

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Jeffrey Agre, <u>et al.</u>	:	
	:	
Plaintiffs,	:	File No. _____
	:	
v.	:	
	:	ANSWER, AFFIRMATIVE DEFENSES, AND THIRD-PARTY COMPLAINT
Rain and Hail LLC, <u>et al.</u> ,	:	
	:	
Defendants and	:	
Third-Party Plaintiffs,	:	
	:	
v.	:	
	:	
Federal Crop Insurance Corporation,	:	
a body corporate and agency of and within	:	
the United States Department of	:	
Agriculture,	:	
	:	
Third-Party Defendant.	:	

Defendants Rain and Hail LLC, Agri General Insurance Company and ACE Property and Casualty Company (“defendants”), in response to the Complaint of plaintiffs Jeffrey Agre, et al. (“plaintiffs”), allege and state as follows:

INTRODUCTION

1. This action is the direct result of three unfortunate circumstances: (1) plaintiffs’ understandable disappointment in the economic performance of the cooperative in which they are shareholders and which processes their sugar beet crops, the Southern Minnesota Beet Sugar Cooperative (“SMBSC”); (2) a series of managerial mistakes by SMBSC, starting with its

decision (made by the cooperative under its Grower Agreements with plaintiffs) to allow plaintiffs' beets insufficient time for any freeze damage to heal before harvesting the 2000 crop and ending with its mismanagement of harvested sugar beets, thus permitting nearly 500,000 tons to be discarded due to its continuing failures to ventilate vulnerable beets and to take other related steps to protect its members' interests; and (3) the unfounded decision of the Federal Crop Insurance Corporation ("FCIC") to issue Manager's Bulletin MGR-01-010 ("MGR-01-010") which unfairly and unreasonably created or exaggerated an expectation of plaintiffs that their economic losses would be covered by crop insurance sold by defendants.

2. Instead of blaming themselves for their failures to give timely notice of any loss believed to have been suffered and to comply with their other obligations under their crop insurance policies, plaintiffs seek to shift any fault to defendants. Plaintiffs take this position even though their 2000 crop was the second highest tonnage produced in the decade 1991 – 2000, was the third highest tonnage processed over that period, and the overall sugar content was the fourth best in that ten year span. Defendants bear no fault and have no liability to plaintiffs, and, if they did, they are entitled to indemnification by either or both of SMBSC and FCIC.

ANSWER AND AFFIRMATIVE DEFENSES

First Defense

3. Defendants admit that they have not paid plaintiffs' untimely, undocumented, and insupportable claims for crop insurance coverage for alleged freeze damage to their 2000 sugar beet crops; defendants deny all other allegations in paragraph 1 of plaintiffs' Complaint.

4. Defendants deny the allegations in paragraph 2 of plaintiffs' Complaint.

5. Defendants admit that they and other crop insurance companies believe the Risk Management Agency ("RMA"), an agency of the United States Department of Agriculture

(“USDA”), erroneously issued MGR-01-010 on behalf of the FCIC, also an agency of the USDA, and, therefore, they also believe that any indemnities payable to plaintiffs should be reimbursed by the FCIC pursuant to 7 U.S.C. § 1508(j)(3). Defendants do not take the position, however, that they will not pay any insurance proceeds to plaintiffs until the federal government agrees either to reimburse them or to pay those claims for them. In fact, all of defendants’ actions with respect to plaintiffs’ claims have been taken in accordance with their insurance policies with plaintiffs and loss adjustment procedures approved, issued, or recommended by the FCIC; defendants deny all other allegations in paragraph 3 of plaintiffs’ Complaint.

6. Defendants admit that plaintiffs claim to be policyholders. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 of plaintiffs’ Complaint and, therefore, deny them.

7. Defendants admit the allegations in paragraph 5 of plaintiffs’ Complaint.

8. Defendants admit that they conducted business in Minnesota in 2000 when plaintiffs’ claims, if any, arose; defendants deny all other allegations in paragraph 6 of plaintiffs’ Complaint.

9. Defendants deny the allegations in paragraph 7 of plaintiffs’ Complaint.

10. Upon information and belief, defendants admit the allegations in paragraphs 8 through 10 of plaintiffs’ Complaint.

11. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 11 through 13 of plaintiffs’ Complaint and, therefore, deny them.

12. Upon information and belief, defendants admit the allegations in paragraphs 14 and 15 of plaintiffs’ Complaint.

13. Defendants admit that the member-growers of SMBSC deliver their harvested sugar beets to piling stations managed by the cooperative and dispersed throughout the geographic region where its members produce sugar beets, and defendants further admit that each member-grower's beets are weighed, sampled, and tested upon delivery and then stored in piles for later processing into sugar; defendants deny all other allegations in paragraph 16 of plaintiffs' Complaint.

14. Defendants admit that throughout the months of August – October, 2000, members of SMBSC delivered their sugar beet production to its piling stations for subsequent processing into sugar at its processing plant in Renville, Minnesota; defendants deny all other allegations in paragraph 17 of plaintiffs' Complaint.

15. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 18 through 20 of plaintiffs' Complaint and, therefore, deny them.

16. Defendants admit the allegations in paragraph 21 of plaintiffs' Complaint, but separately state that sugar beets are not unique in their risk of damage from adverse weather conditions.

17. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 22 through 24 of plaintiffs' Complaint and, therefore, deny them.

18. Defendants admit that properly maintained sugar beets, whether undamaged at any time or damaged by a freeze, can be stored all winter if any freeze damage is permitted to heal prior to harvest, and they further admit that freeze damaged beets, if the damage has not

been healed prior to harvest, will gradually deteriorate to a greater extent than undamaged beets; defendants deny all other allegations in paragraph 25 of plaintiffs' Complaint.

19. Upon information and belief, defendants admit the allegations in paragraph 26 of plaintiffs' Complaint.

20. Defendants admit that plaintiffs claim they purchased sugar beet crop insurance purchased from defendants, that the policies at issue are known as multi-peril crop insurance policies, and that such policies protect, among other things, against the risk of loss caused by freezing or other adverse weather conditions occurring within the insurance period, subject, at all times, to all terms and conditions of the policy; defendants deny all other allegations in paragraph 27 of plaintiffs' Complaint.

21. Defendants admit that the crop insurance policies in issue were promulgated by the FCIC as regulations issued pursuant to the Federal Crop Insurance Act, as amended (the "FCIA"), 7 U.S.C. § 1501 *et seq.*, that the relevant regulations are codified at 7 C.F.R. §§ 457.8 and 457.109, and that those policies protect plaintiffs and other policyholders in accordance with their terms and subject to their conditions; defendants deny all other allegations in paragraph 28 of plaintiffs' Complaint.

22. Upon information and belief, defendants admit that the SMBSC growing area experienced one or more freezes of varying severity between October 6 – 10, 2000; defendants deny all other allegations in paragraph 29 of plaintiffs' Complaint.

23. Defendants deny the allegations in paragraphs 30 and 31 of plaintiffs' Complaint.

24. Upon information and belief, defendants admit that plaintiffs delivered their 2000 sugar beet crop to SMBSC piling stations and that, after plaintiffs' beets were delivered,

sampled, and tested, their beets were commingled with other SMBSC growers' beets; defendants deny all other allegations in paragraph 32 of plaintiffs' Complaints.

25. Defendants admit the allegations in paragraph 33 of plaintiffs' Complaint.

26. Defendants deny the allegations in paragraph 34 in plaintiffs' Complaint.

27. Upon information and belief, defendants admit that the SMBSC growing area experienced one or more freezes of varying severity between October 6 – 10, 2000; defendants separately state that the insurance period is a defined policy term, and they deny all other allegations in paragraph 35 of plaintiffs' Complaint. 28. Defendants deny the allegations in paragraph 36 and 37 of plaintiffs' Complaint.

29. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 38 through 42 of plaintiffs' Complaint, and, therefore, deny them. Defendants separately state in response to the allegations in these paragraphs that plaintiffs are asserting a method for calculating their claimed losses which radically departs from the terms of their sugar beet insurance policies. In the first place, they fail to acknowledge that SMBSC accepted their entire production of sugar beets which means (a) that the sugar content and purity of their beets met the cooperative's standards for acceptance (12% and 80%, respectfully) and (b) that any indemnity payable must be calculated pursuant to 7 C.F.R. § 457.109, ¶ 13(d). In turn, this requires analysis of at least two other factors which plaintiffs ignore, specifically:

(a) The effect of each policy's special provisions -- The FCIC issues special provisions on a county-by-county basis for establishing coverage levels and related actuarial and premium information. The special provisions help determine, among other matters, the actual level at which coverage potentially

would be implicated. To illustrate this point, the special provisions for Yellow Medicine County establish a sugar content level of 15% for adjusting losses, meaning that, if the insured has no loss in production quantity and his or her crop has a sugar content level at or above 15%, there is no obligation to pay an indemnity, even if there have been adverse weather conditions.

(b) The effect of each insured's coverage level -- Another feature of federally subsidized crop insurance is that an insured has limited coverage ranges which may be elected -- 50% of average production history ("APH") at the low end, which is catastrophic risk protection coverage ("CAT coverage"), and up to 85% at the high end. In reality, this is a form of risk retention by each insured, as he or she decides to retain a large share of the risk by obtaining only CAT coverage or to retain as little risk as possible by purchasing coverage at 85% of APH. As is typical with most insurance, coverage levels dictate total premium costs, and the highest coverage level is the most expensive. In balancing their needs for risk protection and for controlling expenses, agricultural producers of sugar beets typically elect coverage at or near the 65% level, thereby reducing their risk exposure below 50%, but also avoiding the much higher cost of 85% coverage. This means that if an insured has elected, for example, coverage at the 65% level, he or she will have no insured loss, even if there have been adverse weather conditions, as long as his or her insured production meets or exceeds 65% of APH and the sugar content for his or her insured units meets or exceeds the level set forth in the applicable special provisions.

30. Defendants deny the allegations in paragraphs 43 through 46 of plaintiffs' Complaint.

31. Defendants admit that, because plaintiffs' failed to give timely notice of any loss and otherwise failed to fulfill their duties as insureds under the sugar beet policy, defendants performed no loss adjustments on their crops in 2000; defendants deny all other allegations in paragraph 47 of plaintiffs' Complaint.

32. Defendants admit that on or after December 15, 2000, SMBSC contacted defendants to advise of a potential crop insurance loss based on freeze damage, that SMBSC is not insured by defendants, and that SMBSC is not an insurance agent placing or procuring crop insurance coverage for its members; defendants deny all other allegations in paragraph 48 of plaintiffs' Complaint.

33. Defendants admit that any notice of loss provided more than fifteen days following the end of the insurance period is untimely, that the insurance period with respect to the 2000 sugar beet crop in SMBSC's growing area ended prior to October 31, 2000, that no timely notice of loss was received, and that untimely loss claims are and must be rejected under the sugar beet crop insurance policy; defendants deny all other allegations in paragraph 49 of plaintiffs' Complaint.

34. Defendants admit that they have sought information from their insureds to verify the existence of a covered loss, if any, and the extent of loss, but plaintiffs have refused to cooperate with such efforts; defendants deny all other allegations in paragraph 50 of plaintiffs' Complaint.

35. In response to the allegations in paragraphs 51 and 52 of plaintiffs' Complaint, defendants admit that Exhibit A is a true and correct copy of a letter dated January 26, 2001,

from Susan S. Martin to J.N. Widner, that this document speaks for itself, and that defendants received a copy of this document in an untimely manner, but deny all other allegations therein.

36. In response to the allegations in paragraphs 53 through 55 of plaintiffs' Complaint, defendants admit that Exhibit B is a true and correct copy of MGR-01-010, that this document speaks for itself, and that defendants received a copy of this document on or after March 2, 2001, but deny all other allegations therein.

37. Defendants deny the allegations in paragraph 56 of plaintiffs' Complaint.

38. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 of plaintiffs' Complaint and, therefore, deny them.

39. Defendants deny the allegations in paragraph 58 of plaintiffs' Complaint.

40. Plaintiffs' allegations in paragraph 59 of their Complaint presuppose the accuracy of the allegations in paragraph 58 thereof, which defendants have denied; defendants, therefore, deny the allegations in paragraph 59.

41. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60 of plaintiffs' Complaint and, therefore, deny them.

42. Defendants admit receiving information from some insureds in April 2001, but deny all other allegations in paragraph 61 of plaintiffs' Complaint.

43. Defendants deny the allegations in paragraph 62 of plaintiffs' Complaint.

44. Defendants admit that nearly eleven months have passed since one or more freezes allegedly damaged plaintiffs' 2000 sugar beet crop, that plaintiffs have yet to comply with their obligations under the sugar beet policy to establish both the existence and the amount of a covered loss, and that plaintiffs' have not cooperated with defendants' efforts to ascertain

information pertinent to these matters; defendants deny all other allegations in paragraph 63 of plaintiffs' Complaint.

45. Defendants deny the allegations in paragraphs 64 through 66 of plaintiffs' Complaint.

46. Defendants admit, in response to paragraph 67 of plaintiffs' Complaint, that they have not paid plaintiffs' incomplete and insupportable claims for indemnity under the sugar beet crop insurance policies issued to them.

47. Defendants deny the allegations in paragraph 68 of plaintiffs' Complaint.

48. Defendants incorporate their admissions, denials, and separate statements with respect to paragraphs 1 through 68 in answer to paragraph 69 of plaintiffs' Complaint.

49. Defendants deny the allegations in paragraphs 70 and 71 of plaintiffs' Complaint.

50. Defendants incorporate their admissions, denials, and separate statements with respect to paragraphs 1 through 71 in answer to paragraph 72 of plaintiffs' Complaint.

51. Defendants deny the allegations in paragraphs 73 through 75 of plaintiffs' Complaint.

52. Defendant incorporate their admissions, denials, and separate statements with respect to paragraphs 1 through 75 in answer to paragraph 76 of plaintiffs' Complaint.

53. Defendants deny the allegations in paragraphs 77 through 79 of plaintiffs' Complaint.

54. Defendants incorporate their admissions, denials, and separate statements with respect to paragraphs 1 through 79 in answer to paragraph 80 of plaintiffs' Complaint.

55. Defendants deny the allegations in paragraphs 81 through 83 of plaintiffs' Complaint.

56. Defendants deny all allegations in plaintiffs' Complaint not specifically admitted herein.

Second Defense

57. Plaintiffs' Complaint fails to state any claim upon which relief can be granted.

Third Defense

58. The crop insurance policy at issue herein contains a written agreement to arbitrate. Accordingly, this action should be dismissed or, in the alternative, stayed and the plaintiffs compelled to arbitrate the dispute which is the subject of this action in accordance with the Commercial Rules of the American Arbitration Association as provided in Section 20 of the subject policy, published at 7 C.F.R. § 457.8, ¶ 20.

Fourth Defense

59. Plaintiffs' have failed to fulfill their duties under the sugar beet policy, in particular their duties:

(a) to provide timely notice of loss (within 72 hours of initial discovery of loss, but no later than 15 days after the end of the insurance period, which terminated no later than harvest) in order to comply with 7 C.F.R. § 457.8, ¶ 14(a)(2);

(b) to leave representative samples intact for each field where beets allegedly damaged by freeze were grown (which samples are to be at least 10 feet wide and extend the entire length of each field) in order to comply with 7 C.F.R. §§ 457.8, ¶ 14(a)(3), and 457.109, ¶ 12(a);

(c) to cooperate in the investigation or settlement of their claims in order to comply with 7 C.F.R. § 457.8, ¶ 14(a)(4), in that they failed to show defendants their damaged crops, to allow removal of samples for testing, and to provide all requested records and documentation;

(d) to submit claims for indemnity not later than 60 days after the end of the insurance period (that is, prior to December 31, 2000) in order to comply with 7 C.F.R. § 457.8, ¶ 14(c);

(e) to establish the total production or value received for their crops, that any loss of production or value occurred during the insurance period, and that any loss of production or value was directly caused by an insured cause of loss (that is, by freeze damage) in order to comply with 7 C.F.R. § 457.8, ¶ 14(e);

(f) to establish that any sugar beet production failed to meet the minimum acceptable standards contained in the grower contract with the Southern Minnesota Beet Sugar Cooperative as required under 7 C.F. R. § 457.109, ¶13(e);

(g) to allow sufficient healing time after the alleged freeze damage to protect the sugar beet crop from further damage as required under 7 C.F.R. § 457.8, ¶14(a)(1); and

(h) to sustain a loss in excess of the applicable county sugar level contained in the Special Provisions of the insurance policy which is set forth under “Insurance Availability.”

Accordingly, plaintiffs are not entitled to receive any indemnity payments under their sugar beet policies with defendants.

Fifth Defense

60. Plaintiffs’ claims for compensatory, consequential, incidental, and similar damages (Complaint, ¶¶ 68, 71, 75, 79, and 83; Prayer for Relief, ¶ 2) are barred by the insurance policy under which they seek relief. 7 C.F.R. § 457.8, ¶ 26(a).

Sixth Defense

61. Plaintiffs' claims for compensatory, consequential, incidental, and similar damages (Complaint, ¶¶ 68, 71, 75, 79, and 83; Prayer for Relief, ¶ 2) are preempted by federal law, and such damages are not recoverable. 7 U.S.C. § 1506(l); 7 C.F.R. ¶ 400.176(b).

Seventh Defense

62. Plaintiffs' claims under the Minnesota Prevention of Consumer Fraud Act (Complaint, Count IV) are preempted by federal law and not actionable. 7 U.S.C. § 1506(l); 7 C.F.R. §§ 400.176(b) and 457.8, ¶ 31.

Eight Defense

63. Plaintiffs' claims for attorneys' fees (Complaint, ¶ 83; Prayer for Relief, ¶ 3) are barred by the insurance policy under which they seek relief. 7 C.F.R. § 457.8, ¶ 26(a).

Ninth Defense

64. Plaintiffs have failed to join all parties necessary to a just adjudication of their action, specifically the FCIC and RMA.

Tenth Defense

65. The Grower Agreement between SMBSC and its members, including plaintiffs, comprehensively establishes the terms by which members produce sugar beets for processing, including:

- (a) the acreage to be planted (§ 1);
- (b) the price to be paid for a member's production and the method of payment (§§ 2 and 3);
- (c) the seed to be planted, which SMBSC furnishes to its members (§ 7); and
- (d) the chemicals to be applied or not to be applied to a member's crop (§ 10).

66. The Grower Agreement gives SMBSC, not its individual members, control of harvesting and delivery decisions, as the following provisions demonstrate:

(a) Section 6 (Hauling Reimbursement), which provides in pertinent part:

“Shareholder shall haul his sugarbeets to the sugarbeet receiving station designated by the authorized representative of the Cooperative”

(b) Section 8 (Delivery of Sugarbeets), which provides in pertinent part:

“Shareholder will harvest and deliver to the Cooperative all sugarbeets grown by him under this agreement, said delivery to be made at such place or places as may be designated by the Cooperative.

(Emphasis added.)

67. The Grower Agreement also imposes duties on SMBSC’s members, including plaintiffs, relating to frost: “The sugarbeets shall be protected from sun and frost after removal from the ground, including sugarbeets that are loaded on trucks, and shareholder agrees not to remove the foliage from the sugarbeet crop more than 24 hours prior to harvesting, except by special permission of a representative of the Cooperative’s agricultural department.” (§ 8; emphasis added.) The first aspect of this duty relates to post-harvest frost protection (when the beets no longer are insured under the sugar beet policy), and the second relates to pre-harvest frost protection, since leaving the foliage intact can prevent or mitigate frost damage and also promote healing of any damage sustained.

68. The Grower Agreement extends to SMBSC explicit rights to reject frost damaged and unacceptable production, as established in Section 8:

The Cooperative has the option of rejecting any diseased, frozen or damaged beets; sugarbeets with less than 12% sugar, or less than 80% purity; sugarbeets which, in the Cooperative’s opinion, are not suitable for the manufacture of sugar; [and] sugarbeets as to which, [in] the Cooperative’s opinion, the terms and

conditions of this agreement have not been properly complied with or for any other bona fide reason.

(Emphasis added.)

69. The Grower Agreement explicitly vests in SMBSC title to sugar beets “upon delivery to, and acceptance by” it of its members’ beet production. (§ 13) Accordingly, once beets have been delivered to and accepted by SMBSC, risk of loss with respect to them passes to SMBSC, which then must take all reasonable steps to maintain delivered beets in a fashion that continues to make them suitable for production of sugar.

70. Upon information and belief, defendants allege that all sugar beets delivered by plaintiff (a) were accepted by SMBSC and (b) had sugar content at or above 12% and purity at or above 80%.

71. There can be no doubt that SMBSC knew there was frost damage and communicated the situation to its members, including plaintiffs. In fact, as early as October 11, 2000, thus immediately following the alleged October 6 – 10 freeze, SMBSC sent an electronic communication to its members stating, in part:

HARVEST UPDATE

With full harvest beginning at many of our locations please pay attention to the below:

Loads that are not satisfactorily defoliated or have frost damage will be rejected starting at 2:00 p.m. today.

Fields that are low lying or that have poor canopy are more susceptible to showing frost damage as compared to others on higher ground with better canopy. Please leave these fields to heal.

It is your responsibility before harvesting each field to take a representative sample of 10 beets and cut a cross section to ensure the beets are healed. We will reject loads with frost damage.

(Emphasis added.) This communication was preceded by another important electronic communication to SMBSC members, including plaintiffs, on Sunday, October 8, 2000, which stated: “Due to a heavy freeze early Sunday morning; full harvest will not begin Monday at 8:00 a.m. Full harvest will be delayed until Tuesday and the start up time will be announced mid-day on Monday.” Subsequent communications from SMBSC (including ones on October 16 and November 3, 7, and 15, 2000) alerted its members to frost damage.

72. Based on information provided by the USDA to defendants, in particular the RMA and FCIC as constituent agencies within the department, defendants believe, and therefore assert, that plaintiffs’ losses, if any, were caused by the negligence, mismanagement, or wrongdoing of SMBSC, as more fully described below. SMBSC’s conduct, accordingly, demonstrates that any loss sustained by plaintiffs was not an insured loss under the sugar beet crop insurance policy.

73. SMBSC’s pre-harvest acts and omissions include the following:

(a) Since SMBSC controls the harvesting of sugar beets grown by its members under the Grower Agreement referenced by plaintiffs in paragraph 8 of their Complaint, SMBSC possessed the authority to determine when and how each plaintiff’s 2000 crop was to be harvested.

(b) SMBSC exercised its authority over the 2000 harvest in a manner detrimental to its members because its decisions neither avoided nor mitigated their losses; in fact, defendants believe that SMBSC’s conduct actually caused the losses of which plaintiffs complain. SMBSC’s conduct was wrongful in two principal respects: (i) it failed to allow the beets to remain in the field unharvested for a sufficient time to permit any freeze damage to heal; and (ii) in addition to

premature harvesting of beets, SMBSC sequenced the harvesting in a fashion that exacerbated any damage already sustained.

74. Insurance coverage ends with harvest, as established in 7 C.F.R. §§ 457.8, ¶ 11(b), and 457.109, ¶ 9. SMBSC's post-harvest conduct also caused damage to its members' sugar beet crops in 2000, as demonstrated by the following:

(a) SMBSC's first serious post-harvest mistake was its failure to segregate production by producer; this failure precluded its members from maintaining samples of their production for testing by defendants, thereby causing plaintiffs to default in respect to one of their key obligations in the event of a loss claim, as noted above, Fourth Defense, (c).

(b) SMBSC also failed to segregate production by quality of beets delivered, thereby creating a situation whereby it had no basis for sequencing its processing decisions in order to accelerate processing of weaker, potentially damaged beets and to defer processing of beets which could be stored longer without risk of deterioration.

(c) SMBSC's most egregious post-harvest mistake was its handling of piled beets after delivery. Quite simply, it failed to use recognized ventilation practices at some of its piling stations, thereby causing severe damage to its members' production. These actions occurred when post-harvest conditions made the no longer insured beets most vulnerable, especially when SMBSC's growing area experienced abnormally warm and wet conditions after October 17, 2000. SMBSC's post-harvest management of the piles is the most reasonable, logical, and factually based explanation for the fact that members who delivered their

production to the Benson, Clara City East, Clara City West, Milan, Murdock, and Raymond piling stations had less than 10% of their beets discarded, but that members who delivered their beets to the Hector, Maynard, and Redwood Falls stations had over 50% of their production discarded.

75. Defendants believe, also based on information furnished by RMA, that SMBSC rejected no beets when its members delivered their 2000 production to its piling stations. This means that all beets produced had sufficient sugar content (12%) and purity (80%) to make them acceptable for processing under the Grower Agreement. Therefore, even if one accepts plaintiffs' theory that there is undetectable freeze damage (as alleged in paragraph 25) and that all of plaintiffs' beets suffered undetectable freeze damage (as alleged in paragraph 31), SMBSC's management of the harvest and its post-harvest handling of the beets becomes the most apparent explanation for its members' losses. As indicated in paragraph 74, SMBSC's conduct is the most reasonable, logical, and factually based explanation for the radically differing experiences of its members.

76. Title to plaintiffs' beets, in accordance with their Grower Agreements with SMBSC, vested in SMBSC upon delivery and acceptance of beets by it. Since all beets were accepted by SMBSC, and those beets were suitable for processing and had adequate sugar content and purity levels, SMBSC assumed all risk of loss with respect to accepted beets. The insurance period for these beets, moreover, terminated prior to delivery, as harvest ends the period.

77. In view of the foregoing, defendants have no liability to plaintiffs, and all losses sustained to the 2000 crop either were attributable to SMBSC or assumed by it.

Eleventh Defense

78. Plaintiff's claim under the Minnesota Prevention of Consumer Fraud Act (Cmplaint, Count IV) fail to set forth claims upon which relief can be granted as plaintiffs are not "consumers" with regard to their relationships with these defendants.

Twelfth Defense

79. Fault attributable to the plaintiffs is a proximate cause of the claimed injuries or damage which should either bar recovery or be apportioned to determine the amount of damages recoverable herein.

Thirteenth Defense

80. Fault attributable to all who are currently parties or may be added as parties should be compared and allocated by the trier of fact to determine the respective liability of the parties and respective obligations of the parties for contribution.

Fourteenth Defense

81. The alleged damages, if any, were the result of intervening forces of third persons over whom defendants had no control, or right of control, and for whom defendants are not responsible.

Fifteenth Defense

83. By the use of reasonable effort or expenditure, plaintiffs could have completely or partially avoided the damages claimed in their Complaint, and plaintiffs' failure to mitigate their damages, if any, bar plaintiffs' claims.

Sixteenth Defense

82. Plaintiffs' Complaint raises issues only capable of determination under federal statutory, regulatory, and common law. In addition, to the extent that plaintiffs possess any claim upon which relief can be granted, their claim results from illegal, improper, and

unauthorized actions of and by officers and agencies of the United States. Accordingly, the District Court of Minnesota's Eighth Judicial District lacks subject matter jurisdiction over plaintiffs' claims, as any subject matter jurisdiction is within the exclusive original jurisdiction of the federal district courts of the United States.

WHEREFORE, having fully answered plaintiffs' Complaint, their Complaint should be dismissed, they should take nothing from this action, and judgment should be entered in favor of defendants.

THIRD-PARTY COMPLAINT

Defendants, for their third-party claims against the FCIC, allege and state as follows:

1. Defendants and third-party plaintiffs are approved providers of crop insurance under insurance policies established by the federal government, published as regulations of the United States, and reinsured by the FCIC.

2. Among the insurance products offered by defendants and third-party plaintiffs are coverages for losses in production or value of sugar beets. Those policies consist of two regulations issued by the FCIC, 7 C.F.R. § 457.8 (the "basic provisions") and 7 C.F.R. § 457.109 (the "crop provisions"). The sugar beet crop insurance policy also includes any catastrophic risk protection endorsement ("CAT coverage"), which a grower may elect in lieu of higher levels of coverage, and the special provisions.

3. Defendants and third-party plaintiffs deny any liability to plaintiffs, but believe that any liability which they may have should be borne, instead, by the FCIC.

4. Third-party defendant FCIC is an agency of and within the USDA, 7 U.S.C. § 1503, and may sue and be sued. 7 U.S.C. § 1506(d).

5. This action arises under the laws of the United States. Therefore, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a) and pursuant to 7 U.S.C. § 1506(d).

6. Venue for this third-party claim in the District of Minnesota is proper pursuant to 7 U.S.C. § 1506(d).

7. FCIC was created pursuant to 7 U.S.C. § 1503 as an agency of and within the USDA to carry out the purposes of the FCIA. Congress has mandated that the FCIC shall operate the federal crop insurance program in an actuarially sound manner. See 7 U.S.C. §§ 1506(o) and 1508(d)(1).

8. USDA's RMA manages the activities and operations of the FCIC, including furnishing personnel who review and approve crop insurance policies, who develop and issue regulations concerning the federal crop insurance program, who negotiate reinsurance agreements, who manage the ongoing contractual relationships between the FCIC and reinsured companies, who provide sources of actuarial and data management expertise to the FCIC, and who monitor compliance with the FCIA, the SRA, and regulations pertaining to the federal crop insurance program. RMA's Administrator serves as the FCIC's Manager. 7 U.S.C. § 6933(c)(2). The FCIC's Manager is its chief executive officer. 7 U.S.C. § 1505(d).

9. The FCIC is authorized to enter into and carry out contracts and agreements. See 7 U.S.C. § 1506(l). This authority includes providing reinsurance for insurers that issue crop insurance policies. See 7 U.S.C. §§ 1508(a) and 1508(k).

10. Approved insurance providers must offer coverage on terms and conditions established by the FCIC, which publishes terms, conditions, endorsements, and special

provisions for both CAT and other policies as regulations issued under the FCIA. See 7 U.S.C. § 1508(k)(1).

11. When quoting premiums for coverage, approved insurance providers must quote rates determined by the FCIC. See 7 U.S.C. § 1508(d)(1).

12. FCIC utilizes private insurers to provide CAT and additional (“Buy-Up”) coverage to producers of agricultural products. A portion of the premium cost of such policies is subsidized by direct payments to reinsured companies.

13. FCIC reinsures defined portions of the underwriting risks of private insurers. Pursuant to regulations it promulgated in 1987, FCIC offers a Standard Reinsurance Agreement (“SRA”) to eligible insurance companies, such as defendants and third-party plaintiffs, to reinsure the policies which those companies issue to producers of agricultural commodities. See 7 C.F.R. § 400.164.

14. The sugar beet crop insurance policy offered by defendants and third-party plaintiffs and reinsured by the FCIC is a combination of several sets of provisions. Two sets of those provisions are published as regulations of the FCIC and appear in the Code of Federal Regulations. One, often referred to as the basic provisions, is set forth at 7 C.F.R. § 457.8 and is denominated as the common crop insurance policy. The other determinative policy language is set forth in the sugar beet provisions, sometimes referred to as the crop provisions, and published at 7 C.F.R. § 457.109. Although other endorsements or special provisions may exist, the portions of the sugar beet crop insurance policy affected by MGR-01-010 are found in the published regulations, specifically 7 C.F.R. §§ 457.8 and 457.109.

15. The basic provisions set forth, among other matters of legal significance, the insurance period defining when coverage begins and ends and the respective duties of the insured and insurer in the event of damage or loss. See 7 C.F.R. § 457.8, ¶¶ 11 and 14.

16. The crop provisions for sugar beets, among other matters of legal significance, contain additional definitions, provide greater specificity with respect to the insurance period, define causes of loss, specify additional duties of the insured and insurer in the event of damage or loss, and set forth the methodology for calculating the indemnity payable on the allowed loss claim. See 7 C.F.R. § 457.109, ¶¶ 1, 9, 10, 12, and 13.

17. Based on FCIC's published regulations, the insurance period for the sixteen Minnesota counties affected by MGR-01-010 ended (for the 2000 crop year) at the earliest of total destruction of the crop, harvest, final adjustment of a loss claim, abandonment of the crop in the field, or November 15, 2000. See 7 C.F.R. §§ 457.8, ¶ 11, and 457.109, ¶ 9. With respect to sugar beets, the term "harvest" is defined in the regulations as "[t]opping and lifting of sugar beets in the field." 7 C.F.R. § 457.109, ¶ 1.

18. The FCIC regulations define explicitly when notice of loss or damage must be provided. In accordance with 7 C.F.R. § 457.8, ¶ 14(a), an insured must provide notice of loss "within 72 hours of your initial discovery of damage (but not later than 15 days after the end of the insurance period). . . ." Given the definition of the insurance period set forth in paragraph 32, coverage can end at various times, based on the earliest of the events specified therein. For instance, if sugar beets had been harvested, the absolute latest date for notice of any loss would be fifteen days following the harvest. Similarly, if the calendar date fixed by the crop provisions is utilized to define the end of the insurance period, November 15 would be the relevant date in Minnesota, meaning that notice of loss would have to be given within fifteen days following that

date (i.e., during the period November 16 – 30, 2000). Because coverage ends at the earliest of various specified events or dates, including harvest, the latest theoretical date for giving notice of loss in Minnesota is November 30, 2000 (the fifteenth day following November 15). MGR-01-010 indicates, however, that harvesting of the beets in question was completed in October prior to delivery of the beets to the processor. Therefore, the insurance period ended in October, and any notice of loss would need to have been given prior to November 15, 2000.

19. The applicable regulations also define an insured producer's duties with respect to permitting appropriate and accurate adjustment of any claimed losses. These duties include leaving "representative samples intact for each field" (which "must be at least ten feet wide and extend the entire length of each field"), allowing removal of samples, providing copies of records, and not taking specified actions (such as destroying unharvested portions of the insured crop without the consent of the insurer). See 7 C.F.R. §§ 457.8, ¶ 14, and 457.109, ¶ 12(a). Availability of representative samples is critical because, without samples, it is impossible to determine the cause and degree of a claimed loss and may be difficult, if not impossible, to determine the amount of a loss. The insured producer's duties also include submitting a fully documented claim for loss indemnity "not later than 60 days after the end of the insurance period." 7 C.F.R. § 457.8, ¶ 14(c). Although the insurance period ends at the earliest of any of several specified events, as set forth in paragraph 35, the theoretical latest date for submitting such documentation would have been January 14, 2001 (assuming that the insurance period ended as late as November 15, 2000). Based on the factual statements made in MGR-01-010 indicating completion of harvest in October, however, the actual latest date for submitting such documentation would have been prior to December 31, 2000. The insured producer, moreover, must comply with 7 C.F.R. § 457.8, ¶ 14(e), which states:

You must establish the total production or value received for the insured crop on the unit, that any loss of production or value occurred during the insurance period, and that the loss of production or value was directly caused by one or more of the insured causes specified in the Crop Provisions.

From the insurer's perspective, compliance with the policy's terms and conditions is critical because: "No indemnity shall be paid unless the insured complies with all terms and conditions of the contract." 7 C.F.R. § 457.7. Accordingly, permitting untimely notice of and documentation of loss defeats effective implementation of the loss adjustment process and eliminates the insured producer's specific and unambiguous duties under the sugar beet crop insurance policy.

20. The introductory paragraph of the policy specifically informs insureds: "The provisions of the policy are published in the Federal Register and codified in chapter IV of title 7 of the Code of Federal Regulations (CFR) under the Federal Register Act (44 U.S.C. 1501 *et seq.*), and may not be waived or varied in any way by the crop insurance agent or any other agent or employee of FCIC or the company."

21. MGR-01-010 amends, waives, or varies terms of the sugar beet policy in a variety of ways. In doing so, MGR-01-010 concedes that notices of losses by sugar beet producers generally were not given "within 72 hours of the freeze, during the harvest periods, or before the end of the insurance period." This concession is material, and it is totally incompatible with the sugar beet policy, because the insured producer has the burden of establishing that his or her "loss of production or value occurred during the insurance period." See 7 C.F.R. § 457.8, ¶ 14(e). This concession also is material because it demonstrates that the FCIC has expanded coverage for the 2000 sugar beet crop in Minnesota beyond the period when it was in the field in violation of 7 U.S.C. § 1508(a)(2).

22. MGR-01-010 purports to negate the insured's obligation to give notice of loss within seventy-two hours of any loss or damage despite the explicit obligation to do so under 7 C.F.R. § 457.8, ¶ 14(a)(2).

23. MGR-01-010 purports to negate the insured's obligation to give notice of loss within fifteen days of termination of the insurance period despite the unambiguous obligation to do so under 7 C.F.R. § 457.8, ¶ 14(a)(2).

24. MGR-01-010 purports to negate the insured's obligation to leave representative samples of the crop available for inspection in connection with adjustment of losses despite the unmistakable obligation to do so under 7 C.F.R. §§ 457.8, ¶ 14(a)(3), and 457.109, ¶ 12(a).

25. MGR-01-010 purports to negate the insured's obligation to submit a fully documented claim for indemnification within sixty days after the end of the insurance period despite the clear obligation to do so under 7 C.F.R. § 457.8, ¶ 14(c).

26. MGR-01-010 purports to negate the insured's obligation to establish the total production or value received for the crop, to establish that any loss of production or value occurred during the insurance period, and to establish that any loss was caused by a covered cause of loss despite the explicit obligations to do so under 7 C.F.R. § 457.8, ¶ 14(e).

27. MGR-01-010 establishes procedures for adjustment of losses not set forth in the regulations embodying the sugar beet policy. In fact, MGR-01-010 actually renders impossible implementation of the available procedures for determining sugar beet losses. MGR-01-010 also effectively eliminates use of tests of raw sugar content "performed by the processor at the time of delivery." 7 C.F.R. § 457.109, ¶ 13(d). FCIC's subsequent issuance of Manager's Bulletin MGR-01-010.1 ("MGR-010-010.1") on June 4, 2001, created additional loss adjustment

problems, especially since it established loss adjustment procedures inconsistent with the terms of the sugar beet policy.

28. Prior to instituting this action, defendants and third-party plaintiffs invoked Section V.Y. of the SRA, which requires them to give notice to the Manager of FCIC of disagreement with any act or omission of the FCIC. That section also mandates the holding of a meeting “in an attempt to resolve the disagreement.” Such a meeting was held on March 28, 2001, but resolution of the issues raised by MGR-01-010 did not occur. Accordingly, all preliminary steps to seeking judicial review, as required by Section V.Y. of the SRA, have been taken.

29. There can be no better evidence that issuance of MGR-01-010 was an error on FCIC’s part than RMA’s admission, through an authorized agent, on June 20, 2001, that, if the agency had known before March 2, 2001 (when the bulletin was issued) what it later learned, MGR-01-010 would not have been issued. Defendants and third-party plaintiffs also allege that issuance of MGR-01-010.1 constitutes an admission by FCIC and RMA that issuance of MGR-01-010 was an error in that, contrary to its position, timely notice of loss in fact could have been given by plaintiffs.

30. In view of the foregoing, issuance of MGR-01-010 and issuance of MGR-01-010.1 constitute errors of the FCIC, thereby entitling defendants and third-party plaintiffs to indemnification for all payments to producers made in conjunction or connection with that bulletin, in accordance with 7 U.S.C. § 1508(j)(3). The indemnification must include all loss adjustment expenses and other expenses, including attorneys’ fees.

WHEREFORE, defendants and third-party plaintiffs demand judgment against the FCIC, as follows:

- (a) Indemnification for any and all liability to plaintiffs;

(b) Reimbursement of all attorneys' fees, costs, and other expenses of this action; and

(c) Such further and additional relief as the Court deems just and equitable.

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