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Good Afternoon

Attached for filing please find Appellant Bremer Bank's Reply Brief

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**478 GE-15-36** Filed: 2/17/2017 Pages: 17  
**SC APPEAL - Reply Brief**

Bremer Bank, National Association

Tracy Kennedy, John Schroeder, Attorneys

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Public Service Commission,	)	
Petitioner, Appellee and	)	Supreme Court No. 20160303
Cross-Appellant,	)	
vs.	)	
	)	
Grand Forks Bean Company, Inc.,	)	
Respondent and Appellee,	)	Grand Forks County District Court
AND	)	File No. 18-2015-CV-00240
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,	)	
Interested Parties and Appellees,	)	
	)	
_____	)	
PSC Case No. GE-15-36	)	

**REPLY 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

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## I. Argument

**The District Court's requirement of a signature to form a credit sale contract but not requiring a signature to form a sale contract, nullifies statutes and creates economic instability for our state's Growers, elevators, and even the PSC.**

¶1 The District Court found that all Growers, except Curt Amundson, had contracts for sale and not credit sale contracts, because some of the Growers adopted the bean contracts which they did not sign personally (signed by their agents), but they did not adopt the PLMAs (which were signed but not by the Growers themselves). (J.A. at 503-513.) The District Court found that contracts for sale took place based on testimony of the Growers despite the fact there were no written contracts other than the PLMA. Curt Amundson was the only Grower that personally signed the PLMA. (J.A. at 117, 508.)

¶2 If this Court upholds the lower Court's decision, Growers will be able to unilaterally make and break contracts with elevators by choosing which contracts signed by their agents or others they want to honor, or by agreeing to oral contracts that they may prefer.

**a. Growers have a statutory responsibility to convert their scale tickets according to statute or the elevator can convert the scale tickets without the Grower's consent.**

¶3 Section 60-02-11, N.D.C.C. is either applicable to the Grower or it's not. If the requirement to convert is applicable to the Grower, the Growers have failed to comply in any way with the statute, and should not be entitled to lien protection. *Stockman Bank of Montana v. AGSCO, Inc.*, 2007 ND 27, ¶11, ¶13, 72 N.W.2d 742. It is not fair to treat Growers who do convert their scale tickets the same as Growers who did not comply with the 45 day conversion requirement. Our legislature has interpreted the failure of a farmer to sign a warehouse receipt within 45 days of delivery leaves him unprotected by the bond, and failure to sign a Credit Sale Contract leaves him

without protection of the Credit Sale Indemnity Fund (“CSI Fund”). Testimony from the *Hearing on S.B. 2291 Before the Senate Agriculture Committee*, 64th N.D. Legis. Sess. (Jan. 30, 2015).

¶4 If § 60-02-11 is not applicable to the Growers as was argued by the Growers, then the elevator can make the conversion on its own. Nothing in the definition of Credit Sale Contracts requires a signature of the Grower. N.D.C.C. § 60-02-01(2). Further, nothing in § 60-02-11, prior to the 2015 amendment requires a signature of the Grower. The legislative history supports this interpretation:

“**Senator Wanzek:** ...“The law currently says that you can hold that but the warehouse has to, after 45 days, either have paid you for that ticket or it has to be recorded on a credit sale contract or it has to go into storage under a warehouse receipt.”

“[Public Service Commissioner] **Randy Christmann:** ...the licensees can make their own policies for when the payment is made, except one of the options has to be exercised within 45 days. If the grain warehouse doesn’t want to store grain, they can have a policy that they pay every day. If the producer doesn’t want to abide by the policies, then they’ll have to go to a different grain dealer. Within those 45 days the warehouseman can set their own policies.”

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

While some Growers cite *Public Service Commission v. Central States Grain, Inc.*, 371 N.W.2d 767 (1985) for the proposition that only the warehouse has a duty to convert scale tickets, this assertion ignores two significant statutory revisions since that case was decided. First, in 2005, § 60-02-11 was amended to require warehouses to post a policy whether deliveries of grain are accepted on cash, storage, or credit sale basis. S.L. 2005, ch. 587, § 1. Second, in 2003, the CSI Fund was established.

¶5 GFB posted that it only accepted beans on a credit sale basis, and so all of the scale tickets were issued on that basis. Thus, when the scale tickets were issued to each Grower, unless the Grower was issued a warehouse receipt or paid, each of the scale tickets was converted to a credit sale contract through GFB's posted policies, and constitute an agreement in writing. Conversion in this manner protects all parties, especially in light of the requirements of posting and the protections afforded under the CSI Fund.

**b. Nullification of Statutes.**

¶6 Section 60-02-11, N.D.C.C. requires that a warehouse post its policy regarding whether grain is being accepted for storage or only under a credit-sale. GFB posted two notices to all Growers that all beans delivered would be considered "Price Later" unless specified otherwise by the Grower, and the second which gave the statutory warning. (J.A. at 385, 491.) GFB complied with the posting requirement § 60-02-11. GFB also complied with the conversion requirements of § 60-02-11, when it placed all of the Grower's scale tickets on Credit Sale Contracts. The District Court's failure to consider § 60-02-11 nullifies the statute in its entirety. It also completely eliminates the usefulness of warehouse receipts and creates a future in which no farmer will ever personally sign a warehouse receipt or credit sale contract in order to get free storage while keeping their options for State protection open.

**c. The Growers seek a windfall not a remedy.**

¶7 The CSI Fund was created by law in 2003 as a result of the trends in agriculture marketing. N.D.C.C. Chapter 60-10. The fund is administered by the PSC and funded by an assessment on grain sold by credit sale. N.D.C.C. § 60-10-01. The fund is there to protect credit sellers in the

event of insolvency for up to 80% of their claim or \$280,000, whichever is less. N.D.C.C. § 60-10-06.

¶8 This insolvency was different than all other insolvencies because the potential for recovery from the bean inventory was more than the amount of what the Growers would have gotten from the CSI Fund, but had there only been \$400,000 worth of beans or less, the Growers would have received more under the CSI Fund. N.D.C.C. § 60-10-01. Under the District Court's ruling the Growers could have unilaterally chosen to have valid and enforceable Credit Sale Contract, simply by agreeing that the signed PLMA's were in fact their contracts.

**d. The Growers had several opportunities to protect their interest but failed to do so.**

¶9 The Growers did not store their beans with GFB under a warehouse receipt. They did not sell their beans on consignment, reserving a first priority security interest. N.D.C.C. § 41-09-03(4) states "The security interest of a co-signor in goods that are the subject of a consignment is a purchase-money security interest in inventory".

¶10 The Growers could have exercised their rights and remedies as sellers under North Dakota Century Code § 41-02-81(2-702) which states "Notwithstanding any other provision of this section, a producer of agricultural products, upon discovery of the buyer's insolvency, may reclaim the products within ten days after the receipt, but if misrepresentation of solvency has been made to the producer in writing within three months before delivery, the ten-day limitation does not apply." The Growers made no such claims in this case. Therefore, any interests arising under § 41-02-81 (2-702), which may have entitled the Growers to possession of the beans sold to GFB

were waived by the failure to make the required demand within the ten-day limitation period. See *Dairy Dept. v. Harvey Cheese Inc.* 278 N.W.2d 137, footnote 4, (N.D. 1979).

¶11 Sale of the beans, except those of WJS Nelson, were delivered to GFB by the Growers prior to December 2013. On November 14, 2014 Curt Amundson contacted the PSC to allege GFB had not been able to market his beans in accordance with his PLMA. On December 23, 2014 eight Growers contacted the PSC alleging difficulties in securing either payment or marketing services from GFB. (J.A. at 320-327.) None of the Growers in this case made a demand for redelivery of their beans and none of the Growers contacted the PSC until a year after they delivered their beans. The Growers failed to make a reasonable demand and the District Court's decision allowed Growers to sit on their rights and choose their remedy.

**e. The holding of the District Court puts a strain on the State's elevators, prohibits the Public Service Commission's ability to assess fees for unsigned credit sale contracts, and therefore creates a chilling effect on our State's agricultural economy.**

¶12 Upholding the lower Court's decision will negatively impact our State's agricultural economy because, as the North Dakota legislature has pointed out, almost all sales to elevators are credit sales, and rarely does a Grower sign the credit sale contract.

**“Senator Wanzek:...**Very few warehouses use warehouse receipts anymore, it's all mostly credit sale contracts.”

**“Senator Wanzek:...**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.”

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

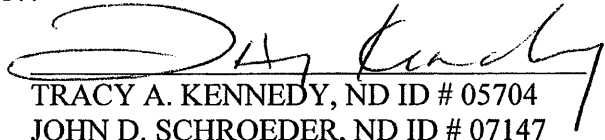
The District Court’s holding will make it difficult for elevators to obtain financing because a credit sale will only be enforceable if and when the Grower says so, leaving the elevator to hold the grain at the mercy of the Grower with nothing in return. The elevators will not be able to get operating financing because without signed warehouse receipts they will have no accounts receivable to pledge, the elevator will have no inventory to pledge because Growers will be able to unilaterally claim that either they do or do not have a credit sale contract, depending on what type of contract is most advantageous to them.

¶13 The CSI fund administered by the PSC is funded by an assessment on all grain sold on credit sale. If the decision of the District Court is upheld it would mean that every credit sale contract not signed by the individual Grower could not be subject to the assessment for the indemnity fund, and puts into question every credit sale assessment made to date.

#### **Conclusion**

¶14 For the forgoing reasons and the reasons submitted in its Appellant Brief, Bremer respectfully requests that this Court reverse the Order and Judgment of the District Court, and determine as a matter of law that the Growers are not receipt holders entitled to first distribution from the trust, determine that Bremer has a first priority lien in the bean proceeds, and remand this matter to the District Court with directions to follow this Court’s ruling.

Dated this 17<sup>th</sup> day of February, 2017.

A handwritten signature in black ink, appearing to read "Tracy Kennedy", written over a horizontal line.

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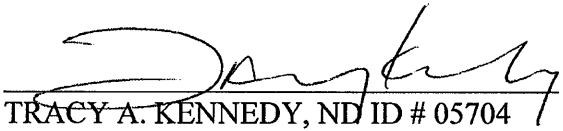
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**CERTIFICATE OF COMPLIANCE**

¶15 The undersigned, as one of the attorneys representing Appellant Bremer Bank, National Association, and one of the authors of the above and foregoing Reply 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 2,000 from the portion of the Brief entitled Argument through the signature block 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 17<sup>th</sup> day of February, 2017.

  
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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Public Service Commission,	)	
Petitioner, Appellee and	)	Supreme Court No. 20160303
Cross-Appellant,	)	
vs.	)	
	)	
Grand Forks Bean Company, Inc.,	)	
Respondent and Appellee,	)	Grand Forks County District Court
AND	)	File No. 18-2015-CV-00240
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,	)	
_____	)	

PSC Case No. GE-15-36

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**CERTIFICATE OF SERVICE BY EMAIL**

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, ORDER FOR JUDGMENT, DATED JULY 22, 2016, AND ORDER DENYING POST-JUDGMENT RELIEF-MOTION FILED AUGUST 24, 2016, DATED SEPTEMBER 15, 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

**BRENDA R. DIPERSIO**, being first duly sworn on oath deposes and says that she is a secretary in the office of Zimney Foster P.C., 3100 South Columbia Road, Ste. 200, Grand Forks, ND 58201, that on the 17<sup>th</sup> day of February, 2017 she served the following:

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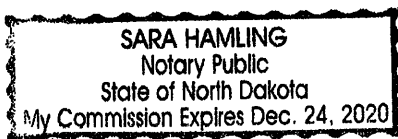
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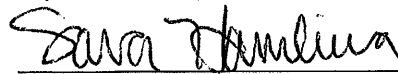
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BRENDA R. DIPERSIO

Subscribed and sworn to before me this 17<sup>th</sup> day of February, 2017.



  
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My commission expires: