

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
KANSAS CITY DIVISION**

<b>In Re:</b>	)	<b>Chapter 11</b>
	)	
<b>FARMLAND INDUSTRIES, INC. et al.,</b>	)	<b>Case No. 02-50557-JWV</b>
	)	<b>Jointly Administered</b>
<b>Debtors.</b>	)	

**MOTION TO WAIVE APPLICATION OF ACCOUNTING REQUIREMENTS UNDER  
SECTION 311 OF THE FEDERAL TRUST INDENTURE ACT**

Commerce Bank, by and through its counsel of record, moves this court to waive the accounting requirements under section 311 of the Federal Trust Indenture Act, 15 U.S.C. §77kkk (“Act”), in its relationship with Farmland Industries. In support of this motion, Commerce Bank states the following:

1. Commerce Bank was formerly trustee of various subordinate bond indentures for Farmland Industries;
2. Commerce Bank also is a secured creditor of Farmland Industries and is a member of both the pre-petition and post-petition bank groups led by Deutsche Bank Trust Company Americas;
3. While serving as trustee for the bond indentures, Commerce Bank did not distribute payments to the bondholders and performed a very limited function as a trustee, consisting of record keeping and acting as a stock transfer agent;
4. Commerce Bank was not responsible making payments to bondholders, thus removing any potential for misapplication of funds, and has not acted against the bondholders so as to violate its fiduciary obligation;

5. On or about November 5, 2002, this Court granted Commerce Bank's motion to withdraw as trustee of the bond indentures and appointed a successor trustee; and
6. Section 311 of the Act is not applicable because Commerce Bank did not have the responsibility or opportunity to act against the bondholders in its own self-interest and is no longer a trustee of the bond indentures.

WHEREFORE, Commerce Bank urges this Court to grant its motion and waive accounting requirements under section 311 of the Act for reasons as set forth in Commerce Bank's Memorandum in Support of its Motion to Waive Application of Accounting Requirements under Section 301 of the Federal Trust Indenture Act.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF COMMERCE BANK’S MOTION TO WAIVE  
APPLICATION OF ACCOUNTING REQUIREMENTS UNDER SECTION 311 OF THE  
FEDERAL TRUST INDENTURE ACT**

Commerce Bank, by and through its counsel of record, submits its memorandum in support of its motion to waive the accounting requirements under section 311 of the Federal Trust Indenture Act, 15 U.S.C. §77kkk (“Act”), in its relationship with Farmland Industries. Entry of such an order is appropriate for the reasons set forth herein.

**A. Introduction**

Commerce Bank was formerly trustee of various bond indentures, which are unsecured creditors to Farmland Industries. Commerce Bank also is a member of both the pre-petition and post-petition bank groups which are secured creditors of Farmland Industries. Pursuant to court order granting its motion, Commerce Bank has withdrawn as trustee of the bond indentures and a successor has been appointed. While serving as trustee, Commerce Bank did not distribute payments to the bondholders and performed a very limited function as a trustee, consisting of record keeping and acting as a stock transfer agent. Commerce Bank was not responsible for making payments to bondholders, removing any potential for abuse and has not acted against the bondholders so as to violate its fiduciary obligation.

Although Commerce Bank was a dual trustee/creditor, the application of the Act is not necessary because Commerce Bank is no longer a trustee of the indenture bonds and had no ability to disadvantage Farmland's indenture bondholders while it was a trustee.

### **B. The Trust Indenture Act of 1939**

The Act regulates the terms of the agreement between debenture holders and the indenture trustee. 15 U.S.C. §77aaa et seq. In particular, section 311 of the Act provides that the indenture require the trustee to “establish certain accounts for the benefit of bond holders in the event that the trustee also becomes a creditor of the issuer and the issuer defaults on the bonds.” Zeffiro v. First Pennsylvania Banking & Trust Co., 623 F.2d 290, 293 (3<sup>rd</sup> Cir. 1980). However, section 311 also specifies that the court has jurisdiction to dispense with the allocation:

The court in which such bankruptcy, receivership, or proceeding for recognition is pending shall have jurisdiction to...(ii) in lieu of such apportionment, in whole or in part, to give the provisions of this paragraph due consideration in determining the fairness of the distributions to be made to the indenture trustee and the indenture security holders with respect to their respective claims, in which event it shall not be necessary to liquidate or to appraise the value of any securities or other property held in such special account or as security for any claim, or to make a specific allocation of such distributions...or otherwise to apply the provisions of this paragraph as a mathematical formula.

15 U.S.C. §77kkk(a)(2)(D).

The Trust Indenture Act was created to “refashion the trust indenture for the purpose of according greater protection to investors.” U.S. SECURITIES AND EXCHANGE COMMISSION, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VI, Trustees Under Indentures (1937) (hereinafter “SEC Report”) (cited by Morris v. Cantor, 390 F. Supp. 817, 820 (S.D.N.Y. 1975).

The Trust Indenture Act was enacted to protect a company's bondholders where the indenture trustee also serves as a creditor of the company to prevent banks from applying funds

toward its own creditor position at the expense of bondholders. See SEC Report at 2-9, 68-70. Legislators intended the Act to “affect only those indenture provisions which relate to the protection and enforcement of the rights of the investors.” See H.R. Committee on Interstate and Foreign Commerce, Report on Trust Indenture Bill of 1939, H.R. REP. NO. 1016, 76<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1939) (“House Report”) (cited in Morris, 390 F. Supp. at 821). The House Report specified that the Act did not apply to “strictly ‘business’ features of indentures”, such as securities offering, maturity date or interest rate decisions. Id.

### **C. Application of the Act to Commerce Bank**

Section 311 is inapplicable to Commerce Bank’s relationship with Farmland Industries. According to the legislative history, the Act was enacted to curb the practice of trustee banks taking advantage of bondholders to satisfy their own creditor debt. Commerce Bank’s role as trustee did not present the same dangers of bondholder abuse. Commerce did not distribute payments to the bondholders, as Farmland makes direct payments to the bondholders and keeps its own records of such payments. Furthermore, Commerce Bank is a secured creditor (as a member of prepetition lender bank group), while the bondholders were expressly subordinated. Under such a credit structure, Commerce Bank receives funds from the agent bank to apply toward Commerce’s accounts before any funds would be applied to the bondholders’ accounts. Therefore, Commerce had no incentive or authority to apply funds toward its own accounts over the bondholders.

Additionally, the intent of the Act was to apply only to indenture provisions relating to the protection and enforcement of bondholders’ rights. Although Commerce Bank served as trustee for the indenture, its duties involved acting as a transfer agent for stocks and performing

some record-keeping functions. These functions could be categorized as “business features of indentures” that Congress specifically determined to not be affected by the Act.

Finally, Commerce Bank’s receipt of funds for Farmland has always been clearly in its role as creditor due to its limited role as trustee. Commerce Bank did not make payments to the bondholders. Therefore, Commerce Bank’s actions as Farmland’s creditor and trustee (without payment duties) were no different than if its only capacity was as Farmland’s creditor. Commerce Bank had no authority over the accounts used by Farmland to pay out on the bonds. From a policy standpoint, the application of section 311 is an unnecessary burden in the current situation.

#### **D. Conclusion**

The Trust Indenture Act was enacted to protect bondholders from banks acting out of self-interest. In the present situation, Commerce Bank is no longer a trustee to the bond indentures and the court has appointed a successor. While it was a trustee, Commerce Bank was not responsible for making payments to bondholders and never received funds from Farmland as trustee, removing any potential for abuse while acting as trustee. Furthermore, Commerce Bank’s functions as trustee consisted of record keeping and acting as a stock transfer agent, which may be deemed “business functions” not covered under the Act. Finally, as a policy standpoint, a trustee/creditor bank should not be liable when it acts in the same way as a bank that is only a creditor. Commerce Bank performed very limited functions as a trustee, and therefore may effectively act as though it is only a creditor for purposes of the Act.

Accordingly, Commerce Bank requests this Court to grant its motion waiving the separate accounting requirements of Section 311 of the Federal trust Indenture Act.

Respectfully submitted,

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