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July 25, 2018

Public Utilities Commission
Kristie Fiegen, Chairperson
Gary Hanson, Vice Chairman
Chris Nelson, Commissioner
Capitol Building, 1st floor
500 E. Capitol Ave.
Pierre, SD 57501-5070

VIA: kristie.fiegen@state.sd.us
VIA: gary.hanson@state.sd.us
VIA: chris.nelson@state.sd.us

Re: In the Matter of the Grain Buyer License Of H&I Grain Of Hetland, Inc.; GW17-002

Dear Ms. Fiegen, Mr. Hanson, and Mr. Nelson,

My client CHS Hedging, LLC ("CHS") did not receive notice of either the April 13, 2018 Petition to Appoint South Dakota Public Utilities Commission as Receiver ("Petition") in the above-referenced matter or the Commission's July 26, 2018 hearing pertaining thereto.

Despite the lack of notice, I plan on attending the July 26 hearing and, as a courtesy, want to provide to you in advance the arguments I plan on raising should I receive the opportunity.

There are numerous legal reasons this Commission should not entertain the Petition presently before it.

First, the Petition fails to fully apprise the Commission of its underlying procedural posture. The Petitioners have already brought a lawsuit against CHS—but they voluntarily ***dismissed*** their suit on January 23, 2018. *See Chad Murphy, et al. v. H&I Grain of Hetland, Inc., et al.*; Third Judicial Circuit, South Dakota, 38 Civ. 17-000045 ("Lawsuit"). Therefore, the Petition's statement that "receivership by the Commission is the last and only remedy" is false. The Petitioners had a proper avenue by which to pursue a remedy in the form of their Lawsuit, and they intentionally chose not to pursue the suit once it became clear there was no merit to their claims.

Second, the Commission has previously concluded that the purpose of the Petitioner's requested receivership is outside the scope of a receiver's duties in this context. Under South Dakota Codified Law (SDCL) 49-45-16.1, "If the commission determines that it is necessary, the commission may apply to the circuit court in the county in which the grain buyer operates or operated for that court to appoint a

receiver. The receiver shall have such powers and duties as the court may direct." The Commission has relied on this provision in the past and applied for a receivership appointment in *In re Anderson Seed Co. Inc.'s Grain Buyer's License*, 2012 WL 11078138, 2012 WL 11078139, 2012 WL 11078140, No. GW12-001 (S.D.P.U.C. 2012). In that case, the Commission concluded it should seek the appointment of a receiver to administer the claims process against a grain buyer bond and the bond proceeds distribution; however, the Commission declined to seek an appointment of a receiver for the purpose of taking possession of assets no longer in the control of the revoked licensee. *Id.* As this Commission concluded in that case, it is not within the proper scope of a receivership under SDCL 49-45-16.1 to try to recover assets from third parties or secured debtholders. *Id.* The Petitioners are now seeking to persuade this Commission to misuse the receivership mechanism created by the South Dakota Legislature for their own personal gain.

Third, the South Dakota Supreme Court has made it clear that a circuit court cannot appoint a receiver for the purpose of representing in an adversarial capacity any party's individual interests. According to the Supreme Court, "[a] statute conferring the power to appoint a receiver must be strictly construed," and "[t]he court cannot confer upon the receiver other or greater authority than is conferred by [statute]." *Case v. Murdock*, 528 N.W.2d 386, 388 (S.D. 1995), *affirmed on reh'g*, 544 N.W.2d 205 (S.D. 1996) (first quoting 19 C.J.S. Corporations, § 756; then quoting *Hogg's Receiver v. Hogg*, 97 S.W.2d 582, 583 (Ky. 1936)). The Court requires that receiverships serve only their intended purpose: "to protect 'property, funds, or proceeds . . . where it is shown that the property or fund is in danger of being lost, removed, or materially injured[.]'" *Id.* (quoting SDCL 21-21-1). And most importantly, the Court categorically prohibits a receiver from acting "for the benefit of one party or another" and only permits a receiver to act "for the benefit of the *court*." *Id.* at 389 (emphasis added). In this case, the Petitioners ask the Commission to appoint a receiver only for the purpose of initiating a lawsuit on their behalf against a third party—i.e., CHS. The Petition, therefore, directly contradicts the Supreme Court's mandates concerning receiverships.

Fourth, the present Petition—like the Petitioners' dismissed lawsuit against CHS—is silent as to (1) the basis of any actual legal claim against CHS and (2) the facts that could possibly give rise to any such legal claim. In other words, the Petitioners ask the Commission to pursue a case so weak that there is not a single claim or fact that has been publicly stated that could give rise to a meritorious lawsuit. This is not surprising; the Petitioners would somehow have to show that CHS is responsible for the trading decisions made by H&I Grain and its principals Duane, JoAnne, and Jarred Stefensen. There is no legal theory that could possibly make CHS responsible for these trading decisions. Furthermore, the Petitioners or the Commission would need to rely upon the credibility of the Steffensens as their main witnesses—and they are the very individuals responsible for the losses.

In addition to the legal barriers to the Petitioners' request, there are numerous pragmatic concerns that would make litigating this case with public funds untenable.

First, in order to advance any sort of legal claim while standing in the shoes of H&I Grain, the Commission would have to take over the enormous task of document production and respond to CHS's

discovery requests. This will give rise to numerous practical difficulties. For instance, the Commissioner would be responsible for producing high volumes of documents from H&I Grain; however, the Commission will first need to explore whether H&I Grain has properly preserved documents, including electronically stored information. If H&I Grain cannot meet its legal obligations, the case may be dismissed and sanctions or fees may be awarded to CHS. Without an analysis of these documentary and discovery issues, the Commission should not even consider granting the Petition.

Second, and relatedly, the press has reported that it will cost approximately $70,000 in fees and costs to pursue a case against CHS. It will cost more than $70,000 to collect and review electronically stored information from H&I Grain, which does not account for expert fees, travel fees, and court reporters, let alone actual legal fees. My client will vigorously defend against these meritless claims. The total costs of litigating this dispute will easily exceed the estimated $70,000.

Third, the Commission, standing as the Receiver, would also be exposed to claims for costs once CHS prevails, including costs of experts and court reporters, etc. *See, e.g.*, SDCL §§ 15-17-37, 15-17-38, 15-17-44. Please be advised that the Petitioners—as Plaintiffs in the Lawsuit—understand this risk. Prior to the January 23, 2018 dismissal, they sought CHS's acknowledgement that CHS would not seek costs and fees recovery for filing the baseless Lawsuit.

Fourth, the Petition's timing is noteworthy. It was filed on April 13, 2018—twenty-four hours after the Commission's April 12, 2018 Order disbursing bond proceeds. In other words, Petitioners refused to use any of their own resources to bring the baseless claims against CHS and dismissed those baseless claims on January 23, 2018. Then Petitioners took every cent they could from the April 12, 2018 disbursement, leaving no money for litigation. Twenty-four hours later, they filed this Petition seeking public funds to pursue their private interests. After careful review, CHS is unable to find a parallel in the law, a situation in which a government actor (the Commission) incurred the financial risk of litigation against a private actor (CHS) for the benefit of non-party private actors (the Petitioners). Indeed, the Supreme Court expressly prohibits it. *See Case*, 528 N.W.2d at 389. The Petitioners' strategy in this case reveals that their present Petition serves only their own interests and is not "for the benefit of the court." *Id.*

This is not a complete recitation of CHS's arguments, and CHS reserves the right to make additional arguments and present additional evidence both before the Commission and in Court should the Commission not deny the Petition.

Thank you.

Sincerely,

Jesse Linebaugh