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August 13, 2007

Kara Van Bockern
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre SD 57501-5070

Re: In the Matter of LW Sales/LW Seed's Failure to Obtain Necessary Licensure Prior to
Operation as a Grain Dealer in the State of South Dakota - Docket GD 07-001

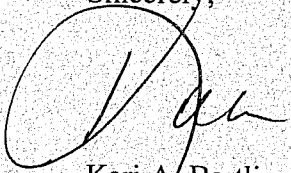
Dear Ms. Van Bockern:

Enclosed please find LW Sales Brief in Resistance to Commission Staff's Motion For
Summary Judgment.

This is intended as service by mail upon you.

Best regards.

Sincerely,



Kari A. Bartling
KAB/gz

Pc: Larry Wheeting / LW Sales, Inc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF LW SALES/LW SEED'S)	
FAILURE TO OBTAIN NECESSARY)	
LICENSURE PRIOR TO OPERATON AS A)	GD07-001
GRAIN DEALER IN THE STATE OF SOUTH)	
DAKOTA)	

**LW SALES BRIEF IN RESISTANCE TO COMMISSION STAFF'S MOTION
FOR SUMMARY JUDGMENT**

COMES NOW, LW Sales/LW Seed (hereinafter LW Sales), by and through its attorney of record, Kari A. Bartling and respectfully submits this Brief in Resistance to Commission Staff's (hereinafter "Staff's") Motion for Summary Judgment.

FACTS

LW Sales has been accused by Public Utilities Commission Staff as acting as a Grain Dealer without a license. It is undisputed that LW Sales is authorized to sell seed under the laws of the State of South Dakota. At issue is the determination of whether LW Sales is a grain dealer under South Dakota law and whether millet sold by LW Sales is classified as grain or as seed for purposes of South Dakota law.

ARGUMENTS AND AUTHORITIES

A. LW Sales does not fall within the definition of "grain dealer" and is therefore not subject to the rules for licensure of a grain dealer under South Dakota Law.

In order for LW Sales to have acted as a grain dealer, they must meet the definition of a grain dealer. South Dakota law generally defines a grain dealer as "any person who buys grain for the purpose of resale." But the definition of grain dealer goes even further, specifically excluding those individuals who engage in the "isolated or occasional resale of grain by a person who does not hold himself or herself out as engaging in the business of reselling grain . . . " SDCL 49-45-1.1 (3). Thus, even if LW Sales on occasion sold a product that could be classified as grain, so long as those sales are occasional in nature and so long as LW Sales does not hold itself out to be a grain dealer, LW Sales falls outside of the definition of grain dealer and is not subject to licensure requirements.

In the present situation, LW Sales sold millet, which can be defined as either seed or grain, to a mushroom company on only five occasions in the past two years. It never held itself out to be a grain dealer, and all products were listed on the invoices as "seed". As such, LW Sales does not fall within the definition of a grain dealer, and is not subject to the licensing requirements of South Dakota law.

B. Millet can be classified as either a grain or a seed, such that LW Sales is not in violation of South Dakota law.

Merriam Webster's Online Dictionary defines millet as:

- 1 : any of various small-seeded annual cereal and forage grasses: a : a Eurasian grass (*Panicum miliaceum*) cultivated for its grain which is used for food b : any of several grasses related to common millet
- 2 : the seed of a millet

See <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=millet>

Under that definition, millet is defined, and can be classified as both a seed and a grain. In its brief, Staff asserts LW Sales "sold millet as a grain to a mushroom spawning company, a business that does not need millet seed, rather, needs grain." Staff Brief, page 1. However, Staff does not cite any specific authority for this assertion that the mushroom industry is limited to using millet grain as opposed to millet seed.

LW Sales classified all products they sent to the mushroom companies as seed, and sold the product as seed. The mushroom companies purchased seed millet. If the mushroom companies required grain, rather than seed, then why did they knowingly seek out and purchase a product that was seed, rather than grain? At no point did LW Sales classify the millet as grain, nor did they hold themselves out to be grain dealers.

SDCL 49-45-1.1 defines "Grain" as "grain, grain sorghums, beans and oil seed. However, the term does not include grain that has been cleaned, processed and specifically identified for an intended use of planting for reproduction and for which a grain warehouse receipt has not been issued."

In the present situation, the millet seed was specifically identified for an intended use of planting for reproduction – the seed is used by the mushroom industry as spawn from which the mushrooms grow. Staff admits this in their Brief for Summary Judgment wherein it states, "The four known lots of grain sold by Mr. Wheeting were intended for use by a mushroom company for use in the spawning process." Staff Brief, page 2.

One court has had an opportunity to consider the processes under which the mushrooms are spawned, and that court stated, "the spawn, which is essentially the seed from which the mushrooms ultimately grow, is nurtured in laboratory cultures." Kaolin Mushroom Farms, Inc. v. U.S., 1979 WL 1476 (E.D. Pa.). That court further stated,

Because mushroom spawn is analogous to the seed from which plants grow, the Internal Revenue Service in Revenue Ruling 56-560 has held that the production and sale of mushroom spawn was such those perform services related to such production could be considered agricultural labor and that the production of the spawn itself took place on a farm.

Id. at *2.

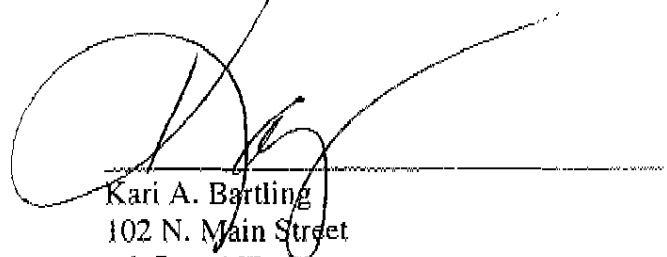
The millet seed became spawn, "the seed from which the mushrooms ultimately grow" a necessary part of the reproductive process for mushrooms. Without this "seed", the mushrooms will not reproduce. Thus, the millet sold by LW Sales was clearly "identified for an intended use of planting for reproduction" and falls outside the definition of "grain" for purposes of South Dakota law.

CONCLUSION

Based on the foregoing information, LW Sales respectfully requests that Commission deny Staff's Motion for Summary Judgment in the above-captioned matter.

Dated this 13th day of August, 2007.

Kolker Law Office



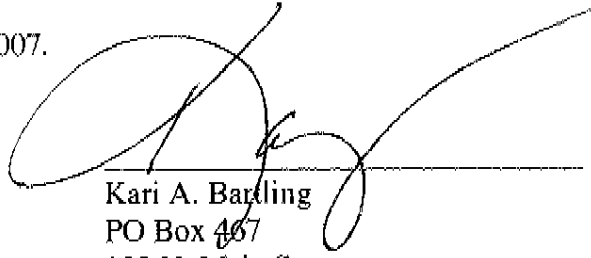
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CERTIFICATE OF SERVICE

The undersigned, attorney for Respondent certifies that on the 13th day of August, 2007, a true and correct copy of was faxed and mailed by first class, postage prepaid mail to the following:

Kara Van Bockern
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre SD 57501-5070

Dated this 13th day of August, 2007.

A handwritten signature in black ink, appearing to read 'Kari A. Bartling', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Kari A. Bartling
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