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 and Beth Nelson, as assignee of the estate of Brad Nelson, Interested Party, Appellee and Cross-Appellant, and Brent Baldwin, Duane Altendorf, Ronald Adams, Nicholas Adams, Chuck Nelson, and WJS Nelson, Inerested Parties and Appellees.	**SUPREME COURT NO. 20160303** Civil No. 18-2015-CV-00240

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SC APPEAL - Reply Brief
Curt Amundson
Jon R. Brakke, Vogel Law Firm

ON 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

REPLY BRIEF OF INTERESTED PARTY, APPELLEE AND CROSS-APPELLANT CURT AMUNDSON

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[¶2]I. The District Court erred in not finding Mr. Amundson to be a receipt holder

[¶3]A. The district court's finding the PLMA signed by Mr. Amundson controlled the transaction was clearly erroneous.

[¶4] As originally argued by Interested Party, Appellee, and Cross-Appellant Curt Amundson ("Mr. Amundson"), the district court erred in finding the price later marketing agreement ("PLMA") signed by Mr. Amundson governed the transaction in question. Only the Brief of Appellees Baldwin, Baldwin Farms, and Altendorf addressed this argument in any depth. See Br. of Appellees Baldwin, Baldwin Farms, & Altendorf ("Baldwin Brief"), at ¶¶ 41-43; cf. Br. of Appellees Adams, Adams, Nelson, & Nelson ("Adams Brief"), at ¶ 52 ("Mr. Amundson signed the PLMA. As such, he is bound by the PLMA that he signed."). The arguments raised are without merit, and the district court committed clear error in finding the PLMA governed Mr. Amundson's transaction with Respondent and Appellee Grand Forks Bean Company, Inc. ("GFB"). Cf. Bleth v. Bleth, 2000 ND 52, ¶ 8, 607 N.W.2d 577 (clearly erroneous error exists if no evidence exists to support a finding, or if the Court is left with a definite and firm conviction a mistake has been made); Jones v. Pringle & Hergstad, P.C., 546 N.W.2d 837, 842 (N.D. 1996) (this Court reviews the existence of a binding contract under the clearly erroneous standard).

[¶5] The Baldwin Brief, citing Buri v. Ramsey, 2005 ND 65, 693 N.W.2d 619, first argues this Court cannot review the district court's finding that the PLMA was binding. See Baldwin Br., ¶ 41. This argument perverts Buri, as Buri merely outlined the long-understood rule that—during a bench trial—a trial court determines issues of credibility when weighing conflicting testimony, and that this Court will not second-guess such

determinations. See Buri, 2005 ND 65, ¶ 10 (citing Akerlind v. Buck, 2003 ND 169, ¶ 7 671 N.W.2d 256). Here, however, there was no conflicting testimony for the Court to weigh—the only testimony offered regarding application of the PLMA was Mr. Amundson's, and Mr. Amundson testified that while he signed the PLMA, the beans delivered where not delivered pursuant to the PLMA. Therefore, Mr. Amundson is not asking the Court to reweigh the district court's credibility determination; instead, Mr. Amundson merely asks this Court to consider whether any evidence submitted supports the district court's finding. Because the district court received no evidence that would support its conclusion that the PLMA governed the transaction between Mr. Amundson and GFB, the district court clearly erred in holding Mr. Amundson to be a credit-sale seller under the PLMA.

[¶6] The Baldwin Brief also argues the PLMA signed by Mr. Amundson must control the transaction because the PLMA was referenced in Mr. Amundson's claim. See Baldwin Br., ¶ 41 (citing J.A., at 508, ¶ 37). Mr. Amundson notes this argument was not raised below, see generally J.A., so this Court should disregard the novel argument. See, e.g., Frison v. Ohlhauser, 2012 ND 35, ¶ 7, 812 N.W.2d 445 ("Arguments not raised before the district court will not be considered on appeal." (citation omitted)).[1] Nevertheless, even if this Court considers the argument, it is without merit.

[¶7] Pleadings are not weighed as evidence. See, e.g., In re Adoption of C.D., 2008 ND 128, ¶ 20, 751 N.W.2d 236 ("Allegations in pleadings, motions, or briefs are not evidence." (citations omitted)). Accordingly, any reference to the PLMA by Mr.

[1] Not only is this argument novel, it is directly contradictory to the argument made to the district court level, when the signatories to the Baldwin Brief argued Mr. Amundson was a receipt holder.

Amundson's claim is not evidence that the PLMA controlled the transaction. Indeed, a reference in a pleading is inconsequential unless the reference materially misleads or prejudices another party. See, e.g., Jacobsen v. Pedersen, 190 N.W.2d 1, 4 (N.D. 1971) ("A variance in a civil action is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (citations omitted)). Here, the evidence actually submitted at trial was that the terms of the PLMA did not govern the transaction between GFB and Mr. Amundson. Assuming this was a "variance," the variance was inconsequential as no party was mislead regarding the nature of Mr. Amundson's claim—a claim regarding beans delivered to GFB while GFB was insolvent. Accordingly, the argument that the PLMA must control because the PLMA was originally referenced by Mr. Amundson is without merit.

[¶8] Moreover, if reference in a claim to a PLMA was sufficient to render a claim a credit-sale claim, other parties' claims must also be credit-sale claims. Specifically, the claims of Brent Baldwin,[2] Baldwin Farms,[3] Duane Altendorf,[4] Chuck Nelson,[5] and Nicholas E. Adams,[6] all referenced PLMAs when filing their respective claims. As those references did not render those claims to be credit-sale claims, Mr. Amundson's reference to the PLMA cannot render him a credit-sale claimant.

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[2] See J.A., at 81-82, 88; see also J.A., at 255-56, 262.

[3] See J.A., at 91-92, 94, 98; see also J.A., at 244-45, 247, 252.

[4] See J.A., at 102-03, 113; see also J.A., at 265-66, 276.

[5] See J.A., at 134-35; see also J.A., at 283-85.

[6] See J.A., at 138-40; see also J.A., at 279-81.

[¶9] The only evidence submitted to the district court showed the PLMA signed by Mr. Amundson did not control his transaction with GFB. Accordingly, the district court's findings were clearly erroneous, and Mr. Amundson must be found to be a receipt-holder.

[¶10]B. The district court erred in applying the statutory requirements for formation of a credit-service contract.

[¶11] Even if the Court finds the PLMA signed by Mr. Amundson governs as to Mr. Amundson's beans, the district court still misapplied the statutory requirements to find the signed PLMA to be a valid credit-sale contract. The North Dakota Public Service Commission ("PSC") agrees with Mr. Amundson's argument, and Mr. Amundson incorporates by reference the arguments raised by the PSC. See Br. of Pet'r, Appelle, & Cross-Appellant Pub. Serv. Comm'n ("PSC Brief"), ¶¶ 17-25.

[¶12] As originally argued by Mr. Amundson, the plain reading of N.D.C.C. § 60-02-19.1 requires compliance with all statutory requirements to create a valid credit-sale contract. Nevertheless, the Baldwin Brief argues the PLMA created a valid credit-sale contract because there was "substantial compliance" with the requirements of the statute. Baldwin Br., ¶ 43 (citation omitted). This argument was never made to the district court. See generally J.A. Accordingly, Mr. Amundson respectfully submits this Court should not consider this argument in the first instance. See, e.g., Frison, 2012 ND 35, ¶ 7 ("Arguments not raised before the district court will not be considered on appeal." (citation omitted)). Nevertheless, in an abundance of caution, Mr. Amundson will respond to the novel argument.

[¶13] The Baldwin Brief cites Stockman Bank of Mont. v. AGSCO, Inc., 2007 ND 26, 728 N.W.2d 142, as supportive of the "substantial compliance" argument, but the reliance

is misplaced, and the Baldwin Brief's argument is meritless. Stockman Bank is inapplicable to the case at bar because the present issue is distinguishable from Stockman Bank. In Stockman Bank, this Court considered whether a statutory lien was created when there was "substantial compliance" with the relevant statute. 2007 ND 26, ¶ 23. However, the present case deals not with creation of a statutory lien, but formation of a valid contract. While Mr. Amundson does not dispute the Court held in Stockman Bank a statutory lien can be created so long as there is substantial compliance with a statute, id., this Court did not consider whether a contract can be formed if there is "substantial compliance." Indeed, taking the Baldwin Brief's argument to its inevitable conclusion creates absurd results. In essence, the Baldwin Brief argues that an enforceable contract could exist, absent consideration, so long as offer and acceptance occur because there is "substantial compliance" as to the required elements of a contract formation—offer, acceptance, and consideration. This argument—bereft of legal support—is not only illogical, but is contrary to black-letter law. E.g., Ripley v. McCutcheon, 48 N.D. 1130, 189 N.W. 104, 104 (1922) ("As consideration is essential to the enforcement of a simple contract, it is subject to demurrer."). Accordingly, the Baldwin Brief's argument that the PLMA is a credit-service contract because there has been substantial compliance with N.D.C.C. § 60-02-19.1 must be disregarded.

[¶14] As originally argued by Mr. Amundson, and as supported by the PSC, all the statutory requirements of N.D.C.C. § 60-02-19.1 must be met to form an enforceable credit-sale contract. Because the PLMA did not meet all requirements of N.D.C.C. § 60-02-19.1, an enforceable credit-sale contract was not formed, and Mr. Amundson is a receipt holder.

[¶15]II. The District Court correctly calculated the date of insolvency

[¶16] Assuming, *arguendo*, the Court finds Mr. Amundson to be a receipt holder, the district court correctly found the date of insolvency to be October 15, 2013.

[¶17] Determination of the insolvency date is straightforward. The date of insolvency is controlled by statute, and occurs "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." N.D.C.C. § 06-04-02. The district court found October 15, 2013, to be the date of insolvency because Duane Altendorf demanded payment for beans, and payment was refused. See Tr. at 193-97, lns. 1-3; id. at 202-03, lns. 6-6. As GFB "refuse[d], neglect[ed], or [was] unable . . . to make payment for grain purchased or marketed," N.D.C.C. § 06-04-02, GFB was insolvent when payment to Duane Altendorf was not made after demand. See J.A., at 492-534, ¶¶ 55-74.

[¶18] Nevertheless, the PSC, see PSC Br., ¶¶ 30-38, Bremer Bank, see Br. of Appellant Bremer Bank, Nat'l Assoc., at ¶¶ 44-51, and Auto-Owners Insurance Company, see Br. of Appellant Auto-Owners Ins. Co., at ¶¶ 45-84, make various arguments that the district court erred in holding October 15, 2013, the date of GFB's insolvency. Mr. Amundson agrees with, and incorporates herein, the arguments made by the Baldwin Brief on these issues. See Baldwin Br., ¶¶ 47-59; see also Adams Br., ¶¶ 32-37. Duane Altendorf demanded payment in October, 2013. GFB did not make payment. Accordingly, GFB was insolvent, and the date determined by the district court must be upheld.

[¶19]CONCLUSION

[¶20] For the foregoing reasons, and for the reasons originally set forth, Mr. Amundson respectfully requests the Court find Mr. Amundson to be a receipt holder, and entitled to payments consistent with this position.

Respectfully submitted February 17, 2017.

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