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August 24, 2007

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Re: LW Sales/LW Seed
Docket GD07-001

Dear Folks:

Enclosed each of you will find a copy of Reply Brief in Support of Motion for Summary Judgment with reference to the above referenced matter. This is intended as service upon you by mail.

Thank you.

Very truly yours,

Kara Semmler
Staff Attorney

Enc.

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

IN THE MATTER OF LW SALES/LW SEED'S)	REPLY BRIEF IN SUPPORT OF
FAILURE TO OBTAIN NECESSARY LICENSURE)	MOTION FOR SUMMARY
PRIOR TO OPERATION AS A GRAIN DEALER IN)	JUDGMENT
THE STATE OF SOUTH DAKOTA)	GD07-001

COMES NOW Commission Staff, by and through one of its attorneys, and hereby supports its request for summary judgment.

FACTS

It appears the parties agree to the following facts:

- i) LW Sales/LW Seed (hereinafter "LW Sales") sold several lots of millet to mushroom company
- ii) Millet can be sold as a grain
- iii) LW Sales did not have a grain dealer's license at the time it sold the millet to various mushroom companies
- iv) LW Sales has a seed dealer's license
- v) LW Sales did not follow seed dealer requirements and laws to qualify its millet as seed, yet believes it is seed simply because it labels it so
- vi) LW Sales does not want to operate under the regulation of the Grain Warehouse Division of the PUC, and therefore does not want a grain dealer's license.

LW Sales appears to propose because it does not consider itself a grain dealer and because it labels its product "seed" that it can prevent being considered a grain dealer and further can prevent its product from falling into the statutory category of grain. Such an analysis would allow any grain dealer to escape regulation by doing the same. Staff urges the Commissioners to resist LW Sales's argument.

Staff will not repeat all facts as stated in its original brief, yet feels the need to stress the following. Although LW Sales indicates it sold millet seed five times, discovery responses submitted recently to Staff indicate it sold eleven lots of grain,

including millet, rye, and milo and has characterized each sale as a seed sale. Further, Mr. Wheeting admitted in October 2006, that the sale of millet to a mushroom company was in fact grain. Specifically, the Grain Warehouse Division of the PUC received a complaint that LW Sales was selling grain without a license. During the course of an investigation conducted by the Grain Warehouse Division, Mr. Wheeting admitted that he acted as a grain dealer without being licensed, but explained it was an isolated incident that would not be repeated. Specifically, Mr. Wheeting stated he regularly sold millet seed and had the necessary licensure from the Department of Agriculture. The millet seed at issue, however, failed to germinate eliminating any chance to market the millet as seed. He, therefore, sold the millet as grain to a mushroom spawning company, a business that does not need millet seed, rather, needs grain. It appears LW Sales now considers the original 2006 sale a seed sale. Staff again stresses the definitions are based upon the product and use of the product, not the perception of the seller or a desire to avoid a regulatory structure.

a) LW SALES ACTED AS A GRAIN DEALER

LW Sales acted as a grain dealer as a matter of law. There are no factual points at issue. As Staff indicated in its first brief, a grain dealer is defined as, "any person who buys grain for the purpose of resale. However, nothing in this chapter applies to the isolated or occasional engaging in the business of 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). LW Sales relies on the second part of the statute to argue it is not a grain dealer. No question of fact exists that Mr. Wheeting operates a commercial facility with equipment necessary to buy and sell grain and seed. This statute was not written to allow a facility owner with all the capabilities of operating as a grain dealer to self-designate what he holds himself out as. Additionally, the statute does not designate what an occasional sale of grain is. Staff argues, however, as a matter of law, five sales

and certainly the eleven sales documented in a recent discovery response is significant and beyond occasional. The producers at issue were completely without protection in all eleven sales as Mr. Wheeting was not bonded or licensed to purchase the product he was dealing in. Staff argues the statute was intended to excuse the producer who must purchase grain to meet contract quotas when his own production has fallen short. The statute is not intended to excuse a facility owner from regulation due to a self-created label and definition of his own business.

b) LW SALES SOLD GRAIN

i) SPAWN IS A GROWING MEDIUM NOT A SEED

LW Sales sold grain as a matter of law. Factual points are not at issue. The four known lots included in Staff's initial Motion and now the known eleven lots of grain sold by Mr. Wheeting were intended for use by a mushroom company for use in the spawning process. LW Sales did not correctly describe spawn in its brief. Spawn is not "seeds," rather spawn is the growing medium and the grain is a single ingredient used in the process of making spawn. Spawn is made by mixing grain with calcium carbonate. This mixture is then cooked and the grain is sterilized and cooled before being inoculated with the mycelium which is the actual mushroom reproductive ingredient. The grain product is sterilized to prevent it from growing. As Mr. Wheeting himself recognized in 2006, a grain that will not germinate is necessary for the spawning process. Staff cited the Mushroom Council's Website in its earlier brief as it accurately describes the process. See *MUSHROOM COUNCIL website: info@mushroomcouncil.com*. The grain, or millet sold by Mr. Wheeting was sterilized and used in the spawning process.

ii) THE MILLET GRAIN WAS USED FOR PRODUCTION NOT REPRODUCTION

It appears LW Sales has confused the term “production” and “reproduction.” As a matter of law, the definition of grain excludes “grain that has been cleaned, processed and specifically identified for an intended use of planting for reproduction.” SDCL 49-45-1.1. Reproduction, according to Webster’s Dictionary is: “the act or process of reproducing; *specifically*: the process by which plants and animals give rise to offspring and which fundamentally consists of the segregation of a portion of the parental body by a sexual or an asexual process and its subsequent growth and differentiation into a new individual.” The millet “seed” as LW Sales defines it does not give rise to new millet plants. The millet “seed” is not growing. In reality, the millet “seed” has been sterilized so it cannot grow. Rather, it is merely intended to be a nutrient substrate on which the mycelium, the mushroom “seeds,” can grow.

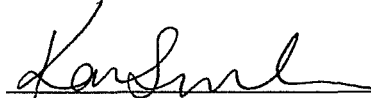
Production, on the other hand, is defined by Webster’s Dictionary as: the act or process of producing. The mushroom company produces mushrooms and the millet grain is used in the production process. The millet grain does not reproduce and is not, therefore excluded from the statutory definition of grain under such an argument. As a matter of law, the product Mr. Wheeting sold falls precisely into the definition of grain.

CONCLUSION

As previously briefed, Commission Staff relies on SDCL 1-26-18 in this request. SDCL 1-26-18 provides for judgment as a matter of law, “if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” There are no issues of material fact for this Commission to consider. Mr. Wheeting was clearly selling a grain

product, as defined by the South Dakota Code, without a license. Our statutes were not intended to allow a grain dealer to escape regulation through self-designation and labeling procedures. Commission Staff respectfully requests this Commission grant its request for Summary Judgment, enjoin Mr. Wheeting from any future grain sales to mushroom companies and assess a penalty of \$400.00 against LW Sales, Inc.

Dated at Pierre, South Dakota, this 23rd day of August, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that copies of Reply Brief in Support of Motion for Summary Judgment were served on the following electronically or by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 23rd day of August, 2007.

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