

STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF MCCOOK )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF THE GRAIN ) CIV. 01-023  
DEALER'S AND GRAIN )  
WAREHOUSEMAN'S BONDS ) PROPOSED FINDINGS OF FACT,  
OF JEFF MULDER D/B/A ) CONCLUSIONS OF LAW, AND  
FREEMAN FERTILIZER ) DECISION OF RECEIVER  
CO., INC. D/B/A MCCOOK )  
FEED & FERTILIZER AND )  
GRAIN INVENTORY )

### PROCEDURAL HISTORY

On February 13, 2001, Jeff Mulder, on behalf of Freeman Fertilizer Co. Inc. d/b/a McCook Feed & Fertilizer (McCook), entered into a stipulation with the Public Utilities Commission (Commission) surrendering his licenses as a grain dealer and grain warehouseman and permitting the Commission to take immediate possession of his facilities. On March 8, 2001, the Commission filed with the First Judicial Circuit a Petition to Appoint South Dakota Public Utilities Commission as a receiver. On March 27, 2001, the Commission was appointed receiver by the Honorable Judge Boyd L. McMurchie of the First Judicial Circuit of South Dakota.

Pursuant to the order of the Court, the Commission was required to determine claims against the cash proceeds of the grain dealer's bonds and the grain warehouseman's bonds, one bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001, and a second bond commencing July 1, 1999, and ending June 30, 2000, with Employers Mutual Casualty Company, being the surety, and all grain inventory located at the Canistota facility. A hearing was held as scheduled on the claims as described above on May 3, 2001, beginning at 10:00 a.m., at the American Legion Hall, Jenard D. Post, 162 Main Street, Canistota, South Dakota. Briefs were filed following the hearing.

By order dated May 8, 2001, the Court authorized the Commission to liquidate the grain inventory. The Commission sent and published notice soliciting bids for the sale of the grain and requested those interested in bidding on the grain to contact the Commission. The Commission accepted the following bids:

FreMar Farmers Cooperative, Marion, South Dakota: approximately 21,000 bushels of soybeans at \$4.12 net per bushel, subject to the discount tables; and

Hanson County Grain Store, Alexandria, South Dakota: approximately 750 bushels of oats at \$1.31 per bushel; approximately 750 bushels of mixed corn and soybeans at \$2.25 per bushel; and approximately 48,000 bushels of corn at \$1.51 per bushel, subject to the discount tables.

On June 14, 2001, the Commission received a letter from FreMar Farmers Cooperative (FreMar) stating that the actual bushels of soybeans received were 15,811 and requested that \$1,500.00 be deducted from the amount FreMar owes for the 15,811 bushels of soybeans. At its July 6, 2001, meeting, the Commission voted to deny FreMar's request to adjust the amount FreMar

owed for the soybeans.

On June 8, 2001, the Commission received a Notice and Motion to Reopen for Further Evidence from Commission Staff. Staff requested the record be reopened for the purpose of receiving into evidence affidavits from some of the claimants requesting rescission of their delayed price contracts and/or deferred payment contracts entered into with McCook. On June 19, 2001, the Commission received a Motion to Reopen for Further Evidence from Home Federal Savings Bank (Home Federal) for the purpose of receiving into evidence the Affidavit of Richard Shane regarding alternative methods of selling grain and the usual practices concerning the issue of elevator contracts. On June 28, 2001, the Commission received the Affidavit of Richard Shane.

At its July 6, 2001, meeting, the Commission considered the motions. None of the parties objected to all of the affidavits being received into evidence. None of the parties requested any additional hearings. Since there were no objections, the Commission voted to grant both motions and received the affidavits into evidence.

At its July 27, 2001, meeting, the Commission considered this matter. The Commission voted to make the following recommendations to the Court: 1) the grain bank and open storage claimants should receive an amount equal to the number of bushels of grain multiplied by the price for the grain when it was sold, less a pro rata share of the storage and handling costs; 2) Home Federal has a perfected security interest in the grain which was sold to McCook and thus, should receive the remainder of the proceeds of the grain, less its pro rata share for storage and handling costs; 3) the cash sale and priced unpaid grain claimants should receive a pro rata share of the \$50,000.00 grain dealer's bond; and 4) state law specifically prohibits the use of bond money for voluntary credit sale contracts so the claimants who signed deferred payment contracts and delayed price contracts are not eligible to receive any bond proceeds. The Commission further explained that, as stated earlier, Home Federal has a valid perfected security interest in the grain which was sold to McCook, and, thus, there are no grain proceeds remaining for the claimants who signed deferred payment contracts and delayed price contracts. The Commission recognized that the claimants who signed deferred payment contracts and delayed price contracts raised issues regarding the rescission or the setting aside of those contracts based on fraud or failure of consideration. However, the Commission believed that these issues went beyond the scope of the Commission's authority as a receiver in this matter. The Court's order granting receivership required the Commission to schedule a hearing for the purpose of making a proposal to the Court regarding the disposition of the inventory and the bonds. It does not contemplate that the Commission, in its role as a receiver, would consider the rescission or setting aside of contracts.

Based on the evidence of record, the Commission makes the following proposed findings of fact and conclusions of law:

### **PROPOSED FINDINGS OF FACT**

1. On February 13, 2001, Jeff Mulder, on behalf of Freeman Fertilizer Co. Inc. d/b/a McCook Feed & Fertilizer (McCook), entered into a stipulation with the Commission surrendering his licenses as a grain dealer and grain warehouseman and permitting the Commission to take immediate possession of his facilities. Exhibit C. On March 8, 2001, the Commission filed with the First Judicial Circuit a Petition to Appoint South Dakota Public Utilities Commission as a receiver. On March 27, 2001, the Commission was appointed receiver by the Honorable Judge Boyd L. McMurchie of the First Judicial Circuit of South Dakota.

2. Pursuant to the order of the Court, the Commission held a hearing on May 3, 2001, in Canistota to determine claims against the cash proceeds of the grain dealer's bonds and the grain warehouseman's bonds, one bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001, and a second bond commencing July 1, 1999, and ending June 30, 2000, with Employers Mutual Casualty Company, being the surety, and all grain inventory currently located at the Canistota facility. Exhibit B.

3. By order dated May 8, 2001, the Court authorized the Commission to liquidate the grain inventory. The Commission sent and published notice soliciting bids for the sale of the grain and requested those interested in bidding on the grain to contact the Commission. The Commission accepted the following bids:

FreMar Farmers Cooperative, Marion, South Dakota: approximately 21,000 bushels of soybeans at \$4.12 net per bushel, subject to the discount tables; and

Hanson County Grain Store, Alexandria, South Dakota: approximately 750 bushels of oats at \$1.31 per bushel; approximately 750 bushels of mixed corn and soybeans at \$2.25 per bushel; and approximately 48,000 bushels of corn at \$1.51 per bushel, subject to the discount tables.

4. On June 14, 2001, the Commission received a letter from FreMar Farmers Cooperative (FreMar) stating that the actual bushels of soybeans received were 15,811 and requested that \$1,500.00 be deducted from the amount FreMar owes for the 15,811 bushels of soybeans. At its July 6, 2001, meeting, the Commission voted to deny FreMar's request to adjust the amount FreMar owed for the soybeans. The Commission noted that in its request for bids sent to potential bidders, the number of bushels were listed as approximate amounts. The Commission had no control over FreMar's course of action for disposal or marketing of the grain.

5. At the May 3, 2001, hearing, Commission Staff submitted an exhibit which classified most of the claims submitted by the claimants. Staff\_\_Exhibit 2.

#### **CLAIM FOR RENT AND LOAD OUT OF GRAIN**

6. Prior to the hearing, a claim was received from R&R Ag Inputs Inc. for rent of the facility at Canistota of \$2000.00 per month, beginning March 1, 2001, and a charge to load out the grain at \$0.05 per bushel. Exhibit E. Commission Staff witness, Bob Knadle, testified that the storage rate charged by most elevators is \$0.001 a day. TR. at 41. Multiplying that storage rate by Staff's estimated number of bushels at the elevator of 69,500, the storage charge would be approximately \$2,100.00 per month. TR. at 40-41. However, Mr. Knadle noted that generally the storage rate includes insurance and bond coverage which R&R Ag Inputs was not providing. TR. at 41. Mr. Knadle stated that the load out charge of \$0.05 per bushel is the amount charged by most elevators. *Id.*

7. Following the hearing, on May 25, 2001, R&R Ag Inputs filed a revised request for expenses related to rent. R&R Ag Inputs submitted a revised claim for rent of \$3,000.00 for the months of March, April, and May.

8. The Commission finds that the charges contained in R&R Ag Inputs revised claim received May 25, 2001, are based on typical industry charges and are reasonable. The Commission finds that

the charges shall be assessed to all claimants, on a pro rata basis, who receive any of the proceeds from the sale of the grain.

### **CLAIMS ARISING FROM STORAGE OF GRAIN**

9. Eight claims were submitted for grain bank corn. Leroy Pullman claimed 80-90 bushels. Exhibit 1AB. Staff submitted documentation supporting 88.61 bushels. Exhibit 3J. Arlo Hofer claimed 2858.38 bushels. Exhibit 1AC. Staff submitted documentation supporting 2868.27 bushels. Exhibit 3K. James McGregor claimed 2788.19 bushels. Exhibit 1AD. Staff submitted documentation supporting 1931.09 bushels. Exhibit 3L. Maynard Yoder claimed 3050 bushels. Exhibit 1AE. Staff submitted documentation supporting 3036.68 bushels. Exhibit 3M. Jerry Herlyn submitted claims for 3115.17 bushels. Exhibit 1AF. Staff submitted documentation supporting 3397.46 bushels. Exhibit 3N. Roger Waltner claimed 1092.43 bushels. Exhibit 1AG. Staff submitted documentation supporting 915.64 bushels. Exhibit 3O. Charles Deckert claimed approximately 45 bushels. Exhibit 1AH. Staff submitted documentation supporting 49.46 bushels. Exhibit 3P. Oren Stahl claimed 904.69 bushels. Exhibit 1AI. Staff supported this amount. These claims are summarized on Staff\_\_Exhibit 2B. The Commission accepts Staff's recommendations. The Commission finds that each of the claimants should be paid out of the money received from the sale of the corn stored at the warehouse. The exact amount of bushels of corn was 47,066.78 and the amount received was \$70,141.44. Based on the bid price of \$1.51 per bushel, subject to the discount tables, the amount received for the corn was \$1.49 per bushel. Thus, each of the above claimants would receive an amount equal to their bushels multiplied times \$1.49 per bushel, less rent and load out costs. Rent should be prorated by the total bushels loaded out. Individual amounts are calculated on Appendix A.

10. Three claims were submitted for open storage corn: Jeff Weber claimed 3142.66 bushels. Exhibit 1L. Commission staff submitted documentation supporting 3146.06 bushels. Exhibit 3G. Dale Seubert claimed 7327.77 bushels. Exhibit 1M. Commission Staff agreed with that amount and submitted documentation supporting that amount. Exhibit 3H. Farmers National, Nagano, claimed 704.80 bushels. Exhibit 1S. Commission Staff agreed with that amount. These claims are summarized on Staff\_\_Exhibit 2C. The Commission accepts Staff's recommendations. The Commission finds that each of the claimants should be paid out of the money received from the sale of the corn stored at the warehouse. The exact amount of bushels of corn was 47,066.78 and the amount received was \$70,141.44. Based on the bid price of \$1.51 per bushel, subject to the discount tables, the amount received for the corn was \$1.49 per bushel. Thus, each of the above claimants would receive an amount equal to their bushels multiplied times \$1.49 per bushel, less rent and load out costs. Rent should be prorated by the total bushels loaded out. Individual amounts are calculated on Appendix B.

11. One claim was submitted for open storage soybeans. Gene Hofer claimed 1626.65 bushels. Exhibit 1W. Commission Staff recommended 1626.67 based on the scale tickets. This claim is summarized on Staff\_\_Exhibit 2H. The Commission accepts Staff's recommendation. The Commission finds that the claimant should be paid out of the money received from the sale of the soybeans stored at the warehouse. The exact amount of bushels of soybeans was 15,811 and the amount received was \$64,753.62. Based on the bid price of \$4.12 per bushel, subject to the discount tables, the amount received for the corn was \$4.095 per bushel. Thus, the above claimant would receive an amount equal to his bushels multiplied times \$4.095 per bushel, less rent and load out costs. Rent should be prorated by the total bushels loaded out. The amount is calculated on Appendix D.

12. One claim was submitted for grain bank oats. Charles Langle claimed 400 bushels. Exhibit 1AA. Commission Staff supported this amount. This claim is summarized on Staff Exhibit 2M. The Commission accepts Staff's recommendation. The Commission finds that the claimant should be paid out of the money received from the sale of the oats stored at the warehouse. The exact amount of bushels of oats was 561.88 and the amount received was \$736.06. Based on the bid price of \$1.31 per bushel, subject to the discount tables, the amount received for the oats was still \$1.31 per bushel. Thus, the above claimant would receive an amount equal to his bushels multiplied times \$1.31 per bushel, less rent and load out costs. Rent should be prorated by the total bushels loaded out. The amount is calculated on Appendix C.

### **CLAIM OF HOME FEDERAL BANK**

13. Home Federal Savings Bank (Home Federal) submitted evidence of a promissory note, executed by the principals of Freeman Fertilizer, in the amount of \$1,000,000.00. Exhibit HF 1. The collection special assets manager for Home Federal, Mike Pierce, testified that an outstanding balance on the note remained in an amount of over \$600,000.00. TR. at 87. Home Federal also submitted evidence of a Small Business Administration (SBA) note executed at Home Federal by the principals of Freeman Fertilizer with a current balance outstanding of \$237,624.81. Exhibit HF 3. Home Federal submitted a blanket security agreement executed by Freeman Fertilizer granting a security interest to Home Federal in the inventory of Freeman Fertilizer. Exhibit HF 5. Home Federal submitted a security agreement concerning the SBA note executed by Freeman Fertilizer granting a security interest to Home Federal in the inventory of Freeman Fertilizer. Exhibit HF 6. Home Federal also provided certified state UCC financing statements. Exhibit HF 7.

14. The Commission finds that Home Federal has a perfected security interest in the proceeds of the grain that remains after the claims of open storage claimants and grain bank claimants are satisfied. Pursuant to SDCL 57A-2-403(1), "[a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value...." Under the express, written terms of both delayed price contracts and deferred payment contracts, title to the grain passes to the buyer even though payment is to be made to the seller at a later date. See *generally* exhibits 1J, 1Q. The definition of a purchase "includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property." SDCL 57A-1-201(32).

15. The Commission believes that Home Federal is a good faith purchaser for value and its perfected security interest attached to the grain when Freeman Fertilizer, d/b/a McCook, had voidable title in the goods. This security interest is superior to the unsecured security interests of the claimants who entered into deferred payment and delayed pricing contracts. After the open storage and grain bank claimants are paid out of the grain proceeds, the remaining proceeds total \$98,707.84. Appendices E, F. After subtracting rent and load out charges, the remaining proceeds total \$94,903.24. *Id.* Since the remainder of the grain proceeds is considerably less than what Home Federal is owed on its loan to Freeman Fertilizer, Home Federal should receive that amount plus the interest earned on the grain proceeds.

### **CASH SALES**

16. Eight claims were submitted for cash sale corn. Gary Waltner claimed 1930.95 bushels for a

total amount due of \$2,462.59. Exhibit 1B. Commission Staff supported this amount. Richard Lauck claimed 430 bushels for a total amount due of \$584.80. Exhibit 1C. Commission Staff supported this amount. Farmers National, Nagano, claimed 3700 bushels for a total amount due of \$5,500.75. Exhibit 1S. Commission Staff supported this amount. Lake Preston Cooperative claimed 10,077.14 bushels for a total amount due of \$17,640.39. Exhibit 1E. Commission Staff submitted documentation supporting 10,072.85 bushels for a total amount due of \$17,487.37. Exhibit 3A. Lester Kappenman claimed 829.99 bushels for a total amount due of \$1,535.48. Exhibit 1F. Commission Staff submitted documentation supporting the same amount of bushels but for a total amount due of \$1,527.20. Exhibit 3B. Farmers National, Paul, claimed 166.07 bushels for a total amount due of \$244.12. Exhibit 1R. Commission Staff submitted documentation supporting the same amount of bushels but for a total amount due of \$205.09. Exhibit 3C. Tim Jensen claimed 9258.51 bushels for a total amount due of \$12,826.65. Exhibit 1H. Commission Staff supported this claim. William Perrenoud claimed 4455.72 for a total amount due of \$6,327.12. Exhibit 1K. Commission Staff submitted documentation for the same amount of bushels but for a total amount due of \$6,112.49. Exhibit 3F. These claims are summarized on Staff\_\_Exhibit 2D. The Commission accepts Staff's recommendations. The Commission finds that each of these claimants should be paid out of the \$50,000.00 grain dealer's bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001. Individual amounts are calculated on Appendix G. In addition, since the money from the bond is accumulating interest, the accrued interest should be included in the overall proceeds. Accrued interest should be added to the amounts, on a prorated basis, at the time of disbursement.

17. Three claims were submitted for priced unpaid corn. Gilbert Buehner claimed 2791.07 bushels for a total amount due of \$5,023.93. Exhibit 1I. Commission Staff supported this claim. Pat Kappenman claimed 6148.85 for a total amount due of \$10,027.93. Exhibit 1J. Commission Staff submitted documentation for 6148.86 bushels with the same amount due. Exhibit 3E. Farmers National, Franz/Nagano claimed 1300 bushels for a total amount due of \$2626.00. Exhibit 1S. Commission Staff supported this claim. These claims are summarized on Staff\_\_Exhibit 2E. The Commission accepts Staff's recommendations. The Commission finds that each of these claimants should be paid out of the \$50,000.00 grain dealer's bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001. Individual amounts are calculated on Appendix G. In addition, since the money from the bond is accumulating interest, the accrued interest should be included in the overall proceeds. Accrued interest should be added to the amounts, on a prorated basis, at the time of disbursement.

18. One claim was submitted for cash sale soybeans. Richard Lauck claimed 1460.80 bushels for a total amount due of \$6,119.22. Exhibit 1C. Commission Staff supported this claim. This claim is summarized on Staff\_\_Exhibit 2I. The Commission accepts Staff's recommendation. The Commission finds that this claimant should be paid out of the \$50,000.00 grain dealer's bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001. The amount is calculated on Appendix G. In addition, since the money from the bond is accumulating interest, the accrued interest should be included in the overall proceeds. Accrued interest should be added to the amount, on a prorated basis, at the time of disbursement.

19. One claim was submitted for priced unpaid soybeans. Derald Klueber claimed 1743.48 bushels for a total amount due of \$7,113.40. Exhibit 1X. Commission Staff supported this claim. This claim is summarized on Staff\_\_Exhibit 2J. The Commission accepts Staff's recommendation. The Commission finds that this claimant should be paid out of the \$50,000.00 grain dealer's bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001. The amount is

calculated on Appendix G. In addition, since the money from the bond is accumulating interest, the accrued interest should be included in the overall proceeds. Accrued interest should be added to the amount, on a prorated basis, at the time of disbursement.

### **DELAYED PRICE AND DEFERRED PAYMENT CONTRACTS**

20. Eight claims were submitted for delayed price contracts for corn. Farmers National, Graham, claimed 2200 bushels. Exhibit 1Q. Commission Staff verified this claim. Farmers National, Ott/Jackson, claimed 4285.21 bushels. Exhibit 1P. Commission Staff verified this claim. Leroy Klockman claimed 1827.86 bushels. Exhibit 1D. Commission Staff verified this claim. Farmers National, Nagano, claimed 3730.36 bushels. Exhibit 1S. Commission Staff verified this claim. Helen Eide claimed 5817.87 bushels. Exhibit 1V. Commission Staff did not verify this claim. Commission Staff submitted documentation showing that this claim had been paid by check which had cleared the bank. Exhibit 3I. Lucille Helmbrecht claimed 2397.51 bushels. Exhibit 1T. Jeff Scott claimed 7172.15 bushels. Exhibit 1G. Rich Hoffman claimed 1957.15 bushels. Exhibit 1U. These claims are summarized on Staff\_\_Exhibits 2F and 2N.

21. Seven claims were submitted for delayed price contracts for soybeans. Leonard Buehner claimed 408.14 bushels. Exhibit 1Y. Commission Staff verified this claim. Helen Eide claimed 1861.76 bushels. Exhibit 1V. Commission Staff submitted documentation verifying 973.87 bushels. Exhibit 3I. Farmers National, Ott/Jackson, claimed 719.06 bushels. Exhibit 1P. Commission Staff verified this claim. Farmers National, Graham, claimed 700 bushels. Commission Staff verified this claim. Tim Jensen claimed 5974.33 bushels. Exhibit 1H. Commission Staff submitted documentation verifying this claim. Exhibit 3D. Jeff Scott claimed 6835.60 bushels. Exhibit 1G. Alvin Scott claimed 5661.71 bushels. Exhibit 1Z. These claims are summarized on Staff\_\_Exhibits 2L and 2O.

22. Four claims were submitted for deferred payment contracts for corn. Pat Kappenman claimed 1515.72 bushels for a total amount due of \$2,178.43. Exhibit 1J. Commission Staff verified this claim. Larry Weber claimed 5257.15 bushels for a total amount due of \$6,764.79. Exhibit 1N. Commission Staff verified this claim. Farmers National, Nichols, claimed 670 bushels for a total amount due of \$1,162.90. Exhibit 1O. Commission Staff verified this claim. Farmers National, Ott/Jackson, claimed 600 bushels for a total amount due of \$1,101.24. Exhibit 1P. Commission Staff verified this claim. These claims are summarized on Staff Exhibit 2G.

23. Three claims were submitted for deferred payment contracts for soybeans. Farmers National, Ott/Jackson, claimed 600 bushels for a total amount due of \$2,610.88. Exhibit 1P. Commission Staff verified this amount. Farmers National Nichols claimed 293 bushels for a total amount due of \$1,337.83. Exhibit 1O. Commission Staff verified this claim. Pat Kappenman claimed 1709.34 bushels for a total amount due of \$7,296.40. Exhibit 1J. Commission Staff verified this claim. These claims are summarized on Staff\_\_Exhibit 2K.

24. Although the deferred payment and delayed pricing claimants have demonstrated that they are owed money for the sale of their grain to McCook, there are no grain proceeds remaining due to Home Federal's perfected security interest. See Findings of Fact 13-15. In addition, pursuant to SDCL 49-45-9, a grain dealer's bond "may not benefit any person entering into a voluntary credit sale with a grain dealer." A voluntary credit sale is defined as "a sale of grain or seeds pursuant

to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts." SDCL 49-45-1.1(5). Thus, deferred payment and delayed pricing contracts are statutorily excluded from bond coverage and the claimants may not receive any of the bond proceeds.

25. Following the hearing, the Commission received a Notice and Motion to Reopen for Further Evidence from Commission Staff. Staff requested the record be reopened for the purpose of receiving into evidence affidavits from some of the claimants requesting rescission of their delayed price contracts and/or deferred price contracts entered into with McCook. Since there were no objections to the admission of the affidavits, the Commission received the affidavits into evidence.

26. Rescission is considered to be an extraordinary, equitable remedy that should be granted only if the evidence is clear and convincing. *Mattson v. Rachetto*, 1999 SD 51, P17, 591 N.W.2d 814, 818. The Commission does not believe that, as a receiver, it can consider requests to rescind or set aside contracts. Generally, if a party would like to rescind or set aside a contract, that party would bring an action against the other party to the contract. See generally *Vermilyea v. BDL Enterprises, Inc.*, 462 N.W.2d 885 (S.D. 1990) (plaintiff brought action against defendant for rescission of lease); *Mattson*, 1999 SD 51, 591 N.W.2d 814 (plaintiff filed suit against defendant for rescission of land contract); *Smith v. Hermsen*, 1997 SD 138, 572 N.W.2d 835 (plaintiff sued for rescission of land sale). The Commission's notice of hearing in this case stated that it would determine claims against the bonds and the grain inventory. The contracts were entered into among McCook and individual claimants. There was no notice to McCook that contracts that it had entered into with some of the claimants were possibly subject to rescission or setting aside as a result of the hearing. Moreover, in this case, the claimants requesting rescission did not do so until after the hearing.

### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter pursuant to SDCL 49-43-5.6, 49-45-16 and SDCL Chapter 21-21.

2. The Commission has jurisdiction over this matter as a receiver appointed by the Court pursuant to SDCL Chapter 21-21, and SDCL Chapters 49-42, 49-43, and 49-45, specifically 49-42-15.1, 49-43-5.6, 49-43-5.8, 49-45-13, 49-45-16, and 49-45-18.

3. All of the above claims found valid by the Commission in findings of fact 16-19 are legitimate claims on the proceeds of the \$50,000.00 grain dealer's bond numbered S16 7010, commencing July 1, 2000, and ending June 30, 2001. All such claims shall be paid out of the proceeds of the bond. All of the claims found valid by the Commission in findings of fact 9-15 are legitimate claims on the proceeds of the sale of the grain. All such claims shall be paid out of the proceeds of the grain.

4. Pursuant to SDCL 57A-2-403(1), "[a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value...." Under the express, written terms of both delayed price contracts and deferred payment contracts, title to the grain passes to the buyer even though payment is to be made to the seller at a later date. See generally exhibits 1J, 1Q. The definition



of a purchase "includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property." SDCL 57A-1-201(32).

5. Home Federal is a good faith purchaser for value and its perfected security interest attached to the grain when Freeman Fertilizer had voidable title in the goods. This security interest is superior to the unsecured security interests of the claimants who entered into deferred payment and delayed pricing contracts.

6. Pursuant to SDCL 49-45-9, a grain dealer's bond "may not benefit any person entering into a voluntary credit sale with a grain dealer." A voluntary credit sale is defined as "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts." SDCL 49-45-1.1(5). Thus, deferred payment and delayed pricing contracts are statutorily excluded from bond coverage and the claimants may not receive any of the bond proceeds.

7. As a receiver, the Commission cannot consider requests to rescind or set aside contracts. Rescission is considered to be an extraordinary, equitable remedy that should be granted only if the evidence is clear and convincing. *Mattson v. Rachetto*, 1999 SD 51, P17, 591 N.W.2d 814, 818. Generally, if a party would like to rescind or set aside a contract, that party would bring an action against the other party to the contract. See generally *Vermilyea v. BDL Enterprises, Inc.*, 462 N.W.2d 885 (S.D. 1990) (plaintiff brought action against defendant for rescission of lease); *Mattson*, 1999 SD 51, 591 N.W.2d 814 (plaintiff filed suit against defendant for rescission of land contract); *Smith v. Hermsen*, 1997 SD 138, 572 N.W.2d 835 (S.D. 1997) (plaintiff sued for rescission of land sale). The Commission's notice of hearing in this case stated that it would determine claims against the bonds and the grain inventory. The contracts were entered into among McCook and individual claimants. There was no notice to McCook that contracts that it had entered into with some of the claimants were possibly subject to rescission or setting aside as a result of the hearing. Moreover, in this case, the claimants requesting rescission did not do so until after the hearing.

It is therefore

ORDERED, that if these findings of fact and conclusions of law are accepted by the Court, the Commission, as receiver, shall pay the above claims from the grain dealer's bond and the grain proceeds in the amounts as listed on Appendices A-G. Accumulated interest on the grain dealer's bond shall be distributed on a pro rata basis to the eligible claimants of the bond proceeds. Accumulated interest on the grain proceeds shall be distributed to Home Federal.

Dated at Pierre, South Dakota, this \_\_\_\_\_ day of August, 2001.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: \_\_\_\_\_

Date: \_\_\_\_\_

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

\_\_\_\_\_  
JAMES A. BURG, Chairman

\_\_\_\_\_  
PAM NELSON, Commissioner