STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF KINGSBURY	THIRD JUDICIAL CIRCUIT

IN THE MATTER OF RECEIVERSHIP OF H & I GRAIN OF HETLAND, INC.	38 Civ. 18-000068 **CHS HEDGING, LLC'S [PROPOSED] MOTION TO DISMISS**

Comes now CHS Hedging, LLC ("CHS"), by and through its undersigned counsel and hereby moves this Court in accordance with South Dakota Codified Laws ("SDCL") § 15-6-7(b) for an order dismissing the present Petition to Appoint an Independent Receiver.

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I. INTRODUCTION

The South Dakota Public Utilities Commission and CHS are back before this Court just three short months after the Court denied and dismissed *with prejudice* a substantively identical petition. The Commission's petition is fatally flawed on its face and contravenes this Court's authority and prior orders. The Commission may not simply return to the Court seeking relief that was already been denied because it was unsatisfied with the outcome of prior proceedings. South Dakota law prohibits relitigation of an issue that has already been litigated or even an issue that *could have been* litigated in a completed prior action. *See Link v. L.S.I., Inc.*, 793 N.W.2d 44, 55 (S.D. 2010).

This case is a textbook example of South Dakota's doctrine of res judicata. It demonstrates why the South Dakota Supreme Court has held that relitigation is contrary to public policy: litigants like the Commission will, if permitted, needlessly impinge on courts' and opposing parties' time and resources with reiterative pleadings. The Court should not allow the Commission to relitigate this matter. CHS respectfully requests that the Court summarily dismiss this Petition to Appoint an Independent Receiver because the petition is prohibited by South Dakota's doctrine of res judicata and the petition does not state a legal basis for the requested relief, *see* SDCL § 15-6-12(b)(5).

II. BACKGROUND

As this Court is aware, this action arises out of a very complex factual and procedural history. The present petition is merely a successive petition for receivership, which this Court has already denied and dismissed with prejudice in case number 38 Civ. 18-000056. For ease of reference, CHS here recounts the complete relevant circumstances. A description of the

circumstances that have occurred subsequent to this Court's dismissal of case 38 Civ. 18-000056 begins on page 7, section II(F), below.

A. H & I Grain Enters Into and Breaches a Contract with CHS.

The circumstances relevant to this case reach back to 2011. H & I Grain of Hetland, Inc. ("H & I Grain"), a former South Dakota corporation, was a licensed grain buyer operating a grain elevator in Hetland, South Dakota. Duane and JoAnn Steffensen were the officers and directors of H & I Grain, and their son, Jared Steffenson, was an authorized agent of H & I Grain. In November 2011, H & I Grain entered into an agreement (the "Customer Agreement") with CHS[1] by which CHS would serve as H & I Grain's broker for the execution of orders on various commodity exchanges. A true and correct copy of that Customer Agreement is attached hereto as Exhibit 1. As part of the agreement to provide such services, Duane and JoAnn signed a Guaranty of Past and Future Indebtedness on November 15, 2011. A true and correct copy of the guaranty is attached hereto as Exhibit 2.

By July 2016, H & I Grain's account with CHS was deficient by over $400,000. H & I Grain nevertheless continued to conduct trades via automated processes on July 8, 11, and 12, 2016, fully knowing that it could not repay the credited funds. CHS shut down H & I Grain's trading account and did not allow any further trading beyond July 13, 2016. Ultimately, due to H & I Grain's conduct, CHS lost nearly $2 million covering H & I Grain's trades. H & I Grain knew in advance it would not be able to repay the amounts credited to it by CHS because it was in fact insolvent or nearly insolvent. To attempt to recover its losses, CHS was forced to initiate suit on September 15, 2016, against Duane and JoAnn Steffensen, who were the guarantors of

[1] H & I Grain in fact contracted with Country Hedging, Inc.; however, there is no dispute that CHS is the proper successor in interest to the agreement. For ease of reference, this Motion proceeds by describing CHS as the relevant party to the agreement.

the credit CHS extended to H & I Grain. A true and correct copy of the Complaint filed in case number 4:16-cv-04132, *CHS Hedging, LLC v. Steffensen*, in the U.S. District Court for the District of South Dakota is attached hereto as Exhibit 3.

B. H & I Grain Deceives Local Producers and the Public Utilities Commission

CHS was not the only victim of H & I Grain's egregious conduct. In addition to CHS's $2 million loss, those in the local farming community who relied on H & I Grain's elevator services were also harmed. In July 2016—after CHS had cut all ties with the Steffensens and their business—H & I Grain began to engage in various tactics to trick grain producers into continuing to use the elevator even though H & I Grain was not actually paying the producers in full for the grain they delivered. H & I Grain's conduct directly violated SDCL §§ 49-45-25 and 49-45-27, which required it to immediately report its insolvency to the South Dakota Public Utilities Commission. Instead, the Steffensens kept H & I Grain's insolvency a secret from both the Commission and its customers. H & I Grain continued to accept grain deliveries from producers while assuring the producers that they would be paid soon, and it carried on operating into the following 2017 growing season even though it was insolvent. H & I Grain's deceptive behavior and its failure to comply with statutory reporting requirements were the direct and exclusive causes of the massive financial losses of the farming community. Importantly, CHS had completely separated itself from H & I Grain throughout this period and had no involvement in or knowledge of H & I Grain's duplicitous and mendacious conduct. In the end, nearly forty individual producers and growing operations were directly harmed by H & I Grain's deception, some of whom were left unpaid for over $200,000 worth of corn and beans they had delivered to H & I Grain.

H & I Grain also made deceptive and fraudulent misrepresentations to the Commission to avoid detection. But by June 2017, the Commission had become aware of H & I Grain's insolvency following an investigation related to the renewal of H & I Grain's grain buyer license. On June 19, 2017, Commission staff requested that the Commission immediately suspend H & I Grain's license. The Commission suspended H & I Grain's license on June 23 and permanently revoked the license on July 21, 2017. The Commission was able to take custody of H & I Grain's $400,000 surety bond to distribute to the affected grain producers. The Commission sent a letter to the affected producers to explain the circumstances on July 21, 2017. A true and correct copy of the Commission's letter to the producers is attached hereto as Exhibit 4.

C. The Producers File Suit Against H & I Grain

The producers, like CHS, ultimately had to resort to litigation to attempt to recover their lost funds beyond the $400,000 covered by the surety bond. On July 21, 2017, one of the producers, Chad Murphy, filed a suit against H & I Grain and the Steffensons. On August 11, 2017, Murphy filed an Amended Complaint, adding over twenty additional plaintiffs (collectively the "*Murphy* plaintiffs")—other producers who had not been paid for their grain deliveries. A true and correct copy of the Amended Complaint filed in case number 38 Civ. 17-000045, *Murphy v. H & I Grain of Hetland, Inc*. (the "*Murphy* action"), in Kingsbury County Circuit Court is attached hereto as Exhibit 5.

Although CHS and the *Murphy* plaintiffs were all victims of H & I's conduct, the *Murphy* plaintiffs decided to seek in their lawsuit additional recovery *from CHS* for the funds they were owed by H & I Grain. CHS moved to dismiss the *Murphy* plaintiffs' claims against CHS on September 1, 2017. Before the Court could dismiss the claims, the *Murphy* plaintiffs voluntarily dismissed CHS as a defendant in the *Murphy* action in recognition of the fact that they did not

have standing to allege any cause of action against CHS. A true and correct copy of the stipulation dismissing CHS is attached hereto as Exhibit 6.

D. The *Murphy* Plaintiffs Ask the Commission to Seek Receivership

After the *Murphy* plaintiffs voluntarily dismissed their suit against CHS, they nevertheless continued to seek out methods by which to procure money from CHS despite the fact that both they *and* CHS were taken advantage of and deceived by the same bad actors: H & I Grain and the Steffensens. To that end, counsel for the *Murphy* plaintiffs developed a tenuous and procedurally improper plan to seek funds from CHS. On April 13, 2018, he filed a petition before the Commission asking it to seek an order from this Court appointing the Commission as receiver for H & I Grain for the express purpose of suing CHS as receiver and then remitting any funds recovered to the *Murphy* plaintiffs. A true and correct copy of the April 13 petition is attached hereto as Exhibit 7.

CHS was not provided notice of the April 13, 2018 petition. The Commission discussed the petition at length during public meetings on April 20 and May 1, 2018. CHS learned of the petition and appeared before the Commission at its July 26, 2018 meeting to explain why the petition and the proposed receivership were improper under South Dakota law. The Commission deferred its decision until its August 7, 2018 meeting. At the August 7 meeting, CHS again appeared to discuss the law of receivership with the Commission. In that meeting, the Commission acknowledged there were pragmatic, procedural, and legal difficulties with the *Murphy* plaintiffs' petition. However, the Commission, under immense local political pressure to help the grain producers recover funds by any means necessary, sought its own path forward. Public Utilities Commissioner Chris Nelson proposed a "substitute motion" by which the Commission would seek receivership of H & I Grain with slightly modified goals. The

Commission's stated purpose for seeking receivership under Commissioner Nelson's substitute motion was to sell H & I Grain to a "consortium" composed of the *Murphy* plaintiffs. The Commission presumes that the consortium, as the new owners of H & I Grain, will be able to sue CHS. Commissioner Nelson stated at the meeting in no uncertain terms that the *Murphy* plaintiffs lacked standing to sue CHS. His intent in seeking receivership was to "do something, whatever we can, to get you standing" to sue CHS. The Commission voted to grant Commissioner Nelson's substitute motion. A true and correct copy of the Commission's order stating its intent to request this Court's permission to take receivership of H & I Grain is attached hereto as Exhibit 8. A complete audio recording of the Commission's August 7 meeting is available at https://puc.sd.gov/commission/media/2018/puc08072018.mp3.

E. The Commission's First Receivership Petition

On August 9, 2018, the Commission filed its first receivership petition with this Court, docketed as case number 38 Civ. 18-000056. The Commission again did not provide CHS notice of its court filing. After CHS discovered that the petition had been filed, it filed its Motion to Intervene and Proposed Motion to Dismiss on September 14, 2018.

On September 19, 2018, the Court held a hearing on the Commission's petition, CHS's Motion to Intervene, and CHS's Motion to Dismiss. A copy of the court reporter's transcript of that hearing is attached hereto as Exhibit 9. At the hearing, this Court first granted CHS's Motion to Intervene, then proceeded to the merits of the Commission's receivership petition and the subject of CHS's Motion to Dismiss. The Court ultimately denied the Commission's petition from the bench, ruling that "the Court cannot appoint a receiver to do that which it cannot do" and that the Commission's stated reasons for seeking a receivership would require the receiver to go beyond the Court's own authority—irrespective of whether the receiver was the Commission

or an unidentified third party. The Court then directed counsel for CHS to file a proposed order for signature.

Following the hearing, counsel for CHS conferred with counsel for the Commission. Counsel for the Commission confirmed that the Commission would not appeal the Court's ruling and approved CHS's proposed order, by which the Court granted CHS's motion to intervene and dismissed the Commission's receivership petition with prejudice. CHS filed the proposed order on September 27, 2018. The Court signed the proposed order on September 28 and filed the order on October 2, 2018. A true and correct copy of the Court's order is attached hereto as Exhibit 10.

F. The Commission's Second Receivership Petition

On October 10, 2018, counsel for the *Murphy* plaintiffs filed a "Second Petition to Appoint South Dakota Public Utilities Commission as Receiver" with the Commission. A true and correct copy of the second petition is attached hereto as Exhibit 11. The second petition is materially identical to the April 13 petition; indeed, it fully incorporates the first petition by reference. The *Murphy* plaintiffs simply asked the Commission to re-petition the Court for the same relief—and on the same basis—that the Court had already denied and dismissed with prejudice.

The Commission took up the second petition in a public meeting on November 15, 2018. CHS appeared at the Commission meeting to explain why the second petition was improper under South Dakota law and further prohibited by the doctrine of res judicata pursuant to this Court's dismissal with prejudice of the Commission's prior receivership petition. Two of the three Commissioners acknowledged that a second receivership petition was likely foreclosed by this Court's prior ruling. Commission Chair Kristie Fiegen expressly conceded that a renewed

receivership petition before the Court would rely on "the same evidence and the same facts" that underpinned its previous receivership petition. Nevertheless, Commissioner Chris Nelson again made a contemporaneous "substitute motion," suggesting that the Commission petition this Court "to appoint an independent receiver." The Commission's purpose in seeking an "independent" receivership, however, remained unchanged from the previous motion: to permit the *Murphy* plaintiffs to somehow recover funds from CHS by assuming the corporate identity of H & I Grain. Commissioner Nelson conceded his proposal carried "no guarantee of success" but that he was willing to "give it a try." Commissioner Gary Hanson commented that he appreciated Commissioner Nelson's substitute motion because it "keeps this [proceeding] alive"—in spite of the Court's prior dismissal. Commissioner Nelson's motion carried. A true and correct copy of the Commission's order to seek appointment of an "independent receiver" is attached hereto as Exhibit 12. A complete audio recording of the November 15 meeting is available at https://puc.sd.gov/commission/media/2018/puc11152018.mp3.

On December 12, 2018, the Commission filed this Petition to Appoint an Independent Receiver. The petition is largely identical to the previously dismissed petition in case number 38 Civ. 18-000056. The only differences in this renewed petition are the addition of some limited procedural history in paragraphs 3(g), (i), (j), and (k), and the deletion of language stating the purpose of the petition from several paragraphs. In all other respects, the two petitions are verbatim reproductions.

III. ARGUMENT

The Court should dismiss the Commission's latest petition for two reasons, each of which is an independently sufficient ground to dismiss. First, and most plain, this petition is substantively identical to the previous petition, and it is therefore prohibited by South Dakota's

doctrine of res judicata. The petition raises no issue or claim that could not have been raised in the previous petition, and it is therefore foreclosed. Second, even on its merits, this petition—as previously determined by this Court—is not permissible under South Dakota's law of receivership.

A. Res Judicata Entirely Precludes the Commission's Receivership Petition

1. The Doctrine of Res Judicata Is Applicable in This Case. "The doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action." *Link*, 793 N.W.2d at 55 (quoting *Barnes v. Matzner*, 661 N.W.2d 372, 377 (S.D. 2003)). South Dakota courts apply this doctrine to give effect to two legal maxims: (1) a party to a lawsuit "should not be twice vexed for the same cause," and (2) "public policy is best served when litigation has a repose." *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.*, 336 N.W.2d 153, 157 (S.D. 1983); *see Link*, 793 N.W.2d at 55. To that end, "if [a] prior final judgment or order had been rendered by a court of competent jurisdiction, it 'is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein . . . .'" *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D. 1993) (quoting *Raschke v. DeGraff*, 134 N.W.2d 294, 297 (1965)). Res judicata is so fundamental that it applies "whether the court was correct at the time or not." *Id.*

> Res judicata applies if the following four elements are satisfied:
>
> (1) the issue in the prior adjudication [is] identical to the present issue, (2) there [was] a final judgment on the merits in the previous case, (3) the parties in the two actions [are] the same or in privity, and (4) there [was] a full and fair opportunity to litigate the issues in the prior adjudication.

Dakota, Minnesota & E. R.R. Corp. v. Acuity, 720 N.W.2d 655, 661 (S.D. 2006).

All four elements are satisfied in this case: The issues and parties are precisely identical, satisfying elements 1 and 3. This Court has already ruled on the merits and dismissed the

Commission's first receivership petition with prejudice, satisfying element 2. And there was a full and fair opportunity to litigate the issues in this case when this Court held a hearing on the matter, at which the Commissioners and their counsel were present, in De Smet, South Dakota, on September 19, 2018, which satisfies element 4. Therefore, res judicata applies, and the Commission's petition is precluded. The Court should summarily dismiss this action.

2. The Commission's Failure to Seek Appointment of an "Independent Receiver" in Its First Receivership Petition Prohibits It From Doing So Now. "[A] final judgment on the merits is a bar to any future action . . . upon the same cause of action settling not only every issue actually presented to sustain or defeat the right asserted, but *every issue that might have been raised* in the first action." *Dakota, Minnesota & E. R.R.*, 720 N.W.2d at 660–61 (emphasis added). "A judgment which bars a second action upon the same claim extends not only to every matter offered and received to sustain or defeat the claim or demand but also to all other admissible matters which might have been offered to the same purpose." *Id.* at 661; *see Adam v. Adam*, 254 N.W.2d 123, 129–30 (S.D. 1977).

In its first receivership petition, the Commission failed to raise any argument suggesting that the Commission was not itself an "independent receiver" or that the Court should appoint some other unidentified "independent receiver." The Commission's failure to raise those issues at the time of its previous petition forecloses it from raising them now in this subsequent petition pursuant to clearly established South Dakota law. *See Link*, 793 N.W.2d at 55; *Dakota, Minnesota & E. R.R.*, 720 N.W.2d at 660–61. As the South Dakota Supreme Court has held, the Commission's attempt to file duplicative receivership petitions with minor changes to its pleadings is contrary to public policy and undermines the authority and finality of this Court's rulings and orders. *Cf. Black Hills Jewelry*, 336 N.W.2d at 157.

3. The Commission's Petition Does Not Raise Any New Substantive Question of Law. To the extent the Commission suggests its second petition presents a new or separate legal issue, it has misconstrued the law and the Court's ruling in case number 38 Civ. 18-000056. To the contrary, the Commission has *not* in fact raised any new issues. There are only two discernable differences between the previous petition and the present one. First, the present petition no longer explicitly states the reason for the requested receivership; however, the reason is amply demonstrated by the Commission's own statements of record in this matter as reflected in the audio recordings of the August 7 and November 15, 2018 public meetings. The only purpose contemplated by the Commission has been to allow the *Murphy* plaintiffs to somehow recover funds from CHS despite the fact that those individuals have no standing to sue CHS. The Commission's renewed petition does not paint the full picture, but the petition's purpose is clear and uncontroverted. The purpose of the presently requested receivership is no different and no more permissible than when the Court denied and dismissed the Commission's previous petition.

Second, the present petition seeks the appointment of an "independent receiver." Presumably, the Commission believes seeking an "independent receiver" is substantively distinct from asking that the Commission itself be appointed as a receiver. However, as the Court explained at the September 18 hearing, the reason the Commission's petition is impermissible is because of the *purpose* for which the receivership is sought—*not* because of the identity of the receiver. The Court held that the Commission wants a receiver appointed to perform tasks for the benefit of the *Murphy* plaintiffs—i.e. transfer ownership of H & I Grain—which, simply put, "the receiver wouldn't have the authority to do" regardless of who the receiver was. *See* Exhibit 9 at 37:12–22. Because the identity of the hypothetical receiver was not determinative of the Court's decision to deny and dismiss of the Commission's previous petition, the Commission's

present request for an "independent receiver" does not rescue this petition from the plain applicability of res judicata under South Dakota law.

4. Conclusion—Res Judicata Bars This Petition and the Court Should Dismiss This Action. The present petition has not raised any new or separate legal issue that was not already fully and finally adjudicated by the Court (or could have been fully and finally adjudicated) in case number 38 Civ. 18-000056. Res judicata applies. The Court should dismiss the present receivership petition because "public policy is best served when litigation"—*i.e.*, the Commission's first petition—"has a repose." *Black Hills Jewelry*, 336 N.W.2d at 157.

B. South Dakota's Receivership Law Forecloses the Commission's Requested Relief

As CHS argued at the September 18, 2018 hearing in case number 38 Civ. 18-000056, and as this Court held at the close of that hearing, South Dakota law does not permit the Commission's intended use of the receivership mechanism. The South Dakota Supreme Court has made it clear that the circuit courts will not appoint a receiver for the purpose of representing any party's individual interests—e.g., the *Murphy* plaintiffs—in an adversarial capacity.

According to the South Dakota 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) (first quoting 19 C.J.S. Corporations, § 756; then quoting *Hogg's Receiver v. Hogg*, 97 S.W.2d 582, 583 (Ky. 1936)), *affirmed on reh'g*, 544 N.W.2d 205 (S.D. 1996). The South Dakota Supreme Court 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). And, as this Court found dispositive on the Commission's previous petition, since a trial court "would not have the power" to do what the Commission wants the receiver to do, the Court "cannot appoint a . . . receiver to do what he [i.e., the judge] cannot do." *Id.*

This Court correctly denied the Commission's first receivership petition and dismissed that action with prejudice. Even if the Court declines to apply the doctrine of res judicata, the same result is warranted on the present petition. The Commission continues to attempt to misuse the receivership mechanism created by the South Dakota Legislature solely for the purported benefit of the third party *Murphy* plaintiffs.

To whatever extent the Commission may assert that its present request for a receivership is to serve any other purpose, such an assertion is unsupported and not credible as revealed by the plain statements of the Commissioners during the public meetings on August 7 and November 15. Furthermore, it is undisputed that H & I Grain was entirely insolvent and was administratively dissolved by the South Dakota Secretary of State on October 5, 2018. A true and correct copy of the Certificate of Administrative Dissolution is attached hereto as Exhibit 13. H & I Grain has further petitioned for bankruptcy in the U.S. Bankruptcy Court for the District of South Dakota. *See In re H & I Grain of Hetland, Inc.*, No. 4:18-bk-40580 (Bankr. D.S.D. Dec. 17, 2018). Therefore, the Commission is plainly not seeking appointment of a receiver to serve any administrative function in winding up H & I Grain. The Commission's petition can only be for the purpose of seeking a path for the *Murphy* plaintiffs to attempt recover funds from CHS, a company with which they are not in privity, through spurious litigation.

IV. CONCLUSION

CHS once again recognizes that the *Murphy* plaintiffs were victims of the Steffensens' and H & I Grain's wrongdoing; however, CHS is likewise a victim of that H & I Grain's conduct. CHS further continues to recognize the Commission's desire to help local farmers. However, this duplicative receivership petition is improper and plainly barred by res judicata. CHS, which has also suffered significant losses at the Steffensens' hands, continues to be

prejudiced and undertake needless expense by the Commission's conduct. The Commission conceded at its November 15 meeting that this petition is based on the same facts and evidence as its previous petition, but it nevertheless proceeded to initiate this meritless and duplicative action. CHS respectfully requests this Court grant its motion and dismiss the Commission's Petition to Appoint an Independent Receiver, which is barred by the doctrine of res judicata and does not state a claim for the requested relief as a matter of law. *See* SDCL § 15-6-12(b)(5).

DATED: December 27, 2018

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