

STATE OF SOUTH DAKOTA
COUNTY OF KINGSBURY

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

IN THE MATTER OF RECEIVERSHIP OF
H & I GRAIN OF HETLAND, INC.

Civ. 18-000056

**CHS HEDGING, LLC'S
MOTION TO INTERVENE**

Comes now CHS Hedging, LLC (“CHS”), by and through its undersigned counsel and hereby moves this Court for leave to intervene in this action pursuant to South Dakota Codified Laws (“SDCL”) § 15-6-24(a) or, in the alternative, § 15-6-24(b). In support thereof, CHS states as follows:

1. This action was initiated by the South Dakota Public Utilities Commission (“the Commission”) to seek receivership over H & I Grain of Hetland, Inc. (“H & I Grain”).
2. The decision to seek this receivership arose from a petition filed before the Commission on April 13, 2018, by Gary Schumacher, counsel for the plaintiffs in this Court’s case number 38 Civ. 17-000045, *Murphy v. H & I Grain of Hetland, Inc.* (the “*Murphy* action”). In his petition, Mr. Schumacher asked the Commission to petition this Court for receivership over H & I for the specific purpose of suing CHS to attempt to recover funds for the benefit of plaintiffs in the *Murphy* action.
3. The Commission took up the petition in a series of public meetings on April 20, May 1, July 26, and August 7, 2018.

4. CHS learned of Mr. Schumacher’s petition in July 2018. CHS appeared at the July 26 and August 7 Commission meetings to explain why Mr. Schumacher’s petition was improper under South Dakota law.

5. The Commission acknowledged the petition suffered from both procedural and substantive defects under South Dakota’s law of receivership. In recognition of this fact, Public Utilities Commissioner Chris Nelson made a contemporaneous “substitute motion” at the August 7 meeting. Commissioner Nelson moved that the Commission petition this Court to take receivership of H & I Grain for “the sole purpose of selling [it] to a consortium of individuals and entities”—i.e., the plaintiffs in the *Murphy* action. Commissioner Nelson made explicit that the intent in selling H & I Grain to the *Murphy* plaintiffs was to permit them to sue CHS. Commissioner Nelson’s substitute motion carried at the August 7 meeting.

6. The Commission filed the present receivership petition on August 9, 2018.

7. CHS now moves to intervene in this action pursuant to SDCL § 15-6-24(a) or, in the alternative, § 15-6-24(b).

8. Section 15-6-24(a) provides, “Upon timely application anyone shall be permitted to intervene in an action . . . [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

9. “The purpose of this rule is ‘to obviate delay and multiplicity of suits by creating an opportunity to persons directly interested in the subject matter to join in an action or proceeding already instituted.’” *In re Estate of Olson*, 759 N.W.2d 315, 318 (S.D. 2008) (quoting *In re D.M.*, 710 N.W.2d 441, 443 (S.D. 2006)). “[I]ntervention standards are flexible,

allowing for some tailoring of decisions to the facts of each case.” *D.M.*, 710 N.W.2d at 443 (quoting *Southard v. Hansen*, 342 N.W.2d 231, 233–34 (S.D. 1984)).

10. Section 15-6-24(a) “is construed liberally, and we resolve all doubts in favor of the proposed intervenors.” *Olson*, 759 N.W.2d at 318 (quoting *United States v. Union Elec. Co.*, 64 F.3d 1304, 1307 (8th Cir. 1995)).

11. The South Dakota Supreme Court applies the following three-part test to determine whether a party may intervene under § 15-6-24(a): (1) “the party must have a recognized interest in the subject matter of the litigation”; (2) “that interest must be one that might be impaired by the disposition of the litigation”; and (3) “the interest must not be adequately protected by the existing parties.” *Id.* (quoting *D.M.*, 710 N.W.2d at 444).

12. As to the first element, CHS has a cognizable interest in the subject matter of the litigation because it is the Commission’s expressed intent to take receivership of H & I Grain and sell the received entity to third parties for the purpose of permitting the third parties to sue CHS. CHS has both a pecuniary and autonomous interest in avoiding costly and spurious litigation that is not permitted under South Dakota’s laws of receivership.

13. As to the second element, CHS’s interests would be impaired if the Court were to grant the Commission’s petition. The *Murphy* plaintiffs— by their own admission—do not have standing to sue CHS. They nevertheless seek to make an end-run around the standing requirement through this receivership petition, which they intend to use to improperly initiate litigation against CHS.

14. As to the third element, CHS’s interests will not be adequately protected by the existing party to this action insofar as the Commission is the only party to the action and the

Commission’s petition does not fully apprise the Court of the circumstances giving rise to the petition. CHS is left to advocate for its own position in this matter.

15. Because CHS satisfies these three conditions—especially under the South Dakota Supreme Court’s requirement to liberally construe motions to intervene in the movant’s favor—it may intervene as of right. *See* SDCL § 15-6-24(a). CHS respectfully asks this Court to grant its motion to intervene in this case.

16. Alternatively, § 15-6-24(b) allows the Court to permit a party to intervene as a matter of discretion. That section provides, “Upon timely application anyone may be permitted to intervene in an action when an applicant’s claim or defense and the main action have a question of law or fact in common.” The defenses CHS would assert against the *Murphy* plaintiffs’ hypothetical lawsuit against CHS share questions of fact *and* law in common with those underlying this Court’s decision to grant or deny the present petition. For example, CHS would challenge the *Murphy* plaintiffs’ standing to bring suit based on their symbolic purchase of H & I Grain. The Court may therefore permit CHS to intervene pursuant to § 15-6-24(b).

17. For these reasons, the Court should grant CHS’s Motion to Intervene and permit CHS leave to file the attached Motion to Dismiss Petition to Appoint South Dakota Public Utilities Commission as Receiver. CHS further requests that in so granting, the Court permit CHS to be heard at any hearing conducted in this matter.

DATED: September 14, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following attorney by ordinary U.S. Mail and by email this 14th day of September, 2018.

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