Jesse Linebaugh
Partner
jesse.linebaugh@FaegreBD.com
Direct **+1 515 447 4706**

Faegre Baker Daniels LLP
33rd Floor ▾ 801 Grand Avenue
Des Moines ▾ Iowa 50309-8003
Main **+1 515 248 9000**
Fax **+1 515 248 9010**

August 4, 2018

Public Utilities Commission
Kristie Fiegen, Chairperson
Gary Hanson, Vice Chairman
Chris Nelson, Commissioner
c/o Patricia Van Gerpen, Executive Director
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,

I write on behalf of my client CHS Hedging, LLC ("CHS") to follow up on the discussions pertaining to the above referenced docket that took place during the Commission's July 26, 2018 meeting. This letter responds to a few of the legal assertions made on behalf of the Petitioners by Mr. Gary Schumacher during that meeting.

First, Mr. Schumacher was not able to rebut the plain holding of the South Dakota Supreme Court that a receiver cannot be appointed for the purpose of adversarial advocacy on behalf of third parties such as the Petitioners. *See Case v. Murdock*, 528 N.W.2d 386, 389 (S.D. 1995), *affirmed on reh'g*, 544 N.W.2d 205 (S.D. 1996); *see also Wipf v. Hutterville Hutterian Brethren, Inc.*, 834 N.W.2d 324, 335 (S.D. 2013) ("Receivers act as officers or agents of the court subject to the control of the court."); *Todd v. Winkelman*, 320 N.W.2d 525, 528 (S.D. 1982) (noting a receiver is appointed to *preserve collateral*, not seek additional assets). Petitioners' receivership request is nothing more than a demand that the Commission pay to litigate a private cause of action on their behalf. As Staff Attorney Kristen Edwards informed the Commission in an April 27, 2018 letter available on this docket, even if the Commission were granted receivership, it could not initiate a lawsuit unless given specific permission to do so by the circuit court. However, as noted in my previous letter, the circuit court will only appoint a receiver "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 S.D. Codified Laws § 21-21-1). H&I Grain of Hetland ("H&I") is insolvent and has no remaining assets—property, funds, proceeds, or otherwise. Therefore, there is simply nothing over which the Commission could take

receivership. The Commission should decline to bring a frivolous petition for receivership before the circuit court.

Second, even if a receivership were attainable, the Commission would be placed in the unenviable position of standing in the shoes of H&I and its owners and managers, the Steffensens, who are currently under criminal indictment for their conduct in the underlying facts surrounding this docket. There simply is no private cause of action the Commission, standing in the shoes of criminal wrongdoers, could allege against CHS in good faith, and the Commission would be absolutely foreclosed from seeking equitable relief of any kind. *See Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 652 N.W.2d 742, 751 (S.D. 2002) (setting forth South Dakota's law requiring a plaintiff enter the court with clean hands, i.e., "[a] party seeking equity must act fairly and in good faith").

At the July 26 meeting, when faced with the reality that H&I has no legal claim against CHS, Mr. Schumacher vaguely asserted his belief that there may be some species of a "tort cause of action" available to H&I against CHS. However, he did not clarify to which tort he referred. If Mr. Schumacher had knowledge of any claim against CHS sounding in tort, he unquestionably would have announced it at the meeting. Instead, he wishes the Commission to undertake the costly and time-consuming process of developing a record for the sole purpose of verifying the plain fact that no such claims exist. And it is important to reiterate that any attempt to bring CHS into court could result in further expenses when CHS is compelled to seek recovery of its costs and fees. The Commission should avoid having these costly burdens foisted upon it and decline to seek a receivership.

Third, even if any meritorious claims existed against CHS—though clearly none do—the Commission is already well apprised of the fact that the Petitioners would not recover any money from a judgment against CHS. On July 10, 2017, Staff Attorney Edwards wrote in a letter to the Commission, "Staff has determined that it would not be beneficial to seek receivership . . . . Our investigation has shown that the assets of [H&I] are encumbered. Therefore, it is our belief that the only beneficiary of a receivership would be the secured creditor, [H&I's] bank." *See* Docket No. GW17-001. Though they are not available to the public, the docket reflects that Grain Warehouse Division Director Jim Mehhaff provided the Commission with copies of the bank's security documents on July 21, 2017. For these reasons, on July 24, 2017, the Commission rightfully and unanimously declined to seek receivership, writing that "the risks and costs of doing so would outweigh any benefits to grain sellers" or any other creditor beyond H&I's bank.

At the July 26, 2018 meeting, Mr. Schumacher conceded that H&I's bank possesses a security interest over H&I's assets and that the Petitioners' prospective interest in any hypothetical recovery against CHS would be unsecured. However, Mr. Schumacher nevertheless represented to the Commission that the Petitioners' claims would be equal in priority to the claims of the bank. Mr. Schumacher risks misleading the Commission with his statements, as there is simply no support for his proposition in the law. The bank's security interest in H&I's assets "is effective according to its terms between the parties, against purchasers of the collateral, and against creditors." S.D. Codified Laws § 57A-9-201(a). Even if the Petitioners' hypothetical future interests in H&I's assets were secured and perfected, the bank's interests would maintain priority because they were first in time. *See id.* § 57A-9-

322(a). There is no provision in the law that would downgrade the bank's well established security interest to put the Petitioners and the bank on a "level playing field," in Mr. Schumacher's words.

Mr. Schumacher hypothesized that the bank's security interest in H&I's assets would not reach a money judgment against CHS because neither the money judgment nor H&I's purported chose in action existed at the time the bank's security interest was perfected. But to the contrary, the South Dakota Supreme Court expressly enforces security interests in future assets, including security interests so broad as to encompass "all of [a company's] contract rights and accounts receivable, checks, drafts, notes, general intangibles and all the sale of any of the foregoing . . . *whether now owned or hereafter acquired*." *See Baldwin v. Castro Cty. Feeders I, Ltd.*, 678 N.W.2d 796, 799–801 & n.4 (S.D. 2004) (emphasis added); *see also, e.g.*, *Sherman v. Upton, Inc.*, 242 N.W.2d 666, 670–71 (S.D. 1976). Of course, the scope of the bank's security interest in H&I's assets is defined by the terms of the applicable security agreement. However, it is clear that—contrary to Mr. Schumacher's position—the priority of the bank's security interest is not weakened by any operation of law merely because the lawsuit he envisions postdates the formulation of the bank's security interest. Rather, the circumstances are the same now as they were on July 24, 2017, when the Commission declined to seek receivership because the bank's security interest would prevent the Petitioners from recovering any funds.

Thank you again for permitting me time to speak at the recent Commission meeting and for your consideration of this letter.

Sincerely,

Jesse Linebaugh