

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SWIFT

EIGHTH JUDICIAL DISTRICT

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Glacial Plains Cooperative,  
a cooperative association,  
f.k.a. United Farmers Elevator,  
Plaintiff,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
ORDER FOR JUDGMENT  
AND JUDGMENT AND  
DECREE**

File No. 76-CV-14-332  
(related case: 76-CV-11-467)

Chippewa Valley Ethanol  
Company, LLLP, successor to  
Chippewa Valley Ethanol  
Company, LLC,  
Defendant.

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The above-entitled matter came on for an 8-day court trial before the undersigned February 23-March 3, 2016. Attorney Jason Lina appeared representing the Plaintiff. Attorneys Ian Pitz and Albert Bianchi, Jr. appeared representing Defendant.

Based upon the evidence adduced, the arguments of counsel, the laws of Minnesota and all the files, records and proceedings herein, the Court makes the following:

**FINDINGS OF FACT**

**Background**

1. Plaintiff Glacial Plains Cooperative (hereinafter "GPC"), formerly known as United Farmers Elevator, is a Minnesota cooperative association. Defendant Chippewa Valley Ethanol Company, LLLP (hereinafter "CVEC") is a

limited liability limited partnership and a successor to Chippewa Valley Ethanol Company, LLC.

2. The parties' predecessors in interest initially signed a Grain Handling Contract (hereinafter "Contract") in 1994. They agreed United Farmers Elevator (now plaintiff Glacial Plains Cooperative) would handle all the grain Chippewa Valley Ethanol Company, LLC (now defendant Chippewa Valley Ethanol Company, LLLP) required for its ethanol plant.

3. CVEC was formed in order to spur economic development in the area and advance the interests of corn producers. At the time (the early 1990s) corn was priced at or below the cost of production. It was felt that creating a local market for corn would boost prices. Although the St. Paul Bank of Co-ops declined to make a loan (it was monitoring the success of another start-up ethanol plant to which it had made a loan), a \$400,000 no-interest loan was available through the National Rural Electric Association. Those investing and receiving shares included farmers, a rural electric cooperative and numerous grain elevators. By 2009, it had grown to some 950 members, mostly farmer-producers.

4. There is a very significant overlap of farmer-members of GPC and members of CVEC, estimated at 60% to 70%.

5. Of all the elevators, GPC invested the most. Its assistance was essential to the speed with which CVEC was formed, if not to the very fact of its formation. Part of the Contract specifically required that GPC become an

owner of CVEC. It was required to purchase 200,000 shares, an investment of \$400,000.

6. Not wanting to be "left at the altar" by CVEC, in the words of GPC's then-manager, GPC negotiated for and obtained certain benefits for itself in the Contract, not the least of which was the exclusive right to handle CVEC's grain needs in perpetuity, so long as it met its contractual obligations.

7. After the Contract was signed, and in reliance upon it, GPC built a grain handling facility immediately adjacent to CVEC's ethanol plant. There were addenda throughout the years relating to the grain handling fee, but the Contract has remained in effect to the present. CVEC commenced operation in 1996.

8. CVEC became GPC's main market for corn. GPC's gamble on the new ethanol plant turned out to have been a good choice, and it saw a number of benefits from the arrangement, some direct and some indirect. GPC received a handling fee under the Contract. It received revenue for the storage of corn. It profited by the margin on corn sales, when it was called upon to sell corn to CVEC; since it had a conveyor attached to CVEC, it had no expenses for loading or shipping.

9. A benefit not spelled out in the Contract is referred to in the industry as the "blend benefit." This is the ability of a grain handler or elevator to blend dryer and/or better quality corn with other, lower quality corn, while still meeting the industry standards for #2 yellow corn with respect to moisture content (15% or less) and foreign material or "FM" (3% or less). While

producers do not receive a premium for delivering corn dryer or cleaner than this standard, those who deliver wetter or dirtier corn are docked at the elevator. If the elevator receiving the corn can blend this higher-moisture or higher-FM corn with other corn and still meet the standard it needs to meet, it does not need to go to the trouble and expense of drying or screening the corn, and it profits on the transaction.

10. Because of its unique position vis-à-vis CVEC and its producers, and because of a generous contractual period under which grain quality is averaged, GPC's blend benefit was substantial, as compared to what an elevator might normally receive. It is not mentioned in the contract, but it is still quite profitable for GPC.

11. Other benefits to the contract included the customer relationships GPC could form with the farmers, not already customer/members of GPC, who would be using the facility to deliver corn under their contracts with CVEC. And there were arbitrage or carry opportunities as well.

12. After working together under the Contract for over 10 years, the parties entered litigation in 2009 over grain-storage issues. The Minnesota Court of Appeals ultimately ordered judgment in favor of GPC for unpaid storage costs.<sup>1</sup>

13. Mike Jerke became CVEC's general manager in 2009. Almost immediately upon his arrival, the parties' relationship seemed to sour. The

<sup>1</sup> *Glacial Plains Co-op. v. Chippewa Valley Ethanol Co., LLP*, No. A10-869, 2011 WL 382710 (Minn. App. Feb. 8, 2011).

tone changed, and Jerke showed GPC less respect than it had received from his predecessor. Jerke began to raise many complaints.

### **Enogen**

14. Despite the ongoing problems Jerke claimed to be having with GPC and was increasingly calling to its attention, in June of 2011, he emailed GPC's manager Tom Traen, explaining that Syngenta had developed corn with an amylase trait (later to be named "Enogen"). He hyperlinked to a Syngenta website, and asked Traen's "thoughts." Enogen had been approved that year by the USDA, but the State of Minnesota imposed an additional regulatory step. Approval in international markets was still in the future. This was the first time CVEC had brought up the topic of amylase corn to GPC.

15. Traen thought it over and responded a week later that GPC would "certainly consider" identity preservation grains (IP). This would be necessary with a GMO such as amylase corn. "A host of factors will determine the feasibility and any possible extra costs," he accurately observed. "Let me know what you're thinking."

16. During July of 2011, the two emailed back and forth, with Traen maintaining that while the project would be feasible, there might be extra costs passed through to CVEC. Jerke maintained there should be no extra cost. Since he was presumably familiar with the Contract and had a basic understanding of the requirements of handling amylase corn, this position necessarily evidenced a fundamental unwillingness on Jerke's part to be reasonable with GPC any longer.

17. After some internal consultation and reflection, Traen's response on August 11, 2011, was a 9-paragraph email in which he discussed how he felt GPC might handle amylase corn and what it might cost CVEC extra per bushel.

18. Traen's email ended: "Let me know if you have further questions." No further questions were forthcoming. Instead, CVEC instituted the lawsuit that ultimately went to arbitration, in which it tried to terminate the Contract.

19. It would not have been possible for CVEC to adopt amylase corn in 2011. It would not become available in the region until 2014 or 2015. CVEC didn't even initiate contact with Syngenta until May 23, 2013. To this day, it is unknown whether CVEC will adopt Enogen commercially; it has not done so yet.

#### **An amylase primer**

20. Amylase corn is corn which has been genetically modified to include the amylase enzyme, which is used to break down starch. Traditionally, amylase has been added in liquid form during the process of turning corn into ethanol.

21. Enogen is a strain of amylase corn developed by Syngenta AG, a Swiss chemical and seed company. Syngenta is reportedly the third largest seed and pesticide supplier to the major grain and oilseed products in the U.S., behind only DuPont Pioneer and Monsanto.

22. Enogen has a genetically-modified alpha-amylase output trait. All corn contains some alpha-amylase, but Enogen has a high inclusion of it. If all

goes right, Syngenta says ethanol facilities that include a 15% blend of Enogen in their corn grind can eliminate the need to add liquid alpha-amylase.

23. Syngenta began developing Enogen in the late 1990s and has spent well over \$200 million doing so. The United States Department of Agriculture (USDA) approved commercialization of Enogen in 2011. Evidence at trial indicated Syngenta was at the time working with 18 ethanol plants in seven states to deliver more than a billion gallons of amylase-grain ethanol. Syngenta's Enogen business continues to grow.

24. To drill down for a moment to the technical, Enogen's higher level of alpha-amylase allows for a more complete hydrolyzation of starch prior to fermentation in the creation of ethanol. This is advantageous because it breaks down the corn faster and makes it easier to pump through the facility, allows for additional throughput and facilitates a higher output of ethanol from every bushel of corn. The alpha-amylase essentially adds viscosity to the corn. With a more slippery corn, it navigates through the ethanol process easier and requires less water usage.

25. Syngenta has found Enogen has the potential to improve process efficiency. Expert testimony established that ethanol plants using amylase grain can experience an 8-10% per gallon decrease in manufacturing costs. Enogen has been shown to reduce natural gas usage and increase yield. This can lead to an increase in profits. Enogen also has the potential to reduce a plant's carbon footprint. Its adoption can also lead to a reduction in a plant's electricity and chemical usage, maintenance and labor costs.

26. While acceptable for use in ethanol production, Enogen is a genetically modified grain which can adversely affect food supplies. The enzyme's ability to break down starch is by no means a beneficial trait in corn used for food.

27. Enogen is not approved for use in all foreign markets – or at least not at the time the USDA gave it the green light. While organic corn, for example, can contain a certain amount of non-organic corn, the tolerance for Enogen in common commodity corn could be almost zero for some food-use customers. This obviously creates a risk of liability and litigation to Syngenta, if not a full-blown international incident. The company requires rigorous identity-preservation (“IP”) measures and a closed-loop system between the farm and the ethanol plant.

28. Syngenta requires of Enogen growers a technology license and a contract with an Enogen-licensed ethanol plant. They go through pre-planting “stewardship training” by Syngenta, but it is the plant's responsibility to supervise them.

29. The growing process begins when the farmer buys Enogen seed. The corn planter has to be first cleaned of #2 yellow corn. The Enogen corn is segregated in the field. There are border rows around the field to prevent cross-pollination. Enogen corn has to be a certain amount of feet away from other growing corn.

30. Complete control of the flow of both Enogen and No. 2 yellow corn is considered ideal for optimum use of Enogen. When Enogen corn is

harvested, it is put into a separate bin or delivered directly to another facility. From beginning to end, the Enogen corn is segregated, as part of the IP protocol.

31. Syngenta requires the truck hauling harvested Enogen corn to be marked as such. Once the truck reaches the grain handler, there needs to be a clearly-marked bill of lading that shows it is delivering Enogen corn. As the truck comes across the scale, the handling facility runs a sample of the corn to test the viscosity and make sure the corn has a high enough alpha-amylase concentration to qualify as Enogen corn. Once the corn passes this test, it is dumped into a segregated dumping facility.

32. Because of the extra handling procedures that are employed in regards to Enogen corn, its farmers and handlers are paid an extra premium. Enogen growers receive on average, an additional \$ 0.40 per bushel.

33. For GPC to handle Enogen, it would need to adhere to the rigorous standards to maintain the purity and identity of Enogen in its facilities and prevent its escape. So would anyone else handling Enogen. For GPC to take delivery, dry, bin and blend Enogen from the contracted farmers, it would have to maintain the identity of that corn completely separate from any other grain. This would include the additional labor of cleaning out trucks, dumps, elevator legs and bins. It could mean increased overtime and weekend work for GPC's employees.

34. Enogen can be, and has been – for some ethanol producers – a boon. Others who have considered its adoption and conducted trials of Enogen

have decided not to use it. Adoption of Enogen is not uniform in the ethanol industry, nor is its adoption essential to a successful ethanol operation.

#### **Use of Enogen by CVEC**

35. As a prerequisite to any adoption of Enogen commercially, ethanol plants conduct trials of the product. CVEC did so, and the trial ended early and unsuccessfully, without having demonstrated any increased ethanol yield. Syngenta ended up explaining away the result, but before Enogen is adopted there will still need to be a *successful* trial.<sup>2</sup>

36. Currently, GPC's facility is incapable of handling Enogen, but so is CVEC's. For either party – or for that matter any facility that plans to start to handle or use Enogen – physical-plant upgrades will be necessary after a successful trial, and protocols will need to be developed, all at a financial cost. Logically, it cannot be a requirement under the Contract for GPC to handle Enogen at this time, since CVEC has not even gotten Syngenta's approval for its commercial use.

37. It may be reasonable for CVEC to require GPC to handle Enogen on an ongoing basis, sometime in the future. First, however, CVEC must explore Enogen's feasibility by conducting another trial. If CVEC moves forward with the use of Enogen, it would be reasonable to require GPC's cooperation and assistance in this regard. This will necessitate good-faith

<sup>2</sup> It would not appear necessary for GPC to ramp up to handle Enogen during a trial. The parties could agree that the Enogen corn used in a second trial would not be handled by GPC, if they wanted. CVEC has already undertaken one trial without GPC's involvement. And Syngenta even has portable equipment it brings to ethanol plants on occasion.

cooperation by both parties. They are capable of this; they have done so before.

38. Heretofore, CVEC has not worked with GPC in good faith to allow it to learn about the requirements to handle Enogen and prepare itself to do so, because CVEC did not want to continue to partner with GPC for the handling of any corn, whether or not Enogen was involved. CVEC was not serious about involving GPC in the use of Enogen – if indeed it will ever end up using Enogen commercially at all. CVEC didn't want GPC to have the necessary information, lest it show it could handle Enogen. CVEC instead wanted to use Enogen as a wedge to manufacture a basis under which it could escape its obligations under a contract it felt was no longer to its economic advantage. As CVEC's counsel stated in an email dated January 14, 2013: "our position [is] that we need to be done with the existing contract one way or the other. That has always been our objective."

39. After the interim arbitration award was issued, Traen continued in good faith to attempt to learn about Enogen, to discuss it with CVEC, and determine what would be needed for GPC to handle Enogen for CVEC. Traen got stonewalled. Enogen would not deal with him directly; he had to work through CVEC, which would be the party contracting with Syngenta if it ended up adopting Enogen commercially. Syngenta is in the business of contracting with ethanol plants, not individual farmers or grain handlers. (Typically, ethanol plants – using Enogen or not – do not have a separate grain handler, as

does CVEC; but then again, the unusual relationship between these two parties was a key element in CVEC's successful birth and start-up.)

40. Jerke was unwilling to discuss paying extra for the handling of Enogen, despite the fact that it is a specialty crop requiring rigor in observing IP protocols, and despite the Contract's provisions about negotiating fees. In Traen's words, with the issue of payment for GPC's increased Enogen-handling costs in play, Jerke now became antagonistic and got irrationally "picky" with GPC in their day-to-day relationship. For example, CVEC unilaterally changed its requirements for soybeans as foreign material ("FM"), departing from the industry standard for #2 yellow corn. It never sat down with Traen to discuss what he would characterize as a "rational" bean tolerance level.

41. Jerke was raising more complaints to Traen, even though GPC's performance under the Contract had in fact been improving. Jerke's predecessor, Bill Lee, had no particular problems with GPC's performance. It was Jerke, and not GPC's performance, that changed the relationship between the parties.

42. CVEC continued to insist, unreasonably, that the entire cost of any Enogen handling would have to be absorbed by GPC, even though there would in fact be very real costs associated with handling the IP product. At the same time, GPC was unable to obtain substantive information from CVEC – or from Syngenta, through CVEC – necessary to firm up a proposal regarding Enogen.

43. Although Syngenta had not dealt with another ethanol plant which worked with a separate grain handler, it would have done so. Its interest is in

the broader adoption of Enogen. As of the date of trial, Enogen was used for the production of about 10% of ethanol in the market. Tim Tierney's aspiration is "to capture more than 30 percent of the entire enzyme market space."

Syngenta wants Enogen adopted by as many ethanol plants as possible.

Syngenta would have been willing to work with GPC, but it had to be through CVEC. In Syngenta's business model, an ethanol plant contracts with Syngenta, and is responsible for its growers, who do not contract directly with Syngenta. The same would have to be true of GPC. This might reasonably require some agreements regarding indemnification between the parties.

44. Still, GPC was not able to communicate directly with Syngenta, whose relationship was with CVEC. And CVEC did not want this communication to happen.

45. It would have been possible – and still is possible – for GPC to handle Enogen corn for CVEC. GPC engaged Cornelius Beukhoff of Thorstad Construction, which builds ethanol and grain handling facilities, to assist. He has designed IP projects in the past, and has "always" been able to come up with a workable design to allow for the necessary grain separation. But to do so, he needed a good deal of information from CVEC. He was unable to obtain it.

46. The communications from CVEC were not substantively helpful to GPC in its effort to refine and develop a proposal to handle Enogen. They were, in Traen's words, "lawyer-driven," and in fact the communication between the

parties eventually eliminated the middle-men and was conducted directly between the parties' counsel.

47. The reason CVEC was unhelpful in this respect was that CVEC had no genuine interest in working with GPC on adopting Enogen or doing anything else. Its objective was, and had been since before the Enogen issue was first broached, to be done with the Contract.

48. The parties had gone to arbitration when, in 2011, CVEC tried to terminate the Contract by accusing GPC of material breaches of its duties outlined under the Contract. Most of this dispute was resolved via an arbitration award that was partially confirmed by this Court in February of 2015. That action, *Chippewa Valley Ethanol Company, LLLP v. Glacial Plains Cooperative*, Swift County District Court File #76-CV-11-467, has been considered by the Court and counsel to have been consolidated with the instant case, though no recognition of that fact appears prior to the instant Order. The affirmative claims of CVEC in this file duplicate its defenses herein.

49. One arbitrators' conclusion this Court confirmed was that GPC had not materially breached the Contract such that CVEC could terminate it.

50. The arbitrators' conclusion not adopted by this Court relates to its treatment of paragraph 6 of the Contract. That paragraph obligated CVEC to pay monthly a certain amount per bushel of grain handled and (among other things not relevant to our inquiry), provided that GPC would be the exclusive grain handler to the ethanol plant so long as it complied with the Contract. It its Order herein filed February 16, 2015, the Court concluded the arbitrators'

determination on and remedy regarding exclusivity contained in paragraph 6 exceeded their authority, as it was not arbitrable under the Contract.

51. Just 16 days after the arbitration panel ruled – and despite its conclusion that GPC's breaches had been cured and were not material breaches sufficient to enable CVEC to repudiate its contract – CVEC wrote to GPC on June 27, 2014, indicating it would terminate the Contract one month hence. In response, GPC initiated this lawsuit and sought a preliminary injunction to prevent the breach; the injunction was denied. GPC's complaint also sought a declaratory judgment that CVEC had breached the Contract through its wrongful termination; a permanent injunction directing CVEC to follow the terms of the Contract; and damages for CVEC's breach prior to an injunction being enforced (and other monetary damages, if the Court did not grant the permanent injunction).

52. It is true there were interruptions in the flow of corn from GPC over the years, but they were *de minimis* in the larger picture. CVEC also experienced interruptions after it refused to work with GPC and began handling its own grain. Some interruptions in flow are inevitable, humans being what they are and equipment being what it is. When CVEC installed a larger hopper to store grain to use during brief interruptions, the situation was much improved.

53. The future of the ethanol industry is not easy to predict, as the evidence demonstrated. Federal renewable fuel standards are subject to change, though the internal combustion engine seems as if it will be with us for

a while yet. The industry has changed since CVEC started producing ethanol 20 years ago and will likely change over the next 20 years as well, with or without Enogen. Yet CVEC seems bullish on the future, judging by its investments and plans. After hearing the parties' damages evidence and calculations, the Court is struck by the many variables and uncertainties at play – so many that the task of arriving at a just value of GPC's damages from CVEC's breach would be a shot in the dark. The Court cannot accurately determine the value of GPC's expectancy under the Contract.

#### **CONCLUSIONS OF LAW**

1. The findings of the arbitration panel, as confirmed by this Court, that there has been no material breach of the terms of the Contract by GPC, are *res judicata*, and nothing new in terms of a breach took place in the time period between the issuance of the arbitrators' final award and the commencement of this action.
2. Even if the arbitrators' conclusion that there had been no material breach were not *res judicata*, GPC in fact committed no material breach of the Contract that would entitle CVEC to terminate the Contract.
3. The development of Enogen, CVEC's interest in considering its use, and CVEC's reservations about GPC's ability to handle Enogen do not constitute an event that frustrates the purpose of the Contract.
4. CVEC has breached the Contract by its unilateral attempt to terminate the same.

5. The issues raised by CVEC as plaintiff in Swift County District Court File #76-CV-11-467 (frustration of purpose and exclusivity) are also raised as affirmative defenses in the instant action, and (as the parties have agreed) the two files should be consolidated.

#### ORDER

1. Swift County District Court File #76-CV-11-467 is hereby consolidated with the instant case under the instant caption and file number.

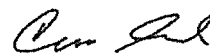
2. The Court declares CVEC's breach of the Grain Handling Contract herein to be wrongful. It has not effectively terminated that Contract.

3. CVEC shall continue to perform its duties and obligations under the terms of the Grain Handling Contract.

08.15.2016

Filed  
Swift County, Minnesota  
Court Administrator

BY THE COURT



Glasrud, Charles  
(Judge)  
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#### MEMORANDUM OF LAW

The grain-handling contract at its inception not only benefited CVEC greatly: it was in fact an essential element in order for it to commence operations. CVEC had no ability itself to handle the corn it would need in order to operate its new ethanol business. GPC, along with others, made contributions and undertook various obligations in order to enable the fledgling ethanol plant to commence operations. In reliance upon the contract, GPC made substantial investments so it could meet and continue to meet CVEC's needs. It also received valuable benefits under the Contract. Occasionally it

fell short of reasonable expectations, but those problems were cured and, where appropriate, GPC paid compensation to CVEC for its losses.

Perfection in the supply of corn is unattainable, and interruptions will inevitably occur – as CVEC later found out when it abrogated the agreement and tried handling its own grain. As CVEC's long-time manager, Bill Lee, said, the plant's downtime due to GPC's fault was "a fraction of a fraction of a percent." He was generally satisfied with GPC's performance, and its performance was in fact acceptable.

The parties had a symbiotic relationship, and it turned out to benefit GPC in many ways – some written into the contract and some indirect. CVEC argues the loss of some of these advantages is not appropriately included in any damage calculation, but it would be a loss nonetheless.

Once it became an established, successful and expanding business, CVEC began not to need its business partner GPC as it had at first. It could save money, it concluded, by handling corn itself. After Mike Jerke replaced Bill Lee (who had few problems working with GPC and his counterpart manager there over many years) as CVEC's general manager, almost immediately what had previously been a successful and relatively trouble-free working relationship became, in CVEC's telling, highly problematic. In fact, it was *economically* problematic for CVEC to stay in the relationship, in terms of maximizing its profits. As a result, CVEC intentionally made things problematic for GPC in other ways. It took actions which it calculated would

ultimately allow it to escape its contract obligations, by rendering GPC's performance impossible.

As the arbitration panel found, whatever performance deficiencies or breaches GPC had committed up to the date of its determination were not material and did not justify CVEC abrogating the Contract. That ruling was confirmed by this Court on February 16, 2015. It is *res judicata*, and even if it were not, the Court agrees with that conclusion.

As GPC points out, the setback of losing in arbitration caused CVEC to apply to paragraph 6 of the Contract the complaints and arguments that had failed to obtain for it legal relief as to the arbitrable portions of the Contract, and just 16 days after receiving the arbitration panel's ruling, CVEC gave notice it was terminating the contract effective in 30 days, on July 27, 2014. CVEC had no desire to continue to be bound by that Contract. As CVEC's counsel had declared a year and a half earlier: "our position [is] that we need to be done with the existing contract one way or the other. That has always been our objective."

Other than relying on a different contractual provision to justify its action, CVEC did not allege any new concerns with GPC's performance. Factually, those concerns had been tried by the arbitration panel already and not found to constitute a material breach. As the panel said, subjective dissatisfaction with the contract is not a reason this Contract can be terminated against the will of the other party. This Court, in its Order denying

summary judgment filed September 1, 2015, already concluded the Contract is not an indefinite contract terminable at CVEC's will.

### **Enogen**

In its latest effort to escape its obligations under the Grain Handling Contract, CVEC now focuses on paragraph 6 of the Contract, which contains an exclusivity clause, providing that GPC's predecessor in interest United Farmer's Elevator

shall be the exclusive handler of grain to the ... ethanol plant, as long as it is complying with all warranties and agreements above described. This contemplates that UFE will continue to be able to handle the full capacity of corn required to run the ... ethanol plant. Should UFE fail to handle the required corn and any additional required after after expansion, if any, this obligation of [CVEC's] exclusive use of UFE shall be null and void.

CVEC seized upon the Enogen issue as a potential new means to escape the Contract. If GPC could not or did not want to handle Enogen, paragraph 6 gave CVEC an out. But after consideration, GPC did express an interest in handling Enogen. It would now be necessary to demonstrate that GPC would not be able to follow through. So CVEC did not respond meaningfully and in good faith to GPC's repeated requests for information regarding requirements – information needed so GPC could figure out how to handle Enogen and what it would cost to do so. With that information, GPC could make a proposal under the Contract regarding a modification of the handling fee, as it was allowed to do under paragraph 1. But CVEC didn't actually want a proposal from GPC.

CVEC ran one trial of Enogen, which was unsuccessful and terminated early. Despite the fact that trials imply that one is open to positive or negative

results and will act accordingly, CVEC claims to accept on faith that – even after one unsuccessful trial and without having conducted a second trial – Enogen will eventually be successful at CVEC and that it will be one of the minority of ethanol plants that adopts it. In fact, it claims, it will *need* to adopt it to remain competitive. It hasn't happened yet, some five years after Mike Jerke first brought up the topic, and it may very well never happen. CVEC's purported conclusion that it will for certain adopt Enogen commercially is not a reasonable one, based on its own trial, the pace with which it is actually moving toward adopting Enogen, and the fact that some ethanol plants have chosen *not* to use Enogen after conducting trials.

Further, as GPC points out, there is no reason it cannot handle Enogen as well as CVEC could. Both have experienced grain-handling glitches in the past, but then nobody is perfect. The evidence showed that while it would be unusual for a third party to be involved in Enogen grain handling, this does not mean it cannot be done successfully here. It's unusual all right, but it stems from the manner in which the parties got themselves an ethanol plant in Benson in the first place.

Syngenta has expressed a willingness to try working with GPC and CVEC. GPC demonstrated that it was ready, willing and able to propose how it would handle Enogen. GPC simply needed information first. Despite repeated requests, CVEC refused to give GPC the information it required, and did not put GPC promptly in touch with the appropriate representative of Syngenta. Demonstrating its seriousness about the implementation of Enogen, GPC

identified and tried to deal directly with Tim Tierney, who was head of Syngenta's business accounts department for Enogen. CVEC sets up a false choice when it says it could either explore and possibly adopt Enogen or adhere to its contract with GPC, but not both. CVEC failed to prove this at trial.

### **Practicality of specific performance**

Plaintiff seeks specific performance of the Contract.<sup>3</sup> When the Court denied the temporary injunction herein in its Order filed August 8, 2014, it found "a likelihood that [CVEC] will prevail on the merits of this action. If [GPC] is able to prevail on a claim based upon the contract, there is an adequate remedy at law, namely money damages."

After the parties developed their arguments and the case progressed, the Court found GPC's contract claim did not, in fact, fail as a matter of law based on indefinite contract duration. It explained its analysis at length in its Summary Judgment Order of September 1, 2015.

Further, based upon the evidence adduced at trial, GPC does herein prevail on the merits. Orders for preliminary relief are by their nature preliminary and subject to change. Once the evidence is developed further, courts' initial assessment of the merits of a case sometimes changes. That is

<sup>3</sup> Injunctive relief has also been mentioned, but the Court characterizes the appropriate relief as specific performance. The two concepts are related, and not always easily distinguished. If one is trying to enjoin a party from certain conduct, this could be viewed through the lens of either injunction or specific performance. *Minnesota Vikings Football Stadium, LLC v. Wells Fargo Bank, Nat'l Ass'n*, No. CV 15-4502 (DWF/JSM), 2016 WL 3527248, at \*7-9 (D. Minn. June 23, 2016)(citing Restatement (Second) of Contracts § 357 (1981), cmt. b). But what we have here is not a duty to refrain from conduct. It is instead a duty to do something – to use GPC for grain handling, and to pay for it.

the case here. As to the Court's statement about the adequacy of money damages, the Court has also become persuaded that its preliminary pronouncement to that effect has proven incorrect.

As the Court noted in its findings, the crystal ball is particularly cloudy on the future of ethanol and CVEC. It finds damages simply too uncertain to be a valid remedy under the facts of this particular case. The Court cannot accurately determine the value of GPC's expectancy under the Contract. This is not a punt; it recognizes the reality and uniqueness of the situation and the parties' relationship to each other. Specific performance is by far the better and fairer remedy here than an attempt to assign money damages. As will be set forth below, it is a workable remedy here.

It is suggested this contractual relationship is like a dead marriage, and if one party wants out you might as well allow it because the two are never going to get along. The parties are just "two scorpions in a bottle" and you can't mend the relationship. All you'll get is continued frustration and bad behavior.

While CVEC may be a "person" in some legal senses, it is not a person that has emotions, spite and grudges. For its managers and directors to behave as if it were would breach their duties to CVEC and its members. Therefore, they can be counted upon to behave reasonably upon learning the outcome of this litigation, not spitefully. In the past, CVEC has made what turned out to be unwise choices regarding its dealings with GPC, with negative results. Those in control wrongly assumed their choices would be fruitful for CVEC. Institutionally, CVEC can learn from those mistakes, chart a new

course, behave efficiently and purge itself of any individuals who would continue to have CVEC play the “scorpion.” CVEC was the only scorpion ever in this particular contractual bottle, and this Court is not going to reward it for bad behavior by giving it exactly what its counsel admitted it wanted all along – to get out of the Contract.

It is important to remember, in the context of remedies, who the parties are. As noted, they are non-human business organizations serving producers. Further, and uniquely, they are each serving many of *same* producers. Ongoing strife and litigation will cause many of these overlapping member/shareholders effectively to be paying attorneys for both sides. This is a special incentive to behave reasonably – and if management does not get the message, those affected producers can make a change and fix that.

In addition, the parties themselves are more than just separate entities who are parties to a contract. GPC owns part of CVEC. The parties would be better characterized as partners. This is not a rational fight for CVEC to continue to have with an entity such as GPC, and the Court believes it can and will now change its outlook.

CVEC cites *Braaten v. Midwest Farm Shows*, 360 N.W.2d 455 (Minn. App. 1985), claiming it is controlling law that a contract such as this one cannot be subjected to specific performance. But the court in *Braaten* held the partnership at issue was dissoluble at any time by any partner because it was of indefinite duration. It appears duration was not specified there; by contrast, this Court has previously already held the explicit indefiniteness of duration in

the instant case does not make the Contract terminable at will. The *Braaten* Court did not go so far as to announce a bright-line rule (as CVEC contends) that no contract without a definite end date could be susceptible of specific performance; it said it “makes *this* partnership agreement inappropriate for specific performance.” *Id.* at 457 (emphasis supplied). And the *Braaten* court went on to discuss case authority relative to contracts that are not certain and complete; the instant contract *is* certain and complete. The *Braaten* decision is simply not on point, but rather specific to a set of facts not analogous to those at bar.

The other case cited by CVEC, *Holmes v. Torguson*, No. CIV. 4-92-259, 1993 WL 385614 (D. Minn. Aug. 20, 1993), *aff'd*, 41 F.3d 1251 (8th Cir. 1994), is similarly inapt. It involved a contract with an unenforceable essential term, plus “no specific term describing the duration of the enterprise so it was terminable at will.” *Id.* at \*6. It is distinguishable, because the instant Contract is enforceable and not indefinite.

Scholars and theoreticians support the Court’s willingness to embrace specific performance. In contract law, “the modern trend is clearly in favor of the extension of specific relief at the expense of the traditional primacy of damages.” E. Allan Farnsworth, *Contracts* §12.4, at 854 (2d ed. 1990); *see also* J. Berryman, *The Specific Performance Damages Continuum: An Historical Perspective*, 17 *Ottawa L. Rev.* 295, 295 (1985).

Courts used to insist the law would not order a party to perform under a services contract and would not issue an injunction stopping an employee from

working for a competitor. *Kimberley v. Jennings*, (1836) 58 Eng. Rep. 621, 621 (Ch.); *Kemble v. Kean*, (1829) 58 Eng. Rep. 619, 619 (Ch.).

However, this rule was relaxed in *Lumley v. Wager*, (1852) 42 Eng. Rep. 687 (Ch.), where the court upheld a non-competition agreement of a breaching opera singer. The rule has been even further relaxed by allowing negative injunctions even when the original contract does not contain an explicit negative covenant, and the further expansion of covenants not to compete. Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* 358 (1989); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-91 (6th Cir. 1898).

As Judge Richard Posner points out, an economic analysis suggests that arranging contract remedies to provide incentives can cause parties to behave efficiently. *Economic Analysis of Law* 131 (5th ed. 1998). He argues damages alone are not a good incentive, where it can be argued they are uncertain and speculative. To this, the Court might add “and not contemplated in the Contract.” In advocating strenuously against specific performance, CVEC seeks to buy its way out of the contract. And it wants to do so through an award of very modest damages, arguing various categories of claimed damage are not available to GPC. This despite the fact that CVEC’s breach would essentially cut the heart out of a longstanding GPC profit center.

When a court is unable to determine the position the breechee (here, GPC) would have occupied had the breacher (CVEC) performed under the contract, damages will not end up being set at a level that would give a where

promisors will be given the proper incentive to perform. See Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 Minn. L. Rev. 2020, 2028 (2009).

Contract doctrine also suggests that courts systematically under-compensate promisees and often, when they cannot accurately determine the value of a promisee's expectancy with certainty, they will only award nominal damages rather than try to put the promisee in the position it would have occupied had the contract been properly performed. *Freund v. Wash. Square Press, Inc.*, 314 N.E.2d 419, 422 (N.Y. 1974). The Court in the instant case seeks to avoid such a result.

Guido Calabresi and A. Douglas Melamed contend that ordering specific performance of contracts can encourage more efficient outcomes. *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1089 (1972). Their reasoning is more involved than the Court believes the reader will want to know. Suffice it to say, however, they contend the traditional reluctance to grant specific performance is to a significant degree misplaced and misinformed.

In determining whether the remedy in damages would be adequate, the following circumstances are significant: (a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected.

Restatement (Second) of Contracts § 360 (1981). As noted, money damages are difficult to prove with reasonable certainty in the instant case. And money

could never give to GPC a “suitable substitute performance” – substitute to continuing to reap the benefits of the unique relationship it has with the ethanol plant, situated directly adjacent to it.

### **Specific performance and involuntary servitude**

CVEC argues for the first time in its 66-page rebuttal brief (after more or less ignoring the topic of specific performance in its initial submission) that one reason specific performance is unavailable as a remedy here is because it would result in involuntary servitude. This argument fails for a number of reasons. First, if any party in the case at bar might be seen as “slave,” it could only be GPC, which is obligated to provide grain handling services. CVEC is simply obligated to utilize GPC’s services, and to write a check.

Second, the cases cited relative to involuntary servitude in the context of specific performance deal with, basically, services contracts – with the services to be provided by the complaining party. In one case cited by CVEC, *Boise Cascade Int’l, Inc. v. N. Minnesota Pulpwood Producers Ass’n*, 294 F. Supp. 1015 (D. Minn. 1968), the burdened party was an association of some 250 pulpwood operators (that is, 250 individual lumberjacks), each with a contract. The court understandably chose not to impose what would amount to involuntary servitude upon them, for what amounts to personal services.

And in the second cited case, *Lamoureux v. MPSC, Inc.*, No. CV 14-1488 (JRT/BRT), 2015 WL 8082598 (D. Minn. Dec. 7, 2015) (*appeal pending*), the court *declined* to allow termination of a perpetual contract, rejecting the involuntary-servitude argument. The decision noted courts are

“understandably wary, for example, about holding an employee forever liable to an employer,” but pointed out the contract at issue required the complaining party simply to write a check. *Id.* at \*6.

Professor Oman explores involuntary servitude in this context in his article cited above. The Court takes time to excerpt it at some length here. Contracts to render personal services will not be specifically enforced, a rule derived from the Thirteenth Amendment to the United States Constitution. Courts often justify denials of specific performance based on this. But the United States Supreme Court has never directly ruled on the issue and the lower courts often use this rule with insufficient analysis.

As Professor Oman points out, while most constitutional provisions require state action before they are applicable, the Thirteenth Amendment contains no such requirement. It simply forbids “slavery and involuntary servitude.” Specific performance of a personal services contract would not violate the Thirteenth Amendment so long as the conditions of its enforcement did not constitute involuntary servitude. The Thirteenth Amendment’s concerns are with the conditions of the contracting party, not any particular remedy. The scope of the Thirteenth Amendment – and ultimately, the legality of specific performance as construed thereunder – hinges on the meaning of “involuntary servitude.”

Professor Oman tells us that when the Thirteenth Amendment was adopted in 1865 by the Reconstruction Congress, its text was taken verbatim from the Northwest Ordinance of 1787. Prior to the Civil War, the term

“involuntary servitude” had been used in the constitutions of more than a dozen states and there was a body of case law surrounding its meaning. Those who adopted the Thirteenth Amendment used language whose meaning had been established in 70 years of legal practice; the congressional debates over the Thirteenth Amendment do not suggest any alternate understanding of the meaning of “involuntary servitude.”

The line between permissible enforcement of contracts and the creation of involuntary servitude (under the guise of a contract) involved the analysis of four interrelated factors. 1) Did the promisor enter the contract while in a state of “perfect freedom” or did the promisee have some overarching power over the promisor? 2) Was the promisor compensated for services with “bona fide consideration” or did the relationship constitute “unrequited toil?” 3) Were there temporal limits on the contract? (Agreements extending over extremely long periods of time were suspect, while more limited engagements were not.) 4) Did the promisee (master) physically dominate and degrade the promisor (servant) with abuse and claim a right to personally capture her and return her to service if she tried to quit?

Professor Oman says the United States Supreme Court has yet to develop a clear doctrinal framework for analyzing claims of involuntary servitude, but in every instance where the Court has actually found it to exist, all four of the pre-Civil War factors mentioned above have been present. (As can be readily seen, factors two and four are missing in the relationship between GPC and CVEC.)

According to Professor Oman, the Supreme Court did its most extensive analysis of the term in the “Peonage Cases,” a series of opinions from the early 20<sup>th</sup> Century. In these cases, the Court declared in “sweeping dicta” that any attempt to enforce a contract with legal sanctions would constitute involuntary servitude. These cases have been cited to support the idea that specific performance of a personal services contract is unconstitutional. However, none involved equitable remedies for breach of contract. They dealt with labor relations at the height of the Jim Crow South, and when considered in a historical context they don’t provide the broad prohibition on specific performance some courts have thought they did.

Professor Oman explores the most recent Supreme Court case to consider the Thirteenth Amendment *United States v. Kozminski*, 487 U.S. 931 (1988), in which two intellectually disabled men were “employed” for 20 years by a family who provided them with no compensation beyond adequate housing, food, clothing and medical care and subjected them to physical and verbal abuse. The Court looked to the Peonage Cases and noted that there, the “involuntary servitude” analysis keyed in on the fact that “the victim had no available choice but to work or be subject to legal sanction.” *Id.* at 943. The Court also acknowledged its “precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment.” *Id.*

The instant case doesn't even compel labor. The prohibition against involuntary servitude certainly does not avail CVEC in its argument against specific performance.

### **Frustration of purpose**

CVEC argues that 1) it is reasonable for it to undertake the use of Enogen corn; 2) GPC is currently unable to do so; and therefore 3) GPC is in breach and CVEC can terminate the contract. The purpose of the contract – exclusively to serve CVEC's grain handling needs – is frustrated, it contends.

But there are problems with this. One is that it is not certain CVEC must and will in fact adopt Enogen, or that it is reasonable to do so. The evidence is not yet in, and a reasonable ethanol plant might choose not to pursue or adopt Enogen. In fact, a number have passed on the opportunity.

As to current inability, it is unfair to read the contract as allowing terminability based on GPC's inability within 30 days to accommodate something that CVEC might or might not adopt – and could not do immediately itself in that time frame. It has been some five years and CVEC has not adopted Enogen, after all. Due to the rigorous protocols necessary to work with Enogen, obviously adopting it would take anyone – whether GPC or CVEC alone, acting as its own grain handler – significant time to do. Here, GPC was not given that time.

CVEC has not yet had a successful trial of Enogen, only a failed trial.<sup>4</sup> Therefore, it cannot have decided to adopt Enogen commercially. It follows that it has not yet gotten Syngenta's authorization to adopt Enogen commercially, which would be the next step after that. Many things need to happen before CVEC ever goes forward with Enogen commercially. It is simply unreasonable and disingenuous to argue that since GPC cannot be ready for Enogen in, at most, 30 days, CVEC is entitled to terminate the contract. Whatever promise Enogen may hold for the ethanol industry, for CVEC it is at present not just a GMO but an "LMO" – a "litigation-modified-organism." But the Enogen cannot produce the result CVEC seeks.

If CVEC's second trial of yields positive results, it would presumably consider utilizing Enogen commercially, but it doesn't have to. There are positives and negatives to using Enogen. Syngenta's representative Tim Tierney would of course would be expected to tout Enogen as a "game-changing" boon to the ethanol industry. That may be puffing. It is a fact that not all ethanol plants that have done trials of Enogen have adopted it. Tierney now has 10%, and is only aiming for 30% of "the entire enzyme market space." This suggests that 70% of the market (presumably by volume of ethanol produced) will still be adding the liquid amylase in processing corn. For some

<sup>4</sup> The failure had nothing to do with GPC, because CVEC didn't involve it in the trial. CVEC surely does not believe it should not attempt to handle Enogen itself merely because its trial failed, or because on other occasions it has experienced operational problems (just as has GPC).

plants, Enogen's advantages outweigh its risks and/or costs; for many others, they do not.

Obviously Enogen is not such a revolutionary development ethanol plants must adopt it or perish. It follows that a contract for grain handling cannot be frustrated in its purpose simply because a contracting ethanol plant cannot adopt Enogen commercially. Most plants seem not to have adopted Enogen. CVEC has been successful in the past without Enogen; it seems in no particular hurry to adopt it; and if it decides it does not like the risk/benefit analysis with Enogen, there is no reason to believe CVEC cannot continue to enjoy success without adopting it.

But assuming CVEC does choose to adopt Enogen commercially, another faulty assumption is that GPC could not handle Enogen for CVEC under the current contract. It might be an unusual arrangement, as some in the industry have noted here. GPC would need to agree to indemnification, and commit to raise the bar of reliability in its systems. But this does not mean the arrangement cannot be done; the evidence is that it can.

Three conditions must be met to make out the defense of frustration of purpose. The party's principal purpose in making the contract must be frustrated, without that party's fault, by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. *Nat'l Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 707 (Minn. App. 1984).

Handling all CVEC's grain was indeed the principal purpose of the Contract. It has not been shown GPC cannot handle Enogen; to the extent

GPC is not sooner ready to do so, this is CVEC's own fault for never having given GPC a fair opportunity to try. And the "non-occurrence event" – here, Enogen coming along – was not a basic assumption of the Contract. (A basic assumption might be the continued viability of the internal combustion engine, say, or the continued existence of the federal renewable fuel standards.)

Enogen coming along did not "change the game" in a significant enough way to frustrate this Contract's purpose; most ethanol plants apparently still function without it. The basic assumption of this Contract was that GPC would be able to take in corn and CVEC would need it. And that assumption still obtains.

GPC's corn blending is neither illegal/prohibited conduct nor inequitable conduct such as to defeat its ability to seek equitable relief. And regardless, as long as the corn delivered constitutes #2 yellow corn, the Court cannot see how GPC's blending conduct becomes relevant to CVEC's attempts to extricate itself from a contract it now thinks it can make more money without.

GPC makes a good, plain point regarding frustration of purpose: the party claiming it cannot itself be the cause of the frustration. That would be inequitable, and CVEC is estopped from asserting it.

### **Conclusion**

Specific performance is a viable remedy here. Further, the Court cannot with certainty, on the basis of the damages evidence presented, arrive at an amount of money damages it can state with confidence adequately compensates GPC. GPC stands to lose many different benefits, benefits CVEC argues all are not compensable. (CVEC's arguing that point actually militates

in favor of specific performance, because it underlines the problems in compensating GPC monetarily for the true consequences of loss of this Contract.) Because there are so many variables, unknowables, and claimed types of damages, the legal remedy of damages is simply not adequate here.

GPC should be entitled to the benefit of its bargain and be allowed to continue to perform under the Contract. Perhaps the parties will want to negotiate for CVEC to handle the Enogen, an apparent modification to the exclusivity clause. They are free to consider this. Absent that, if GPC cannot or will not, in the end, handle Enogen – and if Enogen is truly to be adopted by CVEC – then GPC will perhaps be in breach of its obligation to be the exclusive grain handler for CVEC. But it deserves a true and fair chance to try.

The Court has chosen GPC's preferred remedy. Once CVEC recommences performance under the Contract by utilizing GPC as its exclusive grain handler, it is possible GPC will still be able to bring forth a claim for damages that accrued during the duration of CVEC's breach. Those would surely be easier damages to calculate than damages for a permanent abrogation of the Contract, but this cannot be done until after the breach has been cured – if it needs to be done at all.

**CCG**

I hereby certify that the foregoing Order For Judgment hereby constitutes  
the Judgment of this Court.

Dated: 8-16-2016

Debra Mueske  
Court Administrator

By Chelsey Hansen