

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF MISSOURI**

<b>In re:</b>	)	<b>In Proceedings Under Chapter 11</b>
	)	
<b>FARMLAND INDUSTRIES, INC., et al.,</b>	)	<b>Case No. 02-50557-JWV</b>
	)	<b>Joint Administration</b>
<b>Debtors.</b>	)	

**JOINT RESPONSE OF DEBTORS AND DEBTORS-IN-POSSESSION  
AND THE OFFICIAL COMMITTEE OF BONDHOLDERS TO MOTION  
TO AMEND PROOF OF CLAIM FILED BY PJ SERVICES, LLC**

COME NOW Farmland Industries, Inc., et al., Debtors and Debtors-in-Possession (collectively, the “Debtors”), and the Official Committee of Bondholders (the “Bondholders Committee”), by and through their undersigned attorneys, and for their Joint Response to Motion to Amend Proof of Claim Filed by PJ Services, LLC (the “Response”), respectfully state as follows:

**BACKGROUND**

1. On May 31, 2002, Debtors filed with the Court a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Debtors continue to operate their businesses and manage their properties as Debtors-in-Possession in accordance with Sections 1107 and 1108 of the Bankruptcy Code.

2. The Bondholders Committee has standing to file this Response as a duly appointed committee of creditors and may appear and be heard on any issue in this case, including this Response. 11 U.S.C. § 1109(b).

3. This is a core proceeding arising under 28 U.S.C. § 157(b)(2)(B). This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 157(a) and 1334.

### **The Original PJ Services Claim**

4. On January 7, 2003, PJ Services, LLC (“PJ Services”) filed proof of claim number 7409 asserting a general unsecured claim against Farmland Industries, Inc. (“FII”) in the amount of \$7,250,000.00.<sup>1/</sup> The proof of claim filed by PJ Services asserted a damages claim against FII based upon an alleged breach of an alleged contract purportedly entered into between PJ Services and FII for the purpose of providing a South African workforce of approximately 200 workers over a period of three years.

### **The “Missing” Contract and Other “Unavailable” Documents**

5. PJ Services did not attach a copy of the alleged contract to its proof of claim. In paragraph one on page two of its proof of claim, which was signed by PJ Services’s member Petrus Botes, PJ Services states that “numerous documents, including the actual contract, are current [sic] being retained by the INS.” Further, in paragraph three on page two of its proof of claim PJ Services states that South Africans not hired by FII were “currently seeking to obtain compensation from PJ Services, LLC for their damages in this regard,” but that documentation in excess of \$6.5 million was not available to support these claims.

### **The Debtors’ and Bondholders Committee’s Objections**

6. On July 25, 2003, the Debtors filed an objection to PJ Services’s claim (the “Objection”) (docket #4333). In the Objection, the Debtors denied the existence of a contract with PJ Services and denied liability to PJ Services for any alleged damages asserted by PJ Services based on contract or otherwise. The Debtors further objected on the grounds that PJ Services had failed to provide any evidence to support the alleged damages claimed.

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<sup>1/</sup> The members of PJ Services, Joyce Coetzee and Petrus Botes, also filed proofs of claim on January 7, 2003. They withdrew their claims on December 1, 2003.

7. On August 20, 2003, PJ Services, through its members Joyce Coetzee and Petrus Botes, filed a response to the Objection (docket #4847).

8. On September 11, 2003, the Bondholders Committee filed its statement in support of the Debtor's Objection (the "Statement in Support") (docket #5461).

### **The Joint Motion for Summary Judgment**

9. On November 10, 2003, the Debtors and the Bondholders Committee filed their joint motion for summary judgment arguing that the undisputed material facts established that PJ Services's claim must fail as a matter of law and, therefore, must be disallowed by the Court (the "Summary Judgment Motion") (docket #6630). The grounds for summary judgment, *inter alia*, were that PJ Services had failed to comply with Federal Rule of Bankruptcy Procedure 3001(c) by failing to attach a copy of the alleged written contract to its proof of claim, and that in the absence of production of the alleged written contract, the alleged three-year agreement was unenforceable under the Missouri Statute of Frauds. Additionally, summary judgment was sought because PJ Services failed to attach any documentation to support its alleged damage claim to either the proof of claim or to the response to the Objection. Further, PJ Services admitted in paragraph three on page two of its proof of claim that documentation to support "in excess of" \$6.5 million of its claim was "not available."

10. On December 1, 2003, PJ Services filed a Response to the Summary Judgment Motion (the "Response") (docket #6899). On page one of its Response, PJ Services stated that it "did not attach a copy of a written contract between Farmland Industries, Inc. and PJ Services, LLC [to its proof of claim] because the agreement between Farmland Industries, Inc. and PJ Services, LLC was an oral agreement for services."

### **PJ Services's Attempt to Amend its Way Out of a Jam**

11. Contemporaneously on December 1, 2003, PJ Services filed a Motion to Amend Proof of Claim Filed by PJ Services, LLC (the "Motion to Amend") (docket #6903). PJ Services attached to the Motion to Amend a proposed amended proof of claim asserting an unsecured claim in the amount of \$4,501,330.00 against FII.<sup>2/</sup> In paragraph one on page two of the amended proof of claim, PJ Services states that the alleged contract between PJ Services and FII was oral and seeks recovery in the amount of \$250,000.00 under a theory of quantum meruit based upon its alleged "part performance" of the oral agreement. PJ Services also seeks reimbursement for expenses it allegedly incurred in the amount of \$1,330.00 to feed and house some South African individuals. Finally, PJ Services seeks to be indemnified in the amount of \$4,250,000.00 because third party South African placement agencies are allegedly looking to PJ Services for indemnification for the reason that South Africans not hired by FII allegedly have sued or have threatened to sue these South African placement agencies, which PJ Services allegedly used to coordinate workers. PJ Services admits that it has not been sued for indemnification.

12. On December 2, 2003, a hearing was held on the Summary Judgment Motion after which the Court took the matter under advisement. Although discussed during argument at the hearing, the Motion to Amend was not submitted to the Court.

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<sup>2/</sup> On December 3, 2003, PJ Services filed a replacement exhibit to its Motion to Amend, which is a proposed amended proof of claim that eliminates the improper classification of a portion of its claim as an unsecured priority claim. Accordingly, the proposed amended proof of claim asserts only a general unsecured claim against FII.

## DISCUSSION

### The Proposed Amended Claim is Untimely and Improperly Sets Forth an Entirely New Claim

13. The Bar Date for filing claims against the Debtors' estates was January 10, 2003, and PJ Services did timely file its original proof of claim. Whether to allow an amendment to a timely filed claim is within the discretion of the Court. In re Wrenn Ins. Agency of Missouri, Inc., 178 B.R. 792, 798 (Bankr. W.D. Mo. 1995). "As a general rule, 'amendment to a claim is freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.'" Id. (citations and internal quotation marks omitted). "Amendments are not automatic but are allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery **based on the same facts set forth in the original claim.**" United States v. Kolstad (In re Kolstad), 101 B.R. 492, 494 (Bankr. S.D. Tex. 1989), aff'd, 928 F.2d 171 (5<sup>th</sup> Cir. 1991)(emphasis added). "It is a generally accepted proposition that amendments to a claim are freely allowed when the purpose of the amendment is to cure a defect in the claim originally filed, to describe the claim already asserted with greater particularity or to plead a new theory of recovery, **but only if the amendment is based on the same facts which were the basis for the claim set forth in the original claim.**" Hillsborough Holdings Corp. v. United States (In re Hillsborough Holdings Corp.), 187 B.R. 763, 765 (Bankr. M.D. Fla. 1995)(emphasis added).

14. "The bankruptcy court must carefully scrutinize such amendments to insure that they do not amount to an attempt to file an entirely new claim after the time for filing claims has expired." Wrenn Ins. Agency, 178 B.R. at 799 (citations and internal quotation marks omitted). "It is wholly inappropriate to use an amendment as a device for filing, after the statutory period,

a claim based on a cause of action of which no notice has been given to the debtor.” Kolstad, 101 B.R. at 494. “[T]he proposed amendment must not be a veiled attempt to assert a distinctly new right to payment as to which the debtor estate was not fairly alerted by the original proof of claim.” Woburn Assocs. v. Kahn (In re Hemingway Transp., Inc.), 954 F.2d 1, 10 (1<sup>st</sup> Cir. 1992).

15. Here, PJ Services is attempting to assert an entirely new cause of action against FII in the proposed amended proof of claim to which neither the Debtors nor the other unsecured creditors were fairly alerted by the original proof of claim. The original proof of claim filed by PJ Services seeks damages based on FII’s alleged breach of an alleged *written* contract. In its proposed amended claim, PJ Services misguidedly seeks recovery under a theory of quantum meruit based on its alleged partial performance of an alleged oral agreement. As a legal proposition, such a claim fails utterly. “Breach of contract and quantum meruit represent two separate causes of action that have different measures of damages.” Total Economic Athletic Mgmt. of America, Inc. v. Pickens, 898 S.W.2d 98, 106 (Mo. App. 1995). Neither the Debtors nor the other unsecured creditors were put on any notice whatsoever by the original proof of claim that PJ Services would attempt to recover under the theory of quantum meruit.

16. Damages recoverable for breach of contract would have been those due PJ Services under the alleged written contract. The alleged three-year agreement is unenforceable under the Statute of Frauds in the absence of production of the written contract or some memorandum or note thereof. See Waller v. Tootle-Campbell Dry Goods Co., 59 S.W.2d 751, 754 (Mo. App. 1933). Further, before PJ Services can make a case of part performance based upon an oral contract, it must first show the existence of such alleged contract. See Ortmeyer v. Bruemmer, 680 S.W.2d 384, 395-96 (Mo. App. 1984).

17. Despite all its pleadings filed in this Court, PJ Services has failed to establish the existence of even the alleged oral agreement. See Arndt v. Beardsley, 102 S.W.3d 572, 575 (Mo. App. 2003)(elements of a contract); Luebbert v. Simmons, 98 S.W.3d 72, 77 (Mo. App. 2003)(elements of a contract); Ahrens v. Dodd, 863 S.W.2d 611, 614 (Mo. App. 1992)(alleged contract must be proven by clear, cogent, unequivocal and convincing evidence). Based upon its factual statement in its original proof of claim that the alleged contract was written and the document was in the possession of the INS, PJ Services's original claim fails in its entirety based on its failure to produce same. PJ Services's original claim also fails based upon its failure to prove even the existence of the alleged oral agreement, such existence being first raised in the Response to the Summary Judgment Motion.

18. Realizing that it cannot recover damages based upon the existence of the alleged contract, PJ Services in the proposed amended proof of claim now seeks to recover the reasonable value of its services allegedly furnished to FII under a quantum meruit theory, which, as stated in Pickens, is an entirely separate cause of action from the breach of contract claim. Completely lacking in the original proof of claim is any request for recovery based on the theory of quantum meruit. The Court should deny PJ Services's Motion to Amend because the proposed amended proof of claim improperly sets forth a new claim against FII.

#### **The Equities Do Not Favor PJ Services**

19. Further, the proposed amendment would not be equitable. The factors to be considered by the Court when determining whether a proposed amendment to a proof of claim would be equitable include: "1) undue prejudice to the opposing party; 2) bad faith or dilatory behavior on the part of the claimant; 3) whether other creditors would receive a windfall if the amendment is not allowed; 4) whether other claimants might be harmed or prejudiced by the

amendment; and 5) the justification for the inability to file the amended claim at the time the original claim was filed.” Wrenn Ins. Agency, 178 B.R. at 799 (citations omitted).

20. First, because PJ Services’s breach of contract theory fails in its entirety, the Debtors and other unsecured creditors will be prejudiced if the Court allows PJ Services to amend its claim to attempt recovery based on its novel (and untimely) quantum meruit argument. Next, PJ Services has acted disingenuously by asserting this brand new theory of recovery only when faced with the complete denial of its original claim. Second, given that the proposed amended proof of claim is based on a factual proposition inconsistent with PJ Services’s own prior pleadings, the Court may properly find PJ Services to have been dilatory or to be acting in bad faith. Third, the other unsecured creditors of FII will not receive a windfall if the Court denies the Motion to Amend. An increase in the distribution percentage based on the denial of PJ Services’s original claim certainly does not equate to a windfall. The purpose of the claims objection process is to attempt to increase the distribution to unsecured creditors who have valid claims by seeking disallowance of claims filed by claimants who have no basis upon which to assert a claim against a debtor. Fourth, the other unsecured creditors will be harmed if the Court allows the amended claim because there exists a possibility that allowance of even a portion of the amended claim will decrease the distribution to other unsecured creditors. Finally, PJ Services has failed to justify its inability to file the amended claim at the time it filed the original claim. PJ Services filed the original claim based upon an alleged breach of a *written* contract and stated that the original contract was being retained by the INS. In both the Response to the Summary Judgment Motion and the proposed amended claim, PJ Services admits that its alleged agreement with FII was oral. PJ Services knew all along that there was no written contract with FII, yet filed a false original claim asserting the contract was in the possession of the INS.



Further, in the original claim, PJ Services states that “it is continuing to incur damages” in excess of \$6.5 million because South African individuals who were not employed by FII are “now currently seeking to obtain compensation from PJ Services, LLC for their damages.” In the proposed amended proof of claim, PJ Services states that “although suit against PJ Services, LLC has not been filed” it estimates that it will be liable for indemnification to third party South African placement agencies in the amount of \$4,250,000.00 because South African individuals have sued or threatened to sue those agencies. This Court should not reward PJ Services for filing a false original claim by allowing it to file an amended claim.

21. If the Court permits the filing of an amended claim to allow PJ Services to attempt recovery based upon a theory of quantum meruit, the amended claim must exclude any attempt to recover damages based upon indemnification or any other contractual theory.<sup>3/</sup> “Quantum meruit recovery is limited to the reasonable value of services performed,” Bash v. B.C. Construction Co., Inc., 780 S.W.2d 697, 698 (Mo. App. 1989), and “may not exceed the amount fixed in the contract, if there is one.” Martin v. Mercantile Trust Co., 293 S.W.2d 319, 328 (Mo. 1956). Damages for indemnification are not recoverable under the theory of quantum meruit. Further, PJ Services does not assert that the alleged oral agreement contained any indemnification provisions.

### **Conclusion**

All parties have a duty to act in a manner consistent with the procedural rules and legal and equitable principles that underpin the bankruptcy system. PJ Services has failed to fulfill either duty. The proposed amended claim is untimely and without adequate justification.

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<sup>3/</sup> Neither the Debtors nor the Bondholders Committee is waiving the right to assert further objections to the allowance of the amended claim, if the Court permits it to be filed. However, the claim based upon indemnification is absolutely impermissible.

WHEREFORE, the Debtors and the Bondholders Committee respectfully request that the Court enter an Order disallowing PJ Services, LLC's motion to amend its claim; and provide such other relief as is just and proper.

Dated: December 11, 2003.

Respectfully submitted,

FARMLAND INDUSTRIES, INC, ET AL.

By: /s/ Tammee E. McVey

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Attorneys for the Official Committee of Bondholders of  
Farmland Industries, Inc., et al.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Joint Response of Debtors and Debtors-in-Possession and the Official Committee of Bondholders to Motion to Amend Proof of Claim Filed by PJ Services, LLC was served by United States mail, First-class, postage prepaid, on the parties listed below on December 11, 2003.

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