

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE GRAIN
BUYER BOND OF H & I GRAIN OF
HETLAND, INC.**

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**STAFF’S MEMORANDUM IN
SUPPORT OF DISTRIBUTION OF
BOND PROCEEDS**

GW17-002

Pursuant to the provisions of SDCL Chapter 49-45, Commission Grain Warehouse Staff (“Staff”) received and reviewed claims made against the H & I Grain of Hetland, Inc. (Buyer) bond and took necessary steps to investigate all claims made. SDCL 49-45-19 provides that all claims shall be made in writing within six months of receipt of notice of revocation.

The Commission revoked Buyer’s license on July 24, 2017. Upon the revocation, Staff sent claim forms to all persons whom Staff determined to have sold grain to Buyer. Included with each claim form was a description of Staff’s finding of what was owed to each seller. In returning the claim form, the seller could either agree with Staff’s findings or dispute such findings. Notice was also published in the appropriate newspapers.

Staff received several claim forms. Many of the claimants agreed with Staff’s findings. However, several whom Staff had determined to have sold grain through a voluntary credit sale (VCS), which is not eligible for bond coverage, disputed Staff’s finding that the transaction was in whole or in part a VCS. The allegation of those disputing Staff’s finding with respect to the VCS contracts was that no VCS contract was ever received by the claimant. Their claims are based off the statute of frauds, as codified in SDCL 57A-2-201(3)(d)(iii), which provides in relevant part that

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable...[w]ith respect to the sale of grain, grain sorghums, beans, pulse crops, and oil seeds ... [i]f within a reasonable time a writing in confirmation of the contract and sufficient against the sender **is received** and the party receiving the writing in confirmation has reason to know its contents, the writing in confirmation satisfies the requirements of subsection (1) of this section against such party unless written notice of objection to its contents is given within two days after the writing in confirmation is received. (*emphasis added*)

The claim made by certain claimants is that the purported VCS contract was never received. In order to investigate this claim, Staff met with Stacy Kruse. See Attachment 1, Affidavit. Staff learned that Buyer deliberately ceased sending out VCS contracts after a certain date. See Attachment 1. Having no evidence to the contrary and no reason to question the accuracy of the information provided to Staff, Staff determined that the VCS contracts in question had not satisfied the legal requirements of a VCS contract.

SDCL 49-45-9 mandates bond coverage for the purpose of protecting all sellers, with the exclusion of those sellers “entering into a voluntary credit sale with a grain buyer.” Thus, if the transaction is not a VCS, it is covered by the bond. For this reason, Staff includes those transactions within its recommendation for bond disbursement.


Some VCS transactions are not subject to the above discussion. This is because the seller did not challenge the type of transaction by stating that they never received the contract. Therefore, Staff has no evidence that they did not. Additionally, Staff is aware of a number of VCS transactions made after December 2016. No parties made a claim against the bond on these transactions nor made a claim that the VCS contract was never received or viewed. Because no claim was made against the bond Staff can only assume that the seller received the contracts. Even if Buyer did not send contracts in the course of business, absent an allegation that it was never received, Staff has no reason to believe that the seller did not obtain a copy in another

manner, such as an in-person demand for a copy of the contract. Thus, the preponderance of the evidence supports a finding that a VCS contract was in place for those sellers.

Conclusion

In the attachments, Staff provides charts of the options for bond distribution. The options are as follows: 1) bond coverage for only those identified by Staff as non-VCS sellers though Staff's original audit; 2) bond coverage to include those claimants who allege not to have perfected a VCS transaction; 3) bond coverage to include those claimants who claimed a VCS contract; or 4) bond coverage for all sales made after the date contracts ceased to be sent out. For the reasons discussed in this brief, Staff recommends Option 2.

Dated this 8th day of March 2018.



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