman is bound to accomplish. In this case, there is no support for an insolvency date prior to December 19, 2014, as GFB consistently had sufficient beans to accomplish redelivery in full to all the growers.

[¶35] The importance of the December 2014 date is established by the evidence. While many of the growers may have called GFB and made various requests to have their

beans sold and/or to get paid, the evidence does not support an entitlement of the growers' or an obligation of GFB with respect to these requests. The growers did not point to any agreement requiring GFB to act upon the asserted requests to sell or pay for their beans. Further, even if they had been entitled to payment, the statute also provides the warehouseman with the option of redelivery.

[¶36] In this case, the growers did not request, and therefore GFB did not refuse, to have the beans redelivered until late 2014. The growers began calling the PSC on November 18, 2014, and expressing concerns about GFB. Ultimately, the growers presented GFB with a joint written demand to transfer the beans to another facility in late November or early December 2014. App. at 389; Tr. at 232:21-233:21. In addition, December 19, 2014, was the first date a claim was filed with the Commission related to GFB. App. at 320. An insolvency date of December 19, 2014, is also consistent with other statutory provisions which envision the filing of a claim precipitating an insolvency. See N.D.C.C. § 60-04-03.1(2) (including the proceeds from any grain sold “from the time of filing of the claim that precipitated an insolvency”).

[¶37] Further, to the extent the insolvency date is unclear, this Court has upheld an interest award (which is based on the insolvency date) from the date the PSC filed an application for appointment as trustee. North Dakota Public Service Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d. 528, 548 (N.D. 1985) (holding the district court did not err in directing interest to accrue from the date of filing when “it is unclear when VFBA first failed to redeem a receipt, it was not later than the date the PSC filed an application for appointment as trustee along with supporting documents indicating VFBA’s insolvent status.”) The PSC’s position on the insolvency date is also supported

by and consistent with N.D.C.C. § 60-02-41 as argued by Auto-Owners. In relevant part, that statute provides, “[w]hen a public warehouseman ceases business through destruction . . . , or through insolvency, such warehouseman shall redeem all outstanding unconverted scale tickets or warehouse receipts at the price prevailing on the date the warehouse was destroyed or closed because of insolvency.” Given the foregoing, it is inconsistent with the statutory scheme to have an insolvency date of October 15, 2013, in this case.

[¶38] Instead, GFB became insolvent when it was unable/refused to redeliver the beans to the growers and ceased doing business in December 2014. The PSC requests the *Judgment* be reversed insofar as it determined GFB was insolvent on October 15, 2013, or any other time prior to December 2014. As a result of the incorrect insolvency date, the case must be remanded to re-determine the value of the growers’ claims under the correct insolvency date.

**C. Whether the district court erred in valuing Altendorf’s claim.**

[¶39] Even if the district court did not err in determining the insolvency date, it erred in valuing Duane Altendorf’s claim. The district court’s error in evaluating Altendorf’s claim is also what ultimately resulted in the incorrect insolvency date. Duane Altendorf delivered 4,408.22 cwt of beans to GFB on September 23 and 24, 2013. App. at 370-79. He was paid \$45 per cwt for 2,000 cwt on December 31, 2013, leaving 2,408.22 cwt for which he had not been paid at the time of insolvency. *Tr.* at 197:23-198:5.

[¶40] Altendorf submitted a claim for 2,408.22 cwt at a price of \$38 per cwt based on the claimed October 15, 2013, insolvency date. App. at 265. Similarly, at the

hearing Altendorf testified he sold 2,000 cwt at \$45 per cwt and the rest at “open market or market price.” *Tr.* at 192:1-3 (Mar. 14, 2016). He testified he was seeking \$38 per cwt for his remaining beans. *Id.* at 199:4-11. He also testified that he specifically asked for his beans to be sold at \$38 per cwt in October 2013, but was told by GFB there was not a market at that time. *Id.* at 202:16-24.

[¶41] Despite the fact that Altendorf specifically testified he was seeking \$38 per cwt and the remaining beans were delivered at an “open” price, the district court valued his claim at \$45 per cwt. *App.* at 508 (¶36). Further, despite the fact Altendorf testified he sold the remaining beans at an “open market or market price”, the district court determined Altendorf’s claim was for immediate payment and used this as the basis for determining the insolvency date of October 15, 2013. *App.* at 523 (¶ 81). The district court clearly erred in making such a determination as it was contrary to what Altendorf testified about his agreement with GFB. As a result, the *Judgment* must be reversed insofar as the insolvency date and the amount of Altendorf’s claim was based on clear error in the district court’s evaluation of Altendorf’s claim.

**D. Whether the district court erred by not determining the value of Curt Amundson’s claim.**

[¶42] After the district court issued its order modifying the PSC’s report, the PSC requested a determination of the value of Amundson’s claim for payment from the indemnity fund. *Doc ID## 381-83*. The PSC requested the court order Amundson be paid \$240,496.41 from the indemnity fund. *Doc ID# 383 (¶6)*. In his response, Amundson asserted lack of subject matter jurisdiction and alternatively requested payment of \$280,000 plus interest. *Doc ID# 401 (¶¶ 3, 7)*. At the hearing on the PSC’s motion, the district court indicated it had calculated the amount of Amundson’s claim,

but removed it from the order because that type of claim was from a different fund and not part of these proceedings. *Motion for Additions Tr.* at 4:18-5:6 (July 1, 2016). The district court had calculated Amundson's claim at \$243,175.11, using a similar method as the PSC. *Id.* at 5:11-20. The district court indicated it would not rule on the issue without Amundson's consent, which was not given. *Id.* at 5:5-10; 6:20-7:3.

[¶43] In its subsequent written order, the district court stated, if Amundson had recognized he had a credit-sale claim, his claim would have been decided administratively for compensation from the indemnity fund. *App.* at 539 (¶6). The district court also indicated the notice appointing the PSC only referenced the insolvency trust fund and did not refer to N.D.C.C. ch. 60-10. From this, the district court concluded that had Amundson not filed a claim to the trust fund, he would have otherwise been eligible to submit an administrative claim to the PSC for payment from the indemnity fund. *Id.* at 539-40 (¶7). As a result, the district court did not rule on the amount to be paid to Amundson.

[¶44] The district court had subject matter jurisdiction and misapplied the law in reaching its determination that it could not determine the amount of Amundson's claim under the indemnity fund. Section 60-10-13, N.D.C.C., provides that claims under the indemnity fund are administered in a manner consistent with Chapter 60-04. There is no other provision in the N.D.C.C. or the N.D. Admin. Code providing further guidance or procedure on these issues. While the district court discussed an administrative remedy for Amundson, it did not cite any authority for such a procedure (there is none), and did not explain how that would be consistent with N.D.C.C. ch. 60-04, which envisions district court proceedings as have occurred in this case. See N.D.C.C. § 60-04-03.

[¶45] Further, the district court relied on the PSC's notice of appointment as trustee as not including reference to the N.D.C.C. 60-10 indemnity fund. However, there is no appointment necessary with the indemnity fund. Rather, the *Notice of Appointment as Trustee* accurately stated the PSC had been appointed as trustee pursuant to N.D.C.C. ch. 60-04. Doc ID# 28. This was the only reference to the trust fund in the notice and is accurate. There is no separate appointment as trustee associated with claims under the indemnity fund as the PSC's role with respect to the indemnity fund is statutorily established by N.D.C.C. § 60-10-02. The *Notice* further provided that "any person having a claim against [GFB] for the non-payment of grain purchased or marketed [by GFB] shall file a claim with the Public Service Commission." *Id.* The notice was not limited to claims only for the trust fund, but for any claims. Therefore, the notice would implicate claims under the indemnity fund.

[¶46] Further, in the PSC's filings associated with its report, it included reference to the N.D.C.C. § 60-10-02 and -04, eligibility for payment from the indemnity fund, as well as an analysis of whether the claims were credit-sale claims. *See, e.g.,* App. at 189 (¶4-5); 199 (¶32); 205 (¶¶ 44-47). While the PSC was not recommending payment from the indemnity fund in its report, the primary issue was whether the growers had credit-sale contracts or were receiptholders (i.e. which fund they should be paid from). No party objected to the district court deciding this issue. The only objection was to deciding the amount of Amundson's claim after he was determined to be a credit-sale claimant. However, a full evidentiary hearing had been held on Amundson's claim consistent with Chapter 60-04, which is how the amount of a claim is to be determined under the indemnity fund. The district court had subject matter jurisdiction to rule on the

amount of Amundson's claim pursuant to N.D.C.C. § 60-10-13, had all the evidence available to it, and had actually calculated the amount of Amundson's claim. There is no additional procedure defined in the law, and no support for the proposition that Amundson's claim be decided administratively. The majority of this litigation was spent addressing whether the growers' claims were from the trust fund or the indemnity fund. There is no reason to delay a determination of the value of Amundson's claim by requiring a separate proceeding when the proceedings have already been administered "consistent with Chapter 60-04." N.D.C.C. § 60-10-13. Accordingly, if the district court's decision that Amundson is a credit-sale claimant is upheld, this case should be remanded to the district court to determine the amount payable to Amundson from the indemnity fund.

**E. Whether the district court erred by denying Bremer's motion to intervene.**

[¶47] The district court did not err by denying Bremer's motion to intervene. Even if the district court had erred, any error would be harmless as Bremer was allowed to make and assert all arguments and participate fully in the proceedings. When Bremer attempted to intervene, it sought to add a contract claim against GFB and a declaratory action against the PSC to assert that its claim had priority. App. at 171-85. The PSC and the growers objected on the grounds that intervention was not necessary and they did not want to be parties to Bremer's litigation with GFB. Doc ID## 135, 137, 143, 146. At the hearing on the motion, Bremer agreed it would eliminate its cross-claim against GFB. *Intervention Tr.* at 12:16-23. As a result, the remaining issue was priority of Bremer's lien in relation to the trust fund. Bremer fully litigated this issue, and no party ever objected to Bremer asserting arguments in this case. In other words, while the parties'

positions were adverse, none of the parties or the court ever precluded Bremer from asserting its position because it had not intervened.

[¶48] At the hearing on Bremer's motion to intervene, PSC counsel expressly stated, "I haven't heard an argument from Bremer Bank today that they couldn't make in the normal course of their objection to our report. I think this is all fair game . . . every argument Bremer Bank has made I agree that they can make in an objection to the Report and Recommendations, including the expense issue that Mr. Schroeder mentioned. I just haven't heard anything that can't be handled under the normal insolvency proceedings." *Intervention Tr.* at 14:22-15:8. In its order denying intervention, the district court stated, "The PSC, the surety and all of the other claimants agree that Bremer may proceed in this action as a claimant and assert objections to any of the proposed distributions. Under these circumstances intervention is unnecessary. In the event that an objection to Bremer's participation in these proceedings were to be asserted, intervention would be granted, but limited to proceedings within the scope of Chapter 60-04 (limited to objections to the commissioner's report and proposed distributions)." App. at 221 (¶5). The district court denied the motion without prejudice and stated Bremer "shall participate in these proceedings to the full extent provided to any other receipt holder/claimant." *Id.* at ¶7.

[¶49] Bremer fully participated in this proceeding, conducted written discovery, noticed numerous depositions, participated fully at the hearing, filed post-hearing briefs, and continues to assert its position on appeal. The district court addressed Bremer's arguments in its decision, and never ruled Bremer was prevented from asserting a position because it had not intervened. As a result, the district court did not err in

denying the motion and any alleged error would have to be considered harmless.  
N.D.R.Civ.P. 61.

#### IV. CONCLUSION

[¶50] For the foregoing reasons, the PSC requests the *Judgment* be reversed and the case be remanded to the district court for proceedings consistent with the Court's decision.

Dated this 5<sup>th</sup> day of January, 2017.

By /s/ Mitchell D. Armstrong

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**CERTIFICATE OF COMPLIANCE**

[¶51] The undersigned, as one of the attorneys representing Petitioner, Appellee and Cross-Appellant, Public Service Commission and one of the authors of the above and foregoing Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission, 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 27 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 5<sup>th</sup> day of January, 2017.

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**CERTIFICATE OF SERVICE**

[¶52] I hereby certify that a true and correct copy of the foregoing **BRIEF OF PETITIONER, APPELLEE, AND CROSS-APPELLANT PUBLIC SERVICE COMMISSION** was on the 5<sup>th</sup> day of January, 2017, served as follows:

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