No. 08-576

IN THE SUPREME COURT OF THE UNITED STATES

FIN-AG, INC.,

Petitioner,

v.

PIPESTONE LIVESTOCK AUCTION MARKET, INC.; SOUTH DAKOTA LIVESTOCK SALES OF WATERTOWN, INC.; WATERTOWN LIVESTOCK AUCTION, INC.; and CIMPL'S, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

REPLY TO OPPOSITION TO PETITION

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Petitioner submits this Reply in support of its Petition for a Writ of Certiorari to review three interrelated decisions of the Supreme Court of South Dakota.

The underlying lawsuits between Fin-Ag and the Sale Barns all involved cross-motions for summary judgment. The South Dakota Supreme Court granted the Sale Barns' motions for summary judgment based upon its ruling that the FSA provided protection to the Sale Barns for the sale of collateral cattle made under the name of C&M Dairy. The Sale Barn's opposition to the Petition is fundamentally misleading because it relies on a characterization of the facts that was not a part of the lower court's decision.

I. The real basis for the lower court's decision.

The Sale Barns attempt to convince this Court that the South Dakota Supreme Court granted summary judgment because Fin-Ag failed to amend its UCC filings to include C&M Dairy as an additional debtor. Such representation is inaccurate and contrary to the written opinions.

The South Dakota Supreme Court did not hold that Fin-Ag should have amended its UCC filings. Rather, the court determined that it was unnecessary to do so in light of its holding that the Sale Barns were protected by the FSA:

> Sale Barns also argue that the sales were authorized, and Fin-Ag's interests were waived or extinguished because

Fin-Ag had no security interest as a result of its failure to amend its financing statement/EFS to reflect material changes under 7 U.S.C. § 1631(c)(4)(D). *However, we need not address the FSA aspects of this issue because we have already determined that Sale Barns are generally entitled to FSA protection.*

To the extent that a failure to amend the financing statement may arise under the UCC on remand, the parties may litigate that issue. Judge Kean did not address the issue in his decision. *Although Judge Timm addressed it, there are material issues of disputed fact precluding summary judgment on the issue of the duty to amend a financing statement (as well as an EFS).* Those facts include allegations that Fin-Ag should have been aware that C & M Dairy was making substantial cattle sales in the region under the name C & M Dairy. There was also a prior lawsuit in which Fin-Ag acknowledged that C & M Dairy was a d.b.a. for Berwalds business. See infra n. 18. These facts are relevant to determine whether Fin-Ag should have amended its financing statement (or EFS) to preserve its security interest. *Whether Fin-Ag's research of alleged unauthorized cattle sales was reasonably sufficient to not require amendment is a question of fact*

> *that is not appropriate for summary judgment.* Considering the conflicting facts, at the summary judgment stage, Judge Timm erred in finding that Fin-Ag's research was sufficiently reasonable.
>
> Appendix to Petition for Writ of Cert., App. A-89, FN 17 (emphasis added).

A primary basis of the Sale Barns' reply is therefore premised on a factual distinction expressly excluded from the lower court's consideration. As such, it is non-responsive to Fin-Ag's Petition and only serves, by its silence, to support Fin-Ag's analysis.

II. Analysis of *Hufnagle* decision.

The Sale Barns' attempt to distinguish *Hugnagle* by arguing that the sale of collateral cattle using a dba does not amount to "fronting" is specious. There is no real distinction between selling collateral under the name of the seller's children or under the seller's fictitious business name. Both are done for the purpose of avoiding the secured party's interest in the collateral. In fact, if the Sale Barns' position was adopted, it would create a situation where the FSA would not provide protection for the sale of collateral under seller's children's names, but would provide protection if seller was clever enough to sell under a fictitious dba. Such result would be absurd and would create a guide for sellers to effectively bypass UCC protections.

Although the South Dakota Supreme Court recognized that the Berwalds created the security interest in the cattle sold through the Sale Barns, it failed to consistently apply the plain language of the FSA to the relevant sales. Had it done so, it would have concluded, like the *Hufnagle* court, that one cannot define "seller" two different ways under the FSA and that the FSA does not provide protection for "fronting" sales.

As it now stands, South Dakota protects "fronting" sales, while Minnesota does not. Such conflicting interpretations between neighboring states will have an affect on interstate lending and farm products sales. Fin-Ag, as well as other agricultural lenders, is seeking clarification of the application and protections afforded under the Food Security Act involving "fronting" sales through the use of a dba.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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