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Kristie Fiegen, Chairperson
Gary Hanson, Vice Chairman
Chris Nelson, Commissioner
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

**RE: Petition to Appoint South Dakota Public Utilities Commission as Receiver
GW17-002
Chad Murphy et al. v. H & I Grain of Hetland, Inc., et al.
Kingsbury County 38 CIV. 17 - 000045**

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

This correspondence is in response to the July 25, 2018 letter by Jesse Linebaugh, attorney for CHS Hedging, L.L.C. (CHS), objecting to the April 13, 2018 Petition to Appoint South Dakota Public Utilities Commission as Receiver (Petition), which was submitted on behalf of the Plaintiffs in the circuit court matter.

First, the underlying procedural posture for both the civil matter in federal court (CHS v. Duane Steffensen et al.) and the civil matter in state circuit court (Chad Murphy v. H & I Grain of Hetland, Inc. et al.) were explained during the PUC hearing on July 26, 2018. The only remedy that will provide any financial relief for the affected producers is the Petition by the PUC. I have attached the Amended Answer and Counterclaims filed on June 2, 2017 in the case of CHS Hedging, L.L.C. v. Duane J. Steffensen and JoAnn Steffensen, U.S. District Court for the District of South Dakota, 4:16-CV-04132-KES, which articulates the causes of action against CHS. *See generally*, Investors Equity Life Insurance Company of Hawaii, LTD, ADM Investor Services, Inc., 1 Fed.Appx. 709 (2001).

Second and third, the Petition is not outside of the scope of the Receiver's duties, as suggested by CHS. CHS' reliance on Case v. Murdock, 528 N.W.2d 386 (S.D. 1995) is

misplaced. SDCL 49-45-16.1¹ and SDCL 21-21-9² provide authority for the PUC to act in this matter.

Fourth, the issues relating to the civil matter in federal court and the civil matter in state circuit court are repeated by CHS and have previously been addressed at the hearing on July 26, 2018 and above in this letter. That fact that CHS has sent counsel from Des Moines, Iowa to argue this matter should inform the Commissioners that CHS believes it has significant risk in this matter if the PUC approves the Petition.

As to the pragmatic concerns raised by CHS, the claims made by CHS with respect to costs, document production, and discovery should not discourage the PUC from going forward with a receivership. Instead, it is quite likely that CHS is posing this concern because they recognize the likelihood of them being found liable if litigation goes forward. In addition, the concerns as stated in their correspondence are vastly overstated.

First, much of the discovery required for purposes of this litigation has already been exchanged. Most, if not all of the documents, have already been compiled and exchanged as part of the federal lawsuit filed by CHS against Duane Steffensen and JoAnn Steffensen. Based on discussions with counsel for H&I Grain, nearly all documents have already been obtained, organized, and exchanged with CHS. Additional disclosure will simply require sending the same documents again.

Further, all of the primary witnesses have been deposed as part of the previous litigation in federal court. Jared Steffensen, Duane Steffensen and JoAnn Steffensen have all been deposed. In addition, the account manager, the head of accounts management, and the compliance officer for CHS have also been deposed. The document discovery and deposition testimony obtained in the federal lawsuit between CHS and Duane and JoAnne Steffensen and the subsequent state court action between the producers and CHS resolved most, if not all of these issues.

Finally, the claim by CHS that the Commission could be exposed to substantial costs has no merit. There is no provision whereby CHS could be awarded their attorney's fees and the assessment of costs to the prevailing party is extremely limited in the State of South Dakota.

¹ SDCL 49-45-16.1 Receiver - Power and duties.

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.

² SDCL 21-21-9 Power of receiver in collection and management of property.

The receiver has, under the control of the court, power to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.
(Emphasis added).

Further, CHS fails to cite SDCL 15-17-52³, which allows a Court to limit the taxation of costs and disbursements in the interests of justice. *See Hewitt v. Felderman*, 2013 SD 91, ¶ 30, 841 N.W.2d 258, 266 (holding that “A court is not required to grant recovery for disbursements simply because a party has achieved the status of a prevailing party. While SDCL 15–17–37 grants no discretion, SDCL 15–17–52 allows a court to ‘limit the taxation of disbursements in the interests of justice.’ This statute grants discretion to deny recovery of disbursements even though SDCL 15–17–37 does not. (internal citations omitted). . . Felderman has failed to carry her burden of convincing this Court that the trial court’s order was not ‘in the interests of justice,’ and thereby an abuse of discretion. We conclude the trial court did not abuse its discretion and we affirm the trial court’s denial of costs and disbursements.”).

By threatening the cost of this litigation, CHS is simply trying to mislead the PUC and discourage you from going forward. The reality of their correspondence should tell the PUC that CHS has real concerns about their liability with respect to this potential claim.

As to questions regarding the perfected security interest potentially held by Great Western Bank in the proceeds of a receivership by the PUC, pursuant to SDCL 57A-9-204⁴, a creditor may not take a security interest in a commercial tort claim prior to the existence of the claim. *See* Comment 4⁵ to SDCL 57A-9-2014. Great Western Bank would not hold a perfected security interest in the proceeds of a receivership that would be prosecuted by the PUC against CHS. There will be claims that sound in tort against CHS which arise from the relationship with H & I Grain. Under SDCL 57A-9-108(e), a general description is not sufficient, a creditor would have to describe the tort specifically, and that would not happen unless the claim existed at the time the creditor took the lien and perfected by filing a financing statement.

³ SDCL 15-17-52 Limit of taxation of disbursements.
The court may limit the taxation of disbursements in the interest of justice.

⁴ SDCL 57A-9-204 Interest in after-acquired collateral.
(a) Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral.
(b) A security interest does not attach under a term constituting an after-acquired property clause to:
(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value; or
(2) A commercial tort claim.
(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

⁵ Uniform Commercial Code Comment 4. **Commercial Tort Claims.** Subsection (b)(2) provides that an after-acquired property clause in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with greater specificity than simply “all tort claims.” *See* Section 9-108(e).

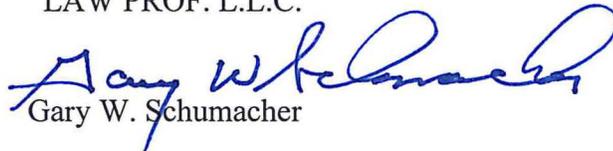
I have attached the legal authority I have cited for the convenience of the Commissioners and the PUC staff counsel.

The producers have suffered significant and consequential losses due to the insolvency of H & I Grain of Hetland, Inc.; and a receivership by the Commission is the last and only remedy available to the producers. The Commission is respectfully urged to consider the grain sellers' Petition to Appoint South Dakota Public Utilities Commission as Receiver and take actions to recover on behalf of the producers.

Thank you.

Sincerely,

WILKINSON & SCHUMACHER
LAW PROF. L.L.C.



Gary W. Schumacher

GWS:lk

Enclosures

cc: Adam de Hueck (via email only with enclosures)
Kristen Edwards (via email only with enclosures)
Jesse Linebaugh (via email only with enclosures)
Donald M. McCarty (via email only with enclosure)
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Mark V. Meierhenry and Clint Sargent (via email only with enclosures)