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June 26, 2019

Via E-mail to:

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Mitchel D. Armstrong, Esq.
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North Dakota Public Service Commission
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122 E. Broadway Avenue
Bismarck, ND 58501

Via U.S. Mail to:

Konrad Crockford, Director
Grain Division
ND Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

Hunter Hanson
218 4th Street SW, Suite 1
Devils Lake, ND 58301

Re:	Insured:	Hunter Hanson d/b/a Nodak Grain
	Policy No.:	GLUK007170
	Claim No.:	117092
	HLF File No.:	4600.320
	Date of Loss:	November 8, 2018 (discovered)

Dear Messrs. Hanson, Armstrong and Crockford:

We write this letter to you on behalf of Great Lakes Insurance SE (“Great Lakes”) in connection with insurance coverage issues under the above-referenced insurance policy (“the Policy”) that arise out of the claim made by Hunter Hanson d/b/a Nodak Grain, against the Policy

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for alleged water damage to grain stored in the grain storage bin located at 5037 91st Avenue NE, Devils Lake, ND 58301.

We have performed a coverage analysis of Mr. Hanson/Nodak Grain's claim asserted and regret to inform you that coverage is not available under the policy to satisfy the claim arising out of the water damage to grain and peas at the Rohrville Elevator in Devils Lake, ND.

We explain the reasons for Great Lakes' denial below. By explaining the reasons for the denial under the policy, however, Great Lakes is not waiving, altering or modifying the written provisions of the insurance contract. It is the insurance contract language that governs, and will continue to govern, the respective rights and obligations of Great Lakes, Mr. Hanson, Nodak Grain, the North Dakota Public Service Commission, and any of their officers, directors or employees.

I. FACTUAL BACKGROUND

Mr. Hanson reported that on or about November 8, 2018, he discovered that water had backed up into the boot at the bottom of the leg of the above referenced grain elevator. Mr. Hanson reported that when the leg was turned on and began operating, it pulled water from the boot up to the distributor of the main elevator.

The water in the distributor then apparently made its way through the downspouts into some of the bins of the facility allegedly causing damage to the grain in storage. Mr. Hanson made a claim for reimbursement of the losses for the allegedly damaged grain under the Commercial Property Coverage Part of the Policy.

It is our understanding that while this event was discovered by Mr. Hanson on or about November 8, 2018, the actual date(s) of any loss is not known.

After receiving Mr. Hanson's report of this event, on November 14, 2018, Great Lakes assigned Border Area Adjuster to investigate the facts and circumstances surrounding the claim. The adjuster determined at the time of his inspection that groundwater was indeed seeping into the elevator pit and he observed approximately two feet of water standing at the bottom of the pit with ice on top of the water. This condition appeared to have been in existence for an extended period of time.

The representative of Nodak Grain who met with the adjuster during the inspection stated that upon initially receiving grain delivery in August 2018, Nodak Grain began to operate the elevator's leg system. It is Great Lakes' understanding that Mr. Hanson and/or his employees observed water in the boot at that time and that Mr. Hanson placed a sump pump down into the boot hoping the cure the problem. Mr. Hanson or his employees would plug in the pump every morning and let it run until no more water was coming out of the sump pump hose, at which point

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they would unplug the sump pump and operate the elevator for the day.

The adjuster reported that at the time of his inspection, the sump pump was lying on its side and not operating properly to remove all the groundwater that seeped into the boot. When the elevator was being operated with grain unloaded by farmers, the grain would drop into the water and then the wet grain/groundwater mixture was being scooped up by the elevator conveyor system. The conveyor system would then deposit the grain into the wood grain bins allegedly resulting in water damage to the grain being held in storage for the past several months.

Border Area Adjustment issued its initial report on November 28, 2018. The initial report raised issues that required additional investigation in order for Great Lakes to make a coverage decision. Great Lakes then issued a reservation of rights letter to Mr. Hanson and requested that Mr. Hanson submit to an examination under oath ("EUO").

In mid-November 2018, various news sources in North Dakota began reporting that Mr. Hanson was the subject of investigations by several law enforcement agencies as well as the North Dakota Public Service Commission ("NDPSC"), concerning his grain operation.

When Mr. Hanson did not respond to Great Lakes' December 28, 2018 request for his EUO, Great Lakes found additional mailing addresses for Mr. Hanson and re-sent the EUO request to Mr. Hanson on January 21, 2019. When Mr. Hanson still did not respond, Great Lakes sent a supplemental EUO request to Mr. Hanson on February 15, 2019.

In the February 15, 2019 correspondence, Mr. Hanson was advised that if he did not respond to the EUO request by March 1, 2019, Great Lakes would consider his claim against the policy to have been withdrawn and Great Lakes would close its file regarding the claim. Mr. Hanson did not respond the February 15, 2019 correspondence.

In April, 2019, Border Area Adjustments obtained information indicating that in the months following Mr. Hanson's submission of this claim, Nodak Grain became insolvent and the North Dakota Public Service Commission ("NDPSC") was appointed as trustee over the assets of Nodak Grain. As part of the NDPSC's role in the insolvency proceedings, NDPSC discovered, in April 2019, that one bin of the elevator contained approximately 3,866 bushels of yellow peas that were apparently damaged by water.

On April 17, 2019, upon learning that the NDPSC had been appointed trustee, Great Lakes sent its reservation of rights letter to the NDPSC and requested that Great Lakes be permitted to conduct an engineering inspection of the grain elevator.

In May 2019, Border Area Adjustment enlisted the services of Matthew Nordine, P.E., of EAPC Architectural Engineering, to investigate the relevant elevator and determine the source of

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water in the boot. At the time of Mr. Nordine's inspection of the elevator on May 31, 2019, the utility room in the basement of the elevator building (approximately 7' below the main level of the elevator) had approximately 1' of standing water throughout the entire floor.

Mr. Nordine was informed that the basement had previously been filled with approximately 4' of water at one time and that all water had been completely pumped out of the basement about a week prior to the time of Mr. Nordine's site visit. The water to the building was also shut off at the time. Mr. Nordine noted that the concrete walls of the utility room were heavily cracked.

The approximately 16' deep pit located in the center of the building had around 1'-2' of standing water at the bottom. According to information obtained from on-site personnel, this water level had been higher and was previously pumped out completely. In his report, Mr. Nordine stated that according to on-site personnel, the water observed within the elevator building had presumably infiltrated the lower levels of the building below grade within the last week from the time of the site visit.

It was Mr. Nordine's opinion that the cause of this water infiltration was due to ground water seepage resulting from the high-water table relative to the building's foundations, improper waterproofing system, and cracking at the building's foundations, which allowed for the infiltration of water into the below grade portions of the building, presumably inadequate drainage/drain tile system at the perimeter of the building, and the lack of or inadequate pumping of water out of the building's sump pump.

II. APPLICABLE POLICY LANGUAGE

Great Lakes issued a Commercial Property Coverage Policy to Hunter Hanson DBA: Nodak Grain, Policy # GLUK007170, with a policy period of May 17, 2018 to May 17, 2019, and with a limit of insurance in the amount of \$350,000. Coverage is written under the CP1020 Causes of Loss – Broad Form. The applicable policy language which forms the grounds for Great Lakes' denial provides as follows:

The Policy provides under the section titled **BUILDING AND PERSONAL PROPERTY COVERAGE FORM CP 00 10 10 12** which reads in part as follows:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

See policy form CP 00 10 10 12 pg. 1 of 16.

The Policy provides under the section titled **CAUSES OF LOSS – BROAD FORM CP**

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10 20 10 12 which reads in part as follows:

A. Covered Causes Of Loss

When Broad is shown in the Declarations, Covered Causes of Loss means the following:

14. Water Damage

a. Water Damage, meaning accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance, that is located on the described premises and contains water or steam.

However, Water Damage does not include:

(1) Discharge or leakage from:

(a) An Automatic Sprinkler System;

(b) A sump or related equipment and parts, including overflow due to sump pump failure or excessive volume of water; or

(c) Roof drains, gutters, downspouts or similar fixtures or equipment;

(2) The cost to repair any defect that caused the loss or damage;

(3) Loss or damage caused by or resulting from continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more; or

(4) Loss or damage caused by or resulting from freezing, unless:

(a) You do your best to maintain heat in the building or structure; or

(b) You drain the equipment and shut off the water supply if the heat is not maintained.

* * *

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. Water

(1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

(2) Mudslide or mudflow;

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(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings;

or

(5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3) or (4), or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

See policy form **CP 10 20 10 12** pg. 2 - 3 of 8.

* * *

E. Loss Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions:

3. Duties In The Event Of Loss Or Damage

a. You must see that the following are done in the event of loss or damage to Covered Property:

* * *

(8) Cooperate with us in the investigation or settlement of the claim.

* * *

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

See the **Building and Personal Property Coverage Form** to your Policy at pgs. 10 - 11 of 16 (form **CP 00 10 10 12**).

III. DENIAL

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We will now set forth the grounds for Great Lakes' denial.

A. Insuring Agreement of the Policy

1. Covered cause of loss.

The Policy only provides coverage for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The term "Broad" appears in the Commercial Property Coverage Part Declarations, thus triggering the definition of water damage set forth above.

The water seepage involved here appears to be seepage of groundwater through the foundation walls of the boat and does not appear to be "...*accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance....*".

Coverage may not, therefore, be available under the policy for any damages resulting from the seepage of groundwater through the basement walls. The lack of a covered cause of loss amounts to one of the bases of Great Lakes' denial of Hanson's claim.

B. Exclusions

An exclusion in the Policy also forms the basis of Great Lakes' denial and is quoted and discussed below.

1. Exclusion B(1)(g)(4).

Exclusion B(1)(g)(4) excludes from coverage any "loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss" . . . "[w]ater under the ground surface pressing on, or flowing or seeping through: (a) Foundations, walls, floors or paved surfaces; (b) Basements, whether paved or not."

It appears that the water damage to the grain was caused, directly or indirectly, by water under the ground surface flowing or seeping through the basement, or the walls, floor or paved surface of the foundation. Thus, the alleged damage to grain is not covered.

C. Loss Conditions

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1. Duties in the event of loss or damage.

The Loss Conditions portion of the policy imposes certain obligations on the insured to assist Great Lakes in the investigation of a loss. Specifically, the insured is required to cooperate with Great Lakes in its investigation and submit to an EUO.

Despite multiple requests that Mr. Hanson submit to an EUO, Mr. Hanson never responded to Great Lakes' requests. Mr. Hanson therefore failed to fulfill his obligations under the Loss Conditions provisions of the Policy. Thus, Great Lakes is entitled to deny coverage under the Policy. Mr. Hanson's failure to cooperate in the investigation of this claim is an additional basis on which Great Lakes denies this claim.

IV. CONCLUSION

We have attempted to set forth the applicable Policy language in this letter; if, however, we have made any typographical errors or misquoted any language, the actual terms and language of the Policy would, of course, control.

Please do not construe anything in this letter, or in any past, present, or future communications, as a waiver, release, modification, or alteration of any right, claim, defense, exclusion, policy language, provision or condition, or time limitation. Nor should this letter or any past, present, or future communications be construed as a waiver, release, modification, or alteration of any right, claim, defense, exclusion, policy language, provision or condition, or time limitation, which may be discovered to be applicable. In setting forth the reasons for Great Lakes' denial, we do not intend for Great Lakes to waive, relinquish or forego any other defenses which may be available under the Policy. Likewise, nothing in this letter, or in any past, present, or future communications, amounts to an admission of any fact. Great Lakes specifically reserves the right to assert other defenses which may apply in the event it learns additional information relevant to its decision to deny this claim.

If the insured carried insurance with any insurance company other than Great Lakes between May 17, 2018 and the present, we would ask that you promptly put them on notice of this claim and provide us with copies of any such policies for Great Lakes' files.

In order to insure that we are basing our assumptions and our conclusions herein on the best and most accurate information, we would ask that you review this matter closely and please advise us of any information you may have which you believe may impact Great Lakes' position as set forth herein. We will, of course, be happy to issue additional clarifications concerning Great Lakes' coverage position as we receive further information.

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Along the same lines, the persons and entities that qualify as insureds under this Policy of insurance are invited to seek the advice of counsel of their own choosing and at their own expense for a more detailed explanation of their exposure to liability, their exposure to liability for any exemplary (punitive) or treble damages, and any other losses, liabilities, injuries, damages, or expenses which are not covered by the Policy. To the extent you or your counsel develop further information or become aware of any legal arguments that may impact Great Lakes' position herein, we would ask that we be promptly advised of same.

If you have any questions relating to this letter, please feel free to contact me.

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A handwritten signature in black ink, appearing to read 'P. Husted', with a stylized flourish extending to the right.

Patrick Q. Husted, Esq.

cc: Border Area Adjustment, Inc. (via email)
Kevin Hoskins
Concorde General Agency
American Insurance, Inc.