

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STOCKMAN BANK OF MONTANA, a)
Montana banking corporation,)
)
Plaintiff/Appellant,)

vs.)
)

AGSCO, INC., a North Dakota corporation, and)
Capital Harvest, Inc., d/b/a Capital Harvest Finance)
Company, a North Dakota corporation, individually)
and as agent for AGSCO, Inc.,)

Defendants/Appellees.)
)

Farmers Union Oil Company of Williston, a North)
Dakota cooperative association, Mon-Kota, Inc., a)
Montana corporation, Betaseed, Inc., a Minnesota)
corporation, Central Insurance Agency, a North)
Dakota corporation, Steven D. Cayko a/k/a Steve)
Cayko, Perry Elletson a/k/a Perry E. Elletson, Ron)
Gross a/k/a Ronnie Gross, Edward P. Ochs a/k/a)
Eddie Ochs, Tom Ochs, Mark Brunelle, Kelly)
Brunelle and Bill Sheldon,)

Defendants,)
)

and)
)

Farmers Union Oil Company of Williston, a North)
Dakota cooperative association,)
)

Third-party Plaintiff,)
)

vs.)
)

Hardy Farms, Inc. and Jim Hardy,)
)

Third-Party Defendants.)
)

Supreme Court No. 20060174

BRIEF OF DEFENDANTS/APPELLEES

ON APPEAL FROM (1) ORDER DATED MARCH 30, 2004, GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, (2) JUDGMENT UPON ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR OF AGSCO/CAPITAL HARVEST ON ITS PRIORITY AGRICULTURAL LIEN DATED JANUARY 27, 2006, AND (3) ORDER DENYING PLAINTIFF'S REQUEST FOR SANCTIONS, DENYING PLAINTIFF'S MOTION TO STAY ENFORCEMENT OF JUDGMENT, DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER DATED MAY 24, 2006.

IN DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT, MCKENZIE COUNTY
THE HONORABLE GERALD H. RUSTAD PRESIDING

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FACTS OF THE CASE AS THEY PERTAIN TO
AGSCO, INC., AND CAPITAL HARVEST

¶1 AGSCO, Inc. (hereinafter “AGSCO”) is a North Dakota Corporation that sells agricultural chemicals and supplies. See Appendix at 90, ¶ 3; Appendix at 200. Capital Harvest, Inc. (hereinafter “Capital Harvest”) is an affiliate corporation of AGSCO. Appendix at 91, ¶ 5; Appendix at 199. Both companies are owned entirely by Randy Brown. Appendix at 90, ¶ 2. In 2002, AGSCO and Capital Harvest (as agent for AGSCO) provided Hardy Farms, Inc. (hereinafter “Hardy Farms”) with up to \$500,000 in credit on a revolving charge account for the purchase of agricultural chemicals and services from AGSCO. Appendix at 303-309.

¶2 Hardy Farms made numerous purchases of agricultural chemicals and services from AGSCO under the 2002 Revolving Charge Agreement. Appendix at 112-123. Hardy Farms failed to pay the balance due on each monthly statement. Appendix at 1080, ¶ 3. Capital Harvest, in its capacity as agent for AGSCO and in order to obtain protection for payment of the debt Hardy Farms incurred with AGSCO, filed a non-consensual Agricultural Supplier’s Lien on behalf of AGSCO in both North Dakota and Montana. Appendix at 70.

¶3 During the 2002 growing season, Hardy Farms grew crops in both North Dakota and Montana. Appendix at 86, ¶ 4. Hardy Farms then sold most of these crops in Montana. Appendix at 180, ¶ 6-7. Purchasers of the crops issued crop proceeds checks listing, *inter alia*, AGSCO, Capital Harvest, and Stockman Bank as payees. Appendix at 47-68.

¶4 Stockman Bank took possession of the checks and sued all of the other payees, alleging it had a superior interest in the proceeds checks and demanding the other payees in North Dakota and Montana prove their lien interest in the proceeds. Appendix at 18-31.

¶5 Stockman Bank then moved the North Dakota district court seeking permission to deposit some of the checks with the court. Supplemental Appendix at 1-2.

¶6 On April 9, 2003, Stockman Bank moved the court for the “Release of Excess Funds.” AGSCO opposed the Motion. Supplemental Appendix at 3. The court heard arguments on the issue on June 16, 2003. Supplemental Appendix at 34. Despite AGSCO’s objections, AGSCO argued there was no such thing as Excess Funds and Stockman Bank should not be allowed to receive a dime until all of the parties interests in the money had be determine by the court. Supplemental Appendix at 36-39.

¶7 AGSCO and Capital Harvest then sought Partial Summary Judgment, asserting AGSCO had a first priority agricultural supplier’s lien on the crop proceeds on deposit with the court. Appendix at 272-273. AGSCO argued because most of the crop proceeds checks came from crops sold in Montana, N.D.C.C. § 41-09-22 required the district court to apply Montana law to determine perfection and priority of the competing liens. Supplemental Appendix at 51-53. Stockman Bank made its own motion for Summary Judgment, asking the court for an Order determining AGSCO did not have a first priority agricultural supplier’s lien. Appendix at 176. Stockman Bank argued for the application of North Dakota law. Supplemental Appendix at 68-72.

¶8 On March 30, 2004, the district court entered its Order granting partial summary judgment in favor of AGSCO/Capital Harvest. Appendix at 937-943. The district court

held AGSCO and Capital Harvest had an agency relationship as that relationship related to the furnishing of agricultural supplies to Hardy Farms. Appendix at 940. The Court held North Dakota law governed perfection and priority of the AGSCO/Capital Harvest agricultural supplier's lien. Id. The Court found the designation of "Capital Harvest as agent for AGSCO" in the lien statement sufficiently identified AGSCO as the supplier of the agricultural chemicals, the description of products furnished as "agricultural chemicals" in the lien documents sufficiently notified the reader of the lien statement of the products supplied, and the lien documents sufficiently described the location of the crops to which the lien applied. Appendix at 940-941. However, the District Court stated "the lien claimed by AGSCO/Capital Harvest **may** be limited to those items covered within the 120-day period and on produce [sic] from the North Dakota lands. This Court believes additional facts may be necessary to determine exactly what those amounts may be." Appendix at 941 (emphasis added).

¶19 On November 16, 2004, AGSCO submitted to the district court its Motion and Brief in Support of Motion for Final Summary Judgment, arguing the agricultural supplier's lien statute allowed AGSCO to recover its aerial application charges and finance charges but did not require AGSCO to show precisely what crops received which products. Appendix at 945. In order to allow the district court to determine the value of supplies and services provided within the court-imposed 120-day period, AGSCO included in its Final Summary Judgment Motion the Affidavit of Greg Breuer, Eastern Account Manager of Montana and salesman for AGSCO, who sold to Hardy Farms the agricultural supplies and application services furnished by AGSCO. Appendix at 946. In his Affidavit, Mr. Breuer carefully detailed each agricultural product and service he

furnished on behalf of AGSCO during the 120-day window, referencing highlights in his sales paperwork consisting of Product Movement Sheets, AGSCO Invoices, and Sales Analysis Sheets. Appendix at 946-955. As of the date of Mr. Breuer's Affidavit, the net retail price of all products furnished and application services furnished to Hardy Farms within the 120-day window was \$176,560.85:

“When I use the term “furnished” in this Affidavit, I mean physically delivered to Hardy Farms, picked up by Hardy Farms, or aerially applied by AGSCO's contracted aerial applicator to Hardy Farms fields....I am *not* including in my retail sale totals any of the products furnished before July 2, 2002.... The net total of products furnished to Hardy Farms within the timeframe is arrived at by adding up the retail prices of all of the yellow highlights, subtracting out the blue highlighted returns associated with those products, and the result is a net sales total during the timeframe July 2, 2002 through October 30, 2004.... Therefore, as stated earlier, the net retail sales, before finance charges are added, owed by Hardy Farms for sales during the July 2, 2002 through October 30, 2002 timeframe, is \$176,560.85.”

Appendix at 948-949 (emphasis in original).

¶10 Stockman challenged Mr. Breuer's recollection. Supplemental Appendix at 92-93. AGSCO and Capital Harvest provided to the district court the Affidavit of Craig Mehling, which corroborated Mr. Breuer's account of what he supplied to Hardy Farms in the court-imposed 120 day period. Appendix at 1085-1087.

¶11 In support of its Motion for Final Summary Judgment, AGSCO also offered the Affidavit of Marc Geatz, Credit Manager for AGSCO and Capital Harvest, in which he established finance charges owed on the agricultural supplies and services furnished within the court-imposed 120-day period. Appendix at 1079-1084. Mr. Geatz used the terms and conditions of the Hardy Farms Revolving Charge Agreement for 2002, which provided the finance charge rate applicable to all products and services purchased by Hardy Farms was 18% per annum (1.5% per month), accruing from the date of purchase

of each product. Id. The total aggregate finance charges computed by Mr. Geatz on the Hardy Farms agricultural products and application services furnished within the court-imposed 120-day period from the date they were furnished in 2002 through June 30, 2004 (the date of his Affidavit) was \$60,703.13, plus a per-day finance charge of \$87.07 for each day thereafter. Id.

¶12 AGSCO/Capital Harvest sought an Order for Final Summary Judgment decreeing AGSCO/Capital Harvest, on its agricultural supplier lien, was owed the unpaid retail price of \$176,560.85, plus finance charges of \$60,703.13, for a total amount owed as of June 30, 2004 of \$237,263.98, plus \$87.07 each day thereafter until paid. Appendix at 944-45.

¶13 On January 21, 2006, the Court issued an Order determining the first priority agricultural lien interest of AGSCO/Capital Harvest in the crop proceeds in the amount of “\$250,585.69, plus \$87.07 per day accruing finance charges after November 30, 2004 until said proceeds check is delivered in to the hands of AGSCO/Capital Harvest.” Appendix at 1127-1129. The Order further determined “upon filing of a Judgment consistent with this Order, AGSCO/Capital Harvest are entitled to obtain from the Clerk of the District Court proceeds from the monies on deposit with this Court.” Id.

¶14 On January 25, 2006, AGSCO/Capital Harvest served and filed its proposed Judgment along with a letter requesting the Clerk of District Court disburse the deposited funds to AGSCO/Capital Harvest as per the district court’s Order. Appendix at 1130-1131, 1147-1148.

¶15 On Friday, January 27, 2006, the Clerk of District Court entered a Judgment in favor of AGSCO/Capital Harvest and released a portion of the funds on deposit to

AGSCO/Capital Harvest. Appendix at 1131. On Monday, January 30, 2006, AGSCO/Capital Harvest served by U.S. Mail its Notice of Entry of Judgment upon the parties and filed the same with the Court. Appendix at 1132-1133. On that same date, counsel for AGSCO/Capital Harvest received in its office a copy of a letter from Garth Sjue, counsel of record for Stockman Bank, in which he tells the Court to “admonish the Clerk of District Court not to distribute proceeds on deposit with the court.” Appendix at 1143-1144.

¶16 On February 1, 2006, counsel for AGSCO/Capital Harvest received in its office a facsimile from Mr. Sjue demanding that AGSCO/Capital Harvest return the disbursed funds within twenty-four hours. Appendix at 1145. Mr. Sjue further threatened in his letter to file a motion to compel and request sanctions as well as report counsel to the attorney disciplinary board for violating the rules of professional conduct if counsel did not return the funds within twenty-four hours. Id.

¶17 On February 7, 2006, Stockman Bank served upon AGSCO/Capital Harvest a Motion to Compel Return of Funds Deposited with the Court and a Request for Sanctions. Appendix at 1136-1137. On February 27, 2006, AGSCO/Capital Harvest submitted to the court its Response to this Motion. Supplemental Appendix at 96-103. On February 15, Stockman Bank served AGSCO with a Motion to Alter or Amend Judgment, or Alternatively, Motion for Relief from Judgment or Order. Appendix at 1164-1165. AGSCO/Capital Harvest responded on March 3, 2006. Supplemental Appendix at 104-112. The court heard oral arguments on March 10, 2006, and on May 24, 2006, the Court ruled in favor of AGSCO/Capital Harvest. Appendix at 1169-1171.

ARGUMENT

A. Summary Judgment Standard and Standard of Review.

¶18 Summary judgment is a procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to a judgment as a matter of law and if no dispute exists as to either the material facts or the reasonable inferences to be drawn from the undisputed facts, or if resolving the factual disputes will not alter the result. University Hotel Development, L.L.C. v. Dusterhoft Oil, Inc., 2006 N.D. 121, ¶ 8, 715 N.W.2d 153. The evidence presented on a motion for summary judgment is viewed in a light most favorable to the party opposing the motion, and that party will be give the benefit of all favorable inferences which can reasonably be drawn from the evidence. Id. Although the party seeking summary judgment has the burden to clearly demonstrate there is no genuine issue of material fact, the court must also consider the substantive evidentiary standard of proof when ruling on a motion for summary judgment. Heart River Partners v. Goetzfried, 2005 N.D. 149, ¶ 9, 703 N.W.2d 330. In considering the substantive standard of proof, on a motion for summary judgment, the court must consider whether the trier of fact could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Id.

¶19 Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial. Id. Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. State

of North Dakota v. North Dakota State University, 2005 N.D. 75, ¶ 8, 694 NW2d 225.

In opposing a motion for summary judgment, a party may not simply rely upon the pleadings. Igelhart v. Igelhart, 2003 N.D. 154, ¶ 10, 670 NW2d 343. Nor may the opposing party rely upon unsupported, conclusory allegations. Id. The opposing party must present competent and admissible evidence by affidavit or other comparable means which raises an issue of material fact. Id. Mere factual assertions in a brief do not raise an issue of material fact. Zuger v. Zuger, 2004 N.D. 16, ¶ 8, 673 N.W.2d 615. If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed no such evidence exists. Id.

¶20 Whether the district court properly granted summary judgment is a question of law subject to de novo review. University Hotel Development, L.L.C., 2006 N.D. 121, 715 N.W.2d 153 at ¶ 9. On appeal the Court decides “if the information **available to the trial court** precluded the existence of a genuine issue of material fact and entitled the moving party to summary judgment as a matter of law.” Id. (citation omitted; emphasis added). In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. Iglehart, 2003 N.D. 154 at ¶ 10. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief. Id.

¶21 If appellate review of a particular issue requires a standard of review other than *de novo*, this Brief will set forth the appropriate standard of review when addressing that particular issue.

B. Capital Harvest Did Not Act For Its Own Benefit By Filing The Agricultural Supplier's Lien As Agent For AGSCO.

¶22 Agency is the relationship which results where one person, called the principal, authorizes another, called the agent, to act for him in dealing with third persons. N.D.C.C. 3-01-01. Any person having capacity to contract may appoint an agent. N.D.C.C. 3-01-04. A principal may authorize an agent to do any act which the principal may do itself. N.D.C.C. 3-01-05. Agencies can be created by a prior authorization or by subsequent ratification. N.D.C.C. 3-01-06. The relationship of principal and agent can be created although neither party receives consideration. N.D.C.C. 3-01-07. "If an agency relationship is denied, the party alleging agency must establish it by clear and convincing evidence." Argabright v. Rodgers, 2003 ND 59, ¶ 6, 659 N.W.2d 369 (citation omitted). On appeal, this Court reviews a district court's finding of agency under the clearly erroneous standard of review. Id. (citation omitted). "A finding of fact is clearly erroneous if it is not supported by any evidence, if, although there is some evidence supporting the finding, a reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous conception of the law." Id. (citation omitted).

¶23 AGSCO/Capital Harvest presented to the district court documentary evidence establishing the agency relationship between AGSCO and Capital Harvest, including the affidavit of Randy Brown, in which he explains the history and function of the respective entities, a copy of the Agency Agreement between AGSCO and Capital Harvest, and copies of the documents related to the Revolving Charge Agreement between the entities and Hardy Farms. Appendix at 89-109. Stockman Bank failed to challenge the content of AGSCO's evidence, choosing instead to make reference to the accounting practices

between AGSCO and Capital Harvest and to the language in the Revolving Charge Agreement documents in support of its argument against an agency relationship. Appendix at 939. The basic facts pertaining to the content of the documents and to the accounting practices between AGSCO and Capital Harvest were not disputed. The district court considered this evidence and determined Capital Harvest acted as AGSCO's agent in this transaction. Appendix at 939. Although Stockman Bank offered a differing view of the uncontested evidence, "a choice between two permissible views of the evidence is not clearly erroneous when the trial court's findings are based on physical or documentary evidence, or inferences from other facts..." Barnes v. Sunderman, 453 N.W.2d 793, 797 n. 5 (N.D. 1990).

¶24 The same result is reached even through an analysis under the less deferential *de novo* standard. Courts treat corporations as "persons" in North Dakota. Airvator, Inc. v. Turtle Mtn. Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983). As a "person," AGSCO had capacity to contract under N.D.C.C. § 9-02-01 and therefore had capacity to appoint an agent under N.D.C.C. § 3-01-04. AGSCO and Capital Harvest presented to the district court below an Agency Agreement executed by AGSCO and Capital Harvest. Appendix at 97-100. N.D.C.C. § 41-02-17 (UCC § 2-210) permits AGSCO to delegate any of its duties to another party; in this case, AGSCO delegated to Capital Harvest such rights and responsibilities as "credit checks and maintenance of Revolving Charge Agreements," which included the right to file agricultural supplier's liens on behalf of AGSCO pursuant to the Revolving Charge Agreement to protect AGSCO's interest in the supplies sold to Hardy Farms. Accordingly, the district court concluded Capital Harvest, pursuant to that Agency Agreement, conducted all of its business with Hardy Farms as affiliate and agent

for AGSCO, including the filing of the agricultural supplier's liens on AGSCO's behalf. Appendix at 939.

¶25 Stockman Bank argues, with no supporting evidence, Capital Harvest acted in its own interest, not as AGSCO's agent, and therefore perfected the lien for its own benefit because the no recourse language of the Agency Agreement required Capital Harvest to "[bear] the entire risk of any non-collection." Brief for Appellant at 14-15. Stockman Bank's characterizations of the accounting relationship between AGSCO and Capital Harvest notwithstanding (see Brief for Appellant at 6-8), Capital Harvest *never pays* AGSCO for accounts receivable when they are transferred from AGSCO's books to Capital Harvest's books for purposes of collection. Appendix at 295-299, ¶ 3-4. In cases where the credit purchaser failed to make payments, AGSCO has already lost the value of the supplies and services to a defaulting non-paying customer, and has never received any money for the supplies or services from either the Customer or from Capital Harvest, so it follows Capital Harvest cannot have any recourse rights back against AGSCO. Appendix at 302, ¶ 15. As presented to the district court, the two affiliated companies have agreed to the no-recourse arrangement precisely for this reason.

¶26 The district court held Capital Harvest acted as an agent for AGSCO, not an assignee. Appendix at 940. The statutory agricultural supplier's lien rights still belong to AGSCO even though AGSCO's agent performed the ministerial act of filing the lien documents on its behalf. Appendix at 301, ¶ 13. Capital Harvest did not provide the farmer with money to pay AGSCO for the supplies. Appendix at 298, ¶ 2. Capital Harvest did not pay AGSCO for the supplies purchased by the farmer, so AGSCO retained its lien rights. Appendix at 298-299, ¶ 6. AGSCO only gets paid if and when

Capital Harvest successfully collects the account balance from the credit purchaser. Appendix at 299, ¶ 8. AGSCO did not assign its right to collection of the Hardy Farms debt to Capital Harvest. Appendix at 110. AGSCO maintained an interest in the debt and continued to a right to payment. Id. There was no evidence before the district court disputing the fact Capital Harvest merely acted as the collection arm for AGSCO.

¶27 Assuming *arguendo* Stockman Bank had proven AGSCO assigned the Hardy Farms account to Capital Harvest, Capital Harvest must still act as agent for AGSCO in its efforts to collect the debt. An assignment from a creditor to a third party for purposes of collection creates a fiduciary relationship between the creditor and the assignee, and this fiduciary relationship is generally characterized as a principal-agent relationship. DeBenedictis v. Hagen, 890 P.2d 529, 532 (Wa. App. 2d 1995) (citations omitted). Even in the absence of the Agency Agreement, the conduct of the parties still indicates an agency relationship. AGSCO maintained an interest in the debt and continued to a right to payment, as evidenced by AGSCO's continued billing of Hardy Farms for the amount due. Appendix at 299, ¶ 8. "An assignee of a claim is an agent of the assignor only if the latter retains an interest in, and control over, the claim." DeBenedictis, 890 P.2d at 533 n.21 (quoting Restatement (Second) of Agency § 14G). Capital Harvest was accountable to AGSCO for the proceeds of the account, which further supports a principal-agent relationship. "If the assignee is to account for the proceeds to the assignor, he is normally the latter's agent." Id. (quoting Restatement (Second) of Agency § 14G, comment a).

¶28 Based on the information available to the district court, it did not clearly err in finding the existence of an agency relationship between AGSCO and Capital Harvest,

and in finding Capital Harvest acted as AGSCO's agent in filing the agricultural supplier's lien.

C. AGSCO's Agricultural Supplier's Lien Is Entitled To Priority Over Stockman Bank's Alleged Security Interest Pursuant To N.D.C.C. § 35-31-01.

¶29 N.D.C.C. § 35-31-01 does not prohibit AGSCO from taking an agricultural supplier's lien based upon the transaction involved in this case. This statute clearly and unambiguously sets forth the types of transactions to which the statutory priority scheme will not apply:

An agricultural supplier's lien filed as a security interest created by contract to secure money advanced or loaned for any purposes is not effective to secure a priority over liens filed under section 35-05-01.

See N.D.C.C. § 35-31-01.

¶30 "Words used in any statute are to be understood in their ordinary sense...." N.D.C.C. § 1-02-02. "Unless words are defined by statute, they must be given their plain, ordinary, and commonly understood meaning." Johnson v. Nodak Mut. Ins. Co., 2005 ND 112, ¶ 13, 699 N.W.2d 45. This statute is unambiguous, and Stockman Bank does not affirmatively state otherwise. See Brief for Appellant at 17 ("if there is any ambiguity in [the statutory language], the "legislative history" of the statute "clearly and unambiguously evidences the legislature's intent") (emphasis added). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05; Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

¶31 Neither AGSCO nor Capital Harvest loaned or advanced money to Hardy Farms. Supplemental Appendix at 94, lines 10-14. Stockman Bank presented absolutely no

evidence to the district court indicating Hardy Farms received any loan proceeds from AGSCO or Capital Harvest. While many of the peripheral documents executed by Hardy Farms for Capital Harvest as agent for AGSCO use some lender/borrower terminology such as “note,” “borrower,” “lender,” and “loan,” those documents are used by Capital Harvest to standardize its practices in the many states in which AGSCO and Capital Harvest do business. Appendix at 95. See also Supplemental Appendix at 94, lines 10-14. Capital Harvest, acting as agent for AGSCO, simply approved a farmer (Hardy Farms) for large credit purchases from AGSCO. Appendix at 91-92. Capital Harvest did not advance or loan any money to any party in this transaction. Appendix at 92-93. Capital Harvest simply blessed a Revolving Charge Account for purchases between Hardy Farms and AGSCO, and courts have long held revolving charge accounts are not loans of money. Supplemental Appendix at 94, lines 15-23, and 95, lines 1-7. See also e.g. Cecil v. Allied Stores Corporation, 513 P.2d 704 (Mont. 1973).

¶32 As stated above, the statutory language is clear and unambiguous, and this Court need not consult legislative intent to interpret this statute. Even if this Court were to conclude the statute is ambiguous, the legislative testimony Stockman Bank brings forth is of little value when determining legislative intent. Little, 497 N.W.2d at 705 (“statements of committee members or interested parties are **not** admissible” when determining legislative intent) (citation omitted) (emphasis in original). Stockman Bank offered the partisan testimony of special interest witnesses, but has not offered a scintilla of evidence to suggest this testimony even influenced, much less motivated, the legislature in enacting this statute. Brief for Appellant at 17-18.

¶33 AGSCO provided chemicals and services worth over \$500,000 to Hardy Farms on credit, for which Hardy Farms did not pay. Appendix at 167. Therefore, AGSCO (through its agent, Capital Harvest) availed itself of its statutory remedy of an agricultural supplier's lien. Appendix at 110. Stockman Bank introduced absolutely no evidence to indicate either AGSCO or Capital Harvest advanced or loaned any money to Hardy Farms. Therefore, Capital Harvest did not file a lien on behalf of AGSCO as "a security interest created by contract to secure money advanced or loaned," and the lien is entitled to the priority position granted by N.D.C.C. § 35-31-01. Based on the information available to the district court, it properly held AGSCO's security interest in the Hardy Farms crops superior to Stockman Bank's security interest.

D. AGSCO Properly Filed Its Agricultural Supplier's Lien Because Hardy Farms Owed The Purchase Price At The Time Of Sale.

¶34 AGSCO and Capital Harvest offered to the district court the following affidavit testimony of Rick Dregseth, Chief Financial Officer of Dakota Fusion, Inc. (an affiliate of AGSCO and Capital Harvest):

As stated, each monthly statement contains a "Payment Due Date," which is a date in the month immediately following the date the purchases were made by the Customer.... If the Customer pays by the Payment Due Date on the statement, the Customer can avoid finance charges on those purchases, and he can also avoid the filing of a lien. As we understand it, the North Dakota statutory requirement for the notice, discussed above, is not dependant upon default. We do not consider a farmer Customer in default if he does not pay by the Payment Due Date, but if we don't receive payment, we reserve the right to file a lien to protect our right to receive payment.

Appendix at 300-301, ¶¶ 11-12. AGSCO and Capital Harvest also offered to the district court the following affidavit testimony of AGSCO'S credit manager, Marc Geatz:

The finance charges charged by AGSCO/Capital Harvest on customer accounts, pursuant to the Revolving Charge Agreement entered into with customers, is 18% per annum (i.e., 1.5% per month) accruing from the date of the purchase of products and services. The customer qualifies for a much lower finance charge rate if the customer's account is paid in full by December 1st of each year, but if it is not paid in full, then the balance accrues, as stated, at 18% per annum, or 1.5% per month."

Appendix at 1080, ¶ 2.

¶35 North Dakota law permits the holder of a Revolving Charge Agreement to charge any finance charge which the Agreement of the parties provides. N.D.C.C. § 51-14-03. Hardy Farm signed a Revolving Charge Agreement with AGSCO/Capital Harvest through which, in return for the privilege of being able to defer payment otherwise due on the date of sale, Hardy Farm agreed to pay a finance charge. If Hardy Farms paid for the chemical between the date of sale and December 1, it would pay a small finance charge with repayment of the purchase price for the chemicals. Appendix at 1080, ¶ 2. If Hardy Farms paid after December 1, it would have to pay the larger 1.5% per month finance charge with repayment of the purchase price for the chemicals. Id. Although Stockman Bank characterizes the December 1, 2002 date as the "due date" for Hardy Farms' indebtedness to AGSCO, December 1 was merely a finance charge modification date in the contract, not a payment due date. Appendix at 1080, ¶¶ 2-3. Based on the information available to the district court, it properly concluded the Hardy Farms debt was due and payable, and AGSCO was entitled to take its agricultural supplier's lien.

E. Capital Harvest, as Agent for AGSCO, Complied with the Requirements of the Agricultural Supplier's Lien Statute when it Filed the Agricultural Supplier's Lien on AGSCO's Behalf.

¶36 The North Dakota Agricultural Supplier's Lien Statute requires the person claiming the lien to include the following information on the lien statement:

- a. The name and address of the person to whom the supplies were furnished.
- b. The name and address of the supplier.
- c. A description of the crops ... and their amount or number, if known, subject to the lien together with a reasonable description, including the county as to the location of the crops ...and the year the crop is to be harvested or was harvested.
- d. A description and value of the supplies and the first date furnished.

N.D.C.C. § 35-31-02(1)-(4).

1. **The lien statement sufficiently identified the name and address of the supplier.**

¶37 The lien statement correctly identifies AGSCO as the lien supplier, while Capital Harvest is merely identified as AGSCO's agent. Appendix at 110. "Any instrument within the scope of [an agent's] authority by which an agent intends to bind [the] principal does bind [the principal] if such intent is plainly inferable from the instrument itself." N.D.C.C. § 3-03-04. The Capital Harvest/AGSCO lien statement plainly identifies AGSCO as the supplier and plainly identifies Capital Harvest as the agent acting for AGSCO. Appendix at 110, Section D. AGSCO's intent to be bound as the supplier by the lien statement filed by its agent is plainly inferable from the instrument itself. Based on the information available to the district court, it properly concluded the lien statement sufficiently identified the name and address of the supplier.

2. **The lien statement sufficiently described the crops to which the lien applied.**

¶38 The description of crops in the lien statement ("all alfalfa, corn, barley, wheat, potatoes and sugar beets") is sufficient under the statute. The statute requires "a

description of the crops ... and their amount or number, **if known.**" N.D.C.C. § 35-31-02(2) (emphasis added). The statute does not absolutely require a designation of acreage, amount, or number, because the statute specifically states such information may be provided only if such information is known. Hardy Farms is a vast multi-crop enterprise with huge fields in Montana and North Dakota. Appendix at 86, ¶ 4. For an unpaid creditor, such as AGSCO or its agent Capital Harvest, to know the acreage, amount, or number of the crops is impractical and unnecessary. Based on the information available to the district court, it properly concluded the lien statement sufficiently described the liened crops.

¶39 Further, the description of the location of the crops to which the lien applied ("Township 151, Range 104, Township 152, Range 104, located in McKenzie County, ND") is sufficient under the statute. The agricultural supplier's lien statute does not require a legal description; it only requires a "*reasonable* description, including the county as to the location of the crops." N.D.C.C. § 35-31-02(3) (emphasis added). The district court held the identification narrowing down the crop fields to a township, range, and county satisfied this statutory requirement. Appendix at 941. Based on the information available to the district court, it properly concluded the lien statement sufficiently identified the location of the liened crops.

3. **The lien statement sufficiently described the supplies furnished and the date on which the supplies were first furnished.**

¶40 The statute requires a lien statement to indicate "a description and value of the supplies." N.D.C.C. § 35-31-02(4). The district court held the lien statement's description of the supplies furnished ("agricultural chemicals") was sufficient under the

statute. Appendix at 941. The categorical term “farm chemicals” is listed in the agricultural supplier’s lien statute itself as one element of the statutory definition of “supplies.” N.D.C.C. § 35-31-01. The inclusion of such categorical descriptions in the statutory language itself evidences the sufficiency of such descriptions for inclusion in lien statements.

¶41 The lien statement’s indication of the date AGSCO furnished the supplies is also sufficient. The face of the lien statement directs the lien claimant to state “the first date the supplier furnished the agricultural supplies or services **for which a lien is claimed.**” Appendix at 110 (emphasis added). Because the July 2, 2002 date is no more than 120 days prior to the October 29, 2002 lien filing date, the July 2, 2002 date is sufficient to put others on notice of AGSCO’s lien claim.

¶42 In re Bernstein, 130 B.R. 244 (Bankr. D.N.D. 1999), does not demand different conclusions as to either of these issues. Bernstein involved 6 lien statements. See Id. at 147. The first three lien statements (“the 1995 lien statements”), filed on March 15, 1996, attempted to claim a lien for supplies furnished between January 1, 1995 and December 4, 1995. Id. On the 1995 lien statements, the supplier indicated it first provided “feed and care” on December 4, 1995. See Id. at 148. The second three lien statements (“the 1996 lien statements”), filed on August 21, 1996, attempted to claim a lien for supplies furnished between April 29, 1996 and August 21, 2006. Id. On the 1996 lien statements, the supplier indicated it first furnished supplies on May 1, 1996, but the supplier left blank the space in which it should have specified the supplies furnished. See Id. at 148.

¶43 With regard to the description of the supplies furnished, the Bernstein court held the phrase “feed and care” on the 1995 lien statements gave the reader of the lien statement “no notice at all of that for which the lien was intended.” See Id. at 155. The term AGSCO included in the lien statement, “agricultural chemicals” is more specific than “feed and care” and gives the reader sufficient notice of the supplies for which AGSCO claimed a lien. In addition (and as discussed above), the term “farm chemicals” is specifically listed within the statutory definition of “supplies.” Based on the information available to the district court, it properly held the term “agricultural chemicals” contained in the lien statement sufficiently described the supplies furnished.

¶44 With regard to the date AGSCO furnished the supplies, Stockman Bank offers an incomplete analysis of Bernstein. The Bernstein court did hold the December 4, 1995 date on the 1995 lien statements was misleading (and, therefore, deficient) because it indicated the last date the supplies were furnished, rather than the first date. Bernstein, 230 B.R. at 154. However, the court further stated:

The 1996 lien statements may be regarded as accurate as they do set forth May 1, 1996 as the date services were provided and from that date, assumed by virtue of section 35-31-02 to be the “first date,” one can make the hundred twenty day calculation.

Id. The AGSCO lien statement is more akin to the 1996 lien statements in Bernstein than the 1995 lien statements. The AGSCO lien statement sets forth July 2, 2002 as the date services were provided. Appendix at 110. Stockman Bank does not dispute AGSCO furnished supplies after that date. Under the above quoted language from Bernstein, the July 2, 2002 date is assumed to be the first date AGSCO furnished supplies for which it claims a lien. Therefore, AGSCO’s lien is valid in this regard because Capital Harvest filed the lien on behalf of AGSCO on October 29, 2002, the last day of the 120-day

period. Based on the information available to the district court, it properly concluded AGSCO's lien statement sufficiently indicated the date AGSCO first furnished the supplies for which it claimed a lien.

F. The District Court Properly Granted AGSCO's Request for an Order Determining Amounts Owed to AGSCO for Products and Services Delivered to Hardy Farms Occurring Within The Court-Imposed 120 Day Period.

¶45 The district court, in its March 30, 2004 Order, limited AGSCO's lien interest to products and services it supplied to Hardy Farms within the 120 days prior to its lien filing. Appendix at 941. The district court required additional information from which it could determine the value of products and services supplied during the 120-day period. Appendix at 941. Pursuant to the district court's Order, counsel for AGSCO asked Greg Breuer to review his file for the specific purpose of determining how much chemical AGSCO furnished to Hardy Farms during the court-imposed 120-day period between July 2, 2002 and October 30, 2002. Appendix at 947, ¶ 2. Mr. Breuer carefully reviewed his records to pinpoint precisely when AGSCO actually furnished (physically delivered to the farmer or his fields) Hardy Farms with supplies. Appendix at 947-955. AGSCO and Capital Harvest presented this affidavit testimony to the district court in its Brief in Support of Motion for Final Summary Judgment. Supplemental Appendix at 113. In his affidavit, Mr. Breuer states clearly and precisely AGSCO furnished \$176,560.85 worth of chemical to Hardy Farm during the court-imposed 120 day timeframe. Appendix at 947. AGSCO and Capital Harvest also presented to the district court the affidavit testimony of Craig Mehling, AGSCO's aerial application agent, in which he corroborated the dates on which he applied the chemicals to Hardy Farms fields. Appendix at 1085-1086.

¶46 Stockman Bank states Mr. Breuer testified in his deposition the dates on the respective AGSCO Product Movement Sheets represent either the date AGSCO delivered the product or the date the customer picked up the product. Brief for Appellant at 23. Mr. Breuer gave this deposition testimony before this district court narrowed the “window” of AGSCO’s lien to the 120 day time frame, when the specific date AGSCO or its aerial application agent actually delivered the chemicals were not as critical to establishing the value of AGSCO’s lien. In the affidavit testimony AGSCO and Capital Harvest provided to the district court, Mr. Breuer explained he provided an overgeneralized answer to the question regarding the dates on the Product Movement Sheets, and he clarified the date on the Product Movement Sheets represents either the date the customer placed the order or the date AGSCO or its agent delivered the chemicals or services, depending on the size of each order. Appendix at 951-952, ¶ 9. Further, Mr. Breuer testified in his deposition his sales paperwork can differ with each transaction with the same customer, depending on whether AGSCO delivered the products or the customer picked up the product. Appendix at 950-951, ¶ 6-7.

¶47 Stockman Bank presents no new evidence to contradict the sworn testimony of the three witnesses discussed above. Instead, Stockman Bank relies on its attorney’s interpretation of a small and incomplete excerpt of Greg Breuer’s deposition testimony. Appendix at 1098-1099. “Unsupported conclusory allegations are insufficient to withstand summary judgment.” University Hotel Development, L.L.C., 2006 ND 121, ¶ 14, 715 N.W.2d 153 (citation omitted). Based on the information available to the district court, it properly concluded AGSCO furnished the agricultural chemicals for which it claimed a lien within the court-imposed 120-day period.

G. AGSCO Is Entitled To Collect Costs Through Its Agricultural Supplier's Lien For Services Provided By Its Aerial Application Agent.

¶48 The agricultural supplier's lien statute provides:

"Any person who furnishes supplies used in the production of crops...is entitled to a lien upon the crops...As used in this chapter, the term "supplies" includes...farm chemicals...*or the furnishing of services in delivering or applying the supplies.*"

N.D.C.C. § 35-31-01 (emphasis added).

¶49 AGSCO and Capital Harvest presented to the district court the following affidavit testimony of Greg Breuer:

AGSCO's contracted aerial applicator is Craig Mehling Spraying Service of Hardin, Montana, and that aerial service is an agent of AGSCO. We employ that aerial applicator to furnish our customers with chemicals which must be, or which are desired to be, applied by aerial application, unless the customer wants to use a different aerial applicator of its own choosing. After our aerial applicator sprays a particular field, he notifies me of that fact and I then enter that data into the AGCSO systems so that the customer can be billed for the application of the chemical by our contracted aerial applicator. Our aerial applicator bills AGSCO for his services and we pay him directly pursuant to our agency agreement.

Appendix at 950. AGSCO and Capital Harvest also presented to the district court the following affidavit testimony of Marc Geatz:

AGSCO has its own contracted aerial applicator, Craig Mehling Spraying Service of Hardin, Montana. When a farm customer buys products which he wants aerially applied to his fields, he is certainly free to choose his own aerial applicator, but AGSCO does provide its own contracted applicator to apply the products if the customer wants us to apply them. Accordingly, we bill the farmer for both the product and the aerial application service accomplished by our agent Craig Mehling Spraying Service.

Appendix at 1083. In addition, AGSCO and Capital Harvest presented to the district court the following affidavit testimony of Craig Mehling:

In 2002 I had a verbal contract with AGSCO, Inc., to apply agricultural chemicals to the fields of AGSCO's customers. In 2002 I applied

AGSCO, Inc.'s chemicals to the Hardy Farm, Inc. crops as an agent of AGSCO, Inc. AGSCO, Inc. paid me for my services and then billed its customer, (in this case, Hardy Farm). I did not bill Hardy Farm, Inc., for my services nor was I paid by Hardy Farm, Inc. In mid-July 2002 I was asked by AGSCO, Inc., to apply GEM, a chemical herbicide to Hardy Farm beet fields.

Appendix at 1086, ¶¶ 3-6. As this testimony indicates, Craig Mehling was not an “independent third party,” but rather an agent of AGSCO, paid by AGSCO, and engaged by AGSCO to aerially furnish the chemicals which Hardy Farms ordered from AGSCO. AGSCO contracted with Hardy Farms to supply chemical to Hardy Farms. Hardy Farms asked AGSCO to deliver some of the chemical by aerial application. Supplemental Appendix at 130-131, ¶¶ 3-4. AGSCO delegated the delivery by aerial application to its agent, Craig Mehling. Appendix at 1086.

¶50 Stockman Bank attacks this testimony, alleging it is “not supported by any facts, and instead is self-serving and is a mere legal conclusion.” Brief for Appellant at 25. Stockman Bank, however, failed to introduce any evidence to the district court contradicting this affidavit testimony. Based upon the information available to the district court, it properly held AGSCO is entitled to recover the aerial application fees and expenses incurred by its agent, Craig Mehling.

H. Proration Of AGSCO's Agricultural Supplier's Lien Claim Between North Dakota And Montana Is Inappropriate.

¶51 Stockman Bank argues AGSCO's lien is limited to “an amount representing the AGSCO products applied to crops in North Dakota.” Brief for Appellant at 26. The plain text of the statute fails to support this argument, especially if this Court compares

the current statutory language with the prior version of the agricultural supplier's lien statute.

¶52 N.D.C.C. § 35-31-01 allows a furnisher of “supplies used in the production of crops, agricultural products, or livestock” to take a lien on “the crops, products produced by the use of the supplies, and livestock and their products including milk.” See N.D.C.C. § 35-31-01. The plain text of the statute dictates agricultural suppliers may take a lien only on “products produced by the use of the supplies,” but the statute imposes no similar limitation of the *crops* upon which an agricultural supplier may take a lien. “Words used in any statute are to be understood in their ordinary sense....” See N.D.C.C. § 1-02-02. Words and phrases in a statute “must be construed according to the context and the rules of grammar and the approved usage of the language.” N.D.C.C. § 1-02-03. The presence of the comma after the word “crops” indicates the phrase “produced by the use of the supplies” modifies the statutory term “products,” but does not modify the statutory term “crops.” Therefore, an agricultural supplier may take a lien on *all of a farmer's crops*, regardless of where or whether the farmer applied specific chemicals to specific crops.

¶53 Stockman Bank's proration argument would have found support under the **prior** version of the agricultural supplier's lien statute:

Any person who furnishes or applies fertilizer, farm chemicals, or seed to another to be spread, applied, sown, or planted on lands owned or contracted to be purchased or used, occupied, or rented, upon filing the statement provided in section 35-09-02, shall have a lien **upon all the crop produced from** the fertilizer, farm chemicals, or seed so furnished to secure the payment of the purchase price thereof.

N.D.C.C. § 35-09-01 (repealed 1987) (emphasis added). By its plain text, the prior version of the agricultural supplier's lien statute limited the supplier's lien to crops

produced from the farm chemicals; by comparison, the current statute includes no such limitation. Based upon the information available to the district court, including the literal language of the statute and the established rules of statutory construction, the district court properly held AGSCO is entitled to a lien on all of the crops properly identified in the lien statement, regardless of whether those particular crops received an application of the particular chemicals AGSCO supplied.

I. AGSCO Is Entitled To Collect Finance Charges At The Contract Rate On Its Line Of Credit With Hardy Farms, Inc. Through Its Agricultural Supplier's Lien.

¶54 N.D.C.C. § 35-01-17, applicable to all Title 35 liens (including the agricultural supplier's lien) states as follows:

“Any person who has a lien inferior to another upon the same property has the right... (1)To redeem the property **in the same manner as its owner might** from the superior lien...”

(Emphasis added). Under this statute, before Stockman Bank receives any proceeds pursuant to its alleged lien¹, AGSCO is entitled to receive the same amount as Hardy Farms would have been required to pay if it sought to redeem the lien or pay the debt.

¶55 North Dakota law permits the holder of a Revolving Charge Agreement to charge any finance charge which the agreement of the parties provides. N.D.C.C. § 51-14-03 provides “a seller may contract for and, if so contracted for, the seller or the holder of the agreement may charge, receive, and collect the service charge authorized by this section.

¹ This Brief refers to Stockman Bank's lien as “alleged” because the Record does not reflect a ruling or Order in which the district court determined Stockman Bank holds a valid lien interest in the crop proceeds deposited with the district court.

The service charge may not exceed the amount agreed to by the parties.” The obligation of the parties is defined by the *contract* and not by the state’s agricultural lien laws. See N.D.C.C. §35-01-11 (stating an obligation to perform is not to be implied from the creation of the lien). Hardy Farms signed a Revolving Charge Agreement with AGSCO through which, in return for the privilege of being able to charge agricultural supplies on credit with AGSCO, Hardy Farms agreed to pay a finance charge of 1.5% per month on the price of the agricultural supplies. Appendix at 106-107. AGSCO/Capital Harvest’s lien served as security for Hardy Farm’s *performance of its contractual obligation* to pay for the chemical plus a finance charge until paid in full. Because Hardy Farms would be required to pay the price of the products plus the 1.5% finance charge per month to AGSCO/Capital Harvest in order to redeem or satisfy the AGSCO lien, AGSCO is entitled to receive an equal amount in finance charges pursuant to N.D.C.C. § 51-14-03 before Stockman Bank is entitled collect anything pursuant to its alleged lien. Based upon the information available to the district court, it properly awarded AGSCO its finance charges according to the terms of the Revolving Charge Agreement.

J. The District Court Properly Rejected Plaintiff’s “Double Recovery” Argument.

¶56 Upholding the district court’s judgment for the full amount awarded to AGSCO will not result in a double recovery in favor of AGSCO. The district court, in its Order for Judgment dated January 21, 2006, found AGSCO demonstrated “as a matter of law” its entitlement to recover a retail price amount on its agricultural supplier lien of \$176,560.85, plus accrued finance charges. Appendix at 1128, ¶ 3. The court did not hold any portion of that amount represented chemicals applied to Montana crops. The

respective Montana and North Dakota agricultural supplier's lien statutes are very different in regards to the time periods in which a lien can be claimed and whether or not the lien claimant must prove application. Compare MCA § 71-3-901 (limiting lien to "all grain or crops dusted or sprayed for and on account of ...material furnished") and MCA 71-3-902 (allowing filing of lien statement "within 90 days after the last labor or service was performed or material furnished") with N.D.C.C. § 35-31-01 and § 35-31-02, discussed supra. In its March 30, 2004 Order, the district court determined North Dakota's agricultural lien statute controlled the extent of AGSCO's lien. Appendix at 940. In its January 21, 2006 Order, the district court impliedly and properly concluded AGSCO's lien has first priority position over Stockman Bank's alleged crop mortgage with respect to \$176,560.85 of crop proceeds for crops. Appendix at 1128. AGSCO sales of supplies and services to Hardy Farms in 2002 exceeded \$500,000. Appendix at 167. The Montana court awarded AGSCO \$196,000 on its Montana claim. Appendix at 1158-1159. The district court in the instant case awarded AGSCO \$176,560.85 plus accrued finance charges on its North Dakota claim. Appendix at 1128, ¶ 3. The aggregate award in the two jurisdictions does not exceed the value of the chemicals and services AGSCO sold to Hardy Farms in 2002. Simply stated, there will be no double recovery by AGSCO in this case because the district court judgment will not make AGSCO whole as to its losses incurred through the Hardy Farms Sales.

1. Stockman Bank was not entitled to relief under Rule 59(j), N.D.R.Civ.P.

¶57 The district court properly denied Stockman Bank's Rule 59(j) Motion to Alter or Amend Judgment. Although newly discovered evidence may support a Rule 59(j)

motion in North Dakota, this Court has not previously construed the standard by which a court should grant a Rule 59(j) motion based on newly discovered evidence. Rule 59(j) is substantially similar to Rule 59(e) of the Federal Rules of Civil Procedure. Because the North Dakota Rules of Civil Procedure were adopted from the Federal Rules of Civil Procedure, North Dakota courts are “guided by and give great deference to federal case law interpreting the federal rule” when construing the derivative state rule. North Shore, Inc. v. Wakefield, 542 N.W.2d 725, 727 (N.D. 1996) (citation omitted). Rule 59(e) motions to alter or amend should be granted when “there is newly discovered evidence which was not available at the time the matter was originally considered **and which would have produced a materially different result.**” In re Anchor Glass Container Corp., 335 B.R. 193, 196 (Bankr. M.D. Fla. 2005) (emphasis added). “A trial court’s decision on a Rule 59(j) motion will not be reversed absent an abuse of discretion.” Hanson v. Hanson, 2003 ND 20, ¶ 5, 656 N.W.2d 656. “A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law.” Kuperus v. Willson, 2006 ND 12, ¶ 8, 709 N.W.2d 726.

¶58 In its January 21, 2006 Order, the district court refused to apportion AGSCO’s lien claim between North Dakota and Montana and granted summary judgment in favor of AGSCO for the full amount of products sold during the 120-day period preceding the date of lien filing. Appendix at 1127-1129. The district court’s ruling implicitly recognized the separate nature of the respective lien claims in North Dakota and Montana. In support of its Rule 59(j) Motion, Stockman Bank presented to the district

court the affidavit testimony of its counsel of record, Garth Sjue, in which he testified AGSCO already collected the “stipulated amount of \$196,000 for chemicals sold by AGSCO, Inc. to Hardy Farm, Inc. and applied to the Montana crops.” Appendix at 1152, ¶ 4. Stockman Bank previously argued in favor of proration of AGSCO’s claim between North Dakota and Montana. Supplemental Appendix at 142-144. The district court implicitly rejected this proration argument in its January 21, 2006 Order Granting Final Summary Judgment to AGSCO and Capital Harvest by awarding to AGSCO and Capital Harvest the full amount they sought. Appendix at 1127-1129. Mr. Sjue’s affidavit testimony did not present to the district court any newly discovered evidence justifying proration of AGSCO’s claim between North Dakota and Montana; his testimony merely set forth the specific amounts of the proration for which it previously argued and which the district court previously denied. As such, Stockman Bank did not present any “newly discovered evidence” which would have produced a materially different result. The district court did not abuse its discretion in denying Stockman Bank relief on this issue.

2. Stockman Bank was not entitled to relief under Rule 60(b)(v), N.D.R.Civ.P.

¶59 Rule 60(b) provides the opportunity for a court to grant “extraordinary relief,” and a court may only grant relief under Rule 60(b) upon a showing of “exceptional circumstances.” Mitchell v. Shalala, 48 F3d 1039 (1995). A party seeking relief from judgment under Rule 60(b) may not rely upon conclusory recitations of the grounds for relief, but must set forth specific details underlying the assertions. Fraffjord v. Ell, 1997 ND 16, ¶ 13, 558 NW2d 848. Even a mistake of law by the Court does not justify setting a judgment aside under Rule 60(b). Production Credit Association of Minot v.

Dobrovolny, 415 NW2d 489, 492 (ND 1987). This Court reviews a trial court's decision on a motion for relief from judgment using an "abuse of discretion" standard. Kuperus, 2006 ND 12, ¶ 8, 709 N.W.2d 726.

¶60 A party alleging double recovery as grounds for relief under Rule 60(b)(v), N.D.R.Civ.P. is required to present to the reviewing court specific evidence of the alleged double recovery. Borgen v. Kinsey, 466 N.W.2d 553, 561 (N.D. 1991). Stockman Bank alleges double recovery in that "the Montana portion of the Defendant's claim allowed by this Court has already been satisfied as a result of the payment made in the Montana crop check litigation." Brief for Appellant at 29. However, Stockman Bank did not provide the district court with any specific evidence as to how AGSCO's recovery in the North Dakota action results in double recovery when the combined amount AGSCO recovered through both the North Dakota and Montana actions was less than the value of the chemicals and services AGSCO provided to Hardy Farms in 2002. The district court did not abuse its discretion in denying Stockman Bank relief on this issue.

3. Stockman Bank was not entitled to relief under Rule 60(b)(vi), N.D.R.Civ.P.

¶61 As stated above, this Court reviews a trial court's decision on a motion for relief from judgment using an "abuse of discretion" standard. Kuperus, supra. In Kopp v. Kopp, 2001 ND 41, 622 NW2d 726, this Court sets forth the standards for granting relief from judgment under Rule 60(b)(vi):

Rule 60(b) attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done, and accordingly N.D.R.Civ.P. 60(b)(vi) should be invoked only when extraordinary circumstances are present. Rule 60(b)(vi), N.D.R.Civ.P., has been broadly construed as a grant of ample power to a trial court to vacate a judgment whenever that action is appropriate to

accomplish justice. The rule provides for relief when the movant demonstrates it would be manifestly unjust to enforce a court order or judgment, and provides an escape from the judgment, unhampered by detailed restrictions. When it is disclosed that a judgment is so blatantly one-sided or so rankly unfair under the uncovered circumstances that courts should not enforce it, N.D.R.Civ. P. 60(b)(vi) provides the ultimate safety valve to avoid enforcement by vacating the judgment to enforce judgment.

¶62 Stockman Bank raised the same issue of double recovery in its Brief in Opposition to Motion for Final Summary Judgment. Supplemental Appendix at 142-144. The district court rejected that argument. Appendix at 1169-1170. Stockman Bank does not present this Court with any argument whatsoever regarding its entitlement to relief under Rule 60(b)(vi) other than its conclusory allegation the Rule applies in the instant case. Brief for Appellant at 29. Stockman Bank has simply failed to call this Court's attention to any circumstances (extraordinary or otherwise), resulting injustice (manifest or otherwise), or unfairness (rank or otherwise) which would justify relief from the district court's judgment. The district court did not abuse its discretion in denying Stockman Bank relief on this issue.

K. Rule 62(a), N.D.R.Civ.P. Did Not Require AGSCO or Capital Harvest To Return Funds Deposited With The Court After The Clerk Of Court Released The Funds To AGSCO and Capital Harvest.

¶63 Rule 62(a), N.D.R.Civ.P. provides, in pertinent part:

Except as stated herein, no execution may issue upon a judgment nor may proceedings be taken for its enforcement until the expiration of ten days after notice of entry of its judgment if the opposing party appeared, and ten days after entry of a judgment by default.

However, this Rule does not apply to the Judgment entered in this case because the Judgment subjected neither Stockman Bank nor its property to personal liability upon the judgment. See United States v. 3,035.73 Acres Of Land, More Or Less, Situated In

Monroe County, State of Arkansas, 496 F.Supp. 1026, 1030 (E.D. Ark. 1980) (stating “[t]here is a serious question as to the application of Rule 62(a) where no action was taken on a judgment against the judgment debtor or his property”); Village of Brown Deer v. City of Milwaukee, 99 N.W.2d 860, 862 (Wis. 1959) (holding the portion of judge’s order staying execution of the judgment was “without meaning” when “neither party was commanded to do anything nor ... ordered to refrain from doing anything” pursuant to the judgment; “the judgment stands by itself and no execution or other process is required by its terms”); Aron v. Snyder, 196 F.2d 38 (D.C. Cir. 1952) (holding the trial court’s order for the clerk of court to “pay forthwith” funds on deposit, in accordance with its conclusions concerning the rights of the parties, did not violate the Rule 62(a) stay). Appendix at 1128-1129, ¶4. In this case, AGSCO/Capital Harvest obtained an Order for Judgment from the district court determining AGSCO and Capital Harvest’s rights to money held by the Court. Appendix at 1127-1129. Stockman Bank does not face personal liability on the Judgment. No Judgment has been docketed against Stockman Bank in favor of AGSCO pursuant to Rule 58, N.D.R.Civ.P. in this case. See N.D.C.C. § 28-20-13. No further action by either party was required under the terms of the Judgment. Stockman Bank cannot expect to receive a Stay of Execution or Proceedings to Enforce a Judgment when there is no Judgment docketed against Stockman Bank.

¶64 Assuming *arguendo* Rule 62(a) applied to the Judgment entered in this case, neither AGSCO nor Capital Harvest violated the Rule 62(a) stay because neither party sought an execution on the Judgment or requested proceedings to enforce the Judgment.

The terms of the January 21, 2006 Order for Judgment made the Judgment self-executing:

Upon filing of a Judgment consistent with this Order, AGSCO/Capital Harvest are entitled to obtain from the Clerk of the District Court proceeds from the monies on deposit with the Court in the sum of \$250,858.69, plus \$87.07 per day accruing finance charges after November 30, 2004 until said proceeds check is delivered into the hands of AGSCO/Capital Harvest.

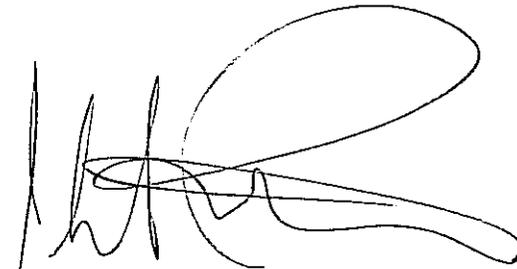
Appendix at 1128-1129, ¶ 4. The Judgment does not direct Stockman Bank to pay any money to any party. The Judgment does not order either party to do anything or to refrain from doing anything. By its terms, the Order did not require AGSCO or Capital Harvest to do anything in order for the Clerk of District Court to release the disbursed funds. As neither AGSCO nor Capital Harvest sought an execution or initiated any proceedings to enforce this Judgment, neither AGSCO nor Capital Harvest violated Rule 62(a).

¶65 Stockman Bank argues the purpose of the stay is “clearly so that certain post judgment motions can be made before the funds are released.” Brief for Appellant at 31. Stockman Bank cites no authority to this Court, and cited no authority to the district court below, in support of this argument. In addition, the motions Stockman Bank contemplated may be made up to fifteen days after Notice of Entry of Judgment, which is five days **after** the expiration of the Rule 62(a) stay and five days after a party can execute on (or use other available remedies to enforce) a Judgment. Therefore, Stockman’s Bank’s unsupported and conclusory statements regarding the purpose of the stay rule is unsupported by the very language of the Rules under which Stockman Bank announced its intentions to proceed.

CONCLUSION

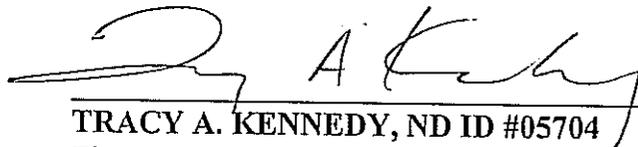
¶66 For all the foregoing reasons, AGSCO and Capital Harvest respectfully request this Court affirm the judgment of the district court below and deny Stockman Bank's motion for summary judgment.

Dated this 2nd day of October, 2006.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STOCKMAN BANK OF MONTANA, a)
Montana banking corporation,)

Plaintiff/Appellant,)

vs.)

AGSCO, INC., a North Dakota corporation, and)
Capital Harvest, Inc., d/b/a Capital Harvest Finance)
Company, a North Dakota corporation, individually)
and as agent for AGSCO, Inc.,)

Defendants/Appellees.)

Farmers Union Oil Company of Williston, a North)
Dakota cooperative association, Mon-Kota, Inc., a)
Montana corporation, Betaseed, Inc., a Minnesota)
corporation, Central Insurance Agency, a North)
Dakota corporation, Steven D. Cayko a/k/a Steve)
Cayko, Perry Elletson a/k/a Perry E. Elletson, Ron)
Gross a/k/a Ronnie Gross, Edward P. Ochs a/k/a)
Eddie Ochs, Tom Ochs, Mark Brunelle, Kelly)
Brunelle and Bill Sheldon,)

Defendants,)

and)

Farmers Union Oil Company of Williston, a North)
Dakota cooperative association,)

Third-party Plaintiff,)

vs.)

Hardy Farms, Inc. and Jim Hardy,)

Third-Party Defendants.)

Supreme Court No. 20060174

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

TIFFANY A. HIMEL, being first duly sworn, deposes and says that on the 2nd day of October, 2006, she filed by e-mail the attached **BRIEF OF DEFENDANTS/APPELLEES and SUPPLEMENTAL APPENDIX OF DEFENDANTS/APPELLEES** according to the N.D. Sup. Ct. Admin. Order 14 upon:

Supclerkofcourt@ndcourts.com

TIFFANY A. HIMEL, being first duly sworn, deposes and says that on the 2nd day of October, 2006, she served by e-mail the attached **BRIEF OF DEFENDANTS/APPELLEES and SUPPLEMENTAL APPENDIX OF DEFENDANTS/APPELLEES** according to the N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF format (document formatting and page numbering may be slightly different than Word), upon:

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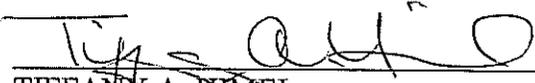
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TIFFANY A. HIMEL, being first duly sworn, deposes and says that on the 2nd day of October, 2006, she served by U.S. Mail the attached **BRIEF OF DEFENDANTS/APPELLEES and SUPPLEMENTAL APPENDIX OF DEFENDANTS/APPELLEES** upon:

Thomas J. Aljets
Attorney for Defendant Central Insurance Agency
PO Box 301
Carrington, ND 58421-0301

Dated this 2nd day of October, 2006.


TIFFANY A. HEMEL

Subscribed and sworn to before me this 2nd day of October, 2006.

MICHELLE JUNTUNEN
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Sept. 27, 2012


NOTARY PUBLIC, NORTH DAKOTA
My commission expires: 09-27-12