BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PUC STAFF'S COMPLAINT AGAINST BANGHART PROPERTIES, LLC, GETTYSBURG, SOUTH DAKOTA	))))))	**RESPONDENT'S POST-HEARING BRIEF CONCERNING COMPLAINT** **GW23-001**

COMES NOW Banghart Properties, LLC, a South Dakota Limited Liability Company (hereinafter referred to as Banghart), by and through its attorney of record, Robert Konrad of Konrad Law, Prof. LLC, and for Respondent's Post-Hearing Brief Concerning Complaint in the above-captioned action, does hereby argue as follows:

INTRODUCTION

Respondent will be referred to herein as "Banghart", and PUC Staff will be referred to as "staff". Citations to the transcripts will be made by stating hearing date, followed by the appropriate page and line number, for example: April 27 Transcript - Page # : Line #. Citations to the Post Hearing Brief filed by staff will be made by stating "Staff brief" followed by the page number. Other citations will be made as needed.

This Commission has requested additional briefing as to the matters contained in the staff Complaint filed on or about January 30, 2023. The complaint has not been amended, and staff in its prayer for relief/conclusion has asked the Commission to make the following determinations:

1. Whether or not, for license period ending June 30, 2022, that Banghart purchased in excess of $5,000,000 of grain?

2. Whether or not, for license period ending June 30, 2023, that Banghart purchased in excess of $5,000,000 of grain?

3. Whether or not Banghart has engaged in late payment, beyond 30 days of final delivery?

4. Whether or not Banghart has provided false or misleading information to PUC staff.

5. And finally, Whether or not Banghart should be granted a Class A license, or in the alternative, a Class B license.

The Complaint also requests minor relief such as referring the matter for criminal prosecution.

The Complaint itself has not been amended and staff is limited to the relief therein requested. Requesting additional relief or action against Banghart at this juncture is improper, in violation of due process, and fails all notice requirements.

This Commission has held extensive hearings on this docket, including a 10-11 hour hearing or April 27, 2023 wherein multiple witnesses testified for the parties. It appears from the Order Denying Class A Grain License that the Commission has no substantial remaining concerns about the Banghart's financial condition. The Commission denied the Class A license, having found "good cause" under SDCL 49-45-7. Respondent disagrees with this finding, and has not yet filed a motion for reconsideration or notice of appeal. Respondent was sent a renewal email for its Class B license currently held, and accordingly, Respondent has filed an application for renewal of its Class B license. At the last hearing, the Commission indicated it would like the complaint matters resolved before ruling on the Class B application. As such, a hearing on the Class B application and resolution of the complaint has been set for June 21, 2023.

It appears from Commissioner comments, most notably Commissioner Nelson, that the paramount question remaining before the Commission is whether or not Banghart exceeded the

Class B licensing limitations by purchasing more than $5,000,000 in grain. Staff has argued that the grain sale numbers provided by both staff an Banghart demonstrate sales in excess of the cap. Banghart, being licensed in surrounding states, has persisted in its argument that the South Dakota PUC only has jurisdiction over its transactions where it takes title in South Dakota, and the aggregate of those South Dakota transactions did not exceed $5,000,000.00.

As noted by Commissioner Nelson, Banghart's jurisdiction/title argument appears to be a case of first impression. For this reason the Commission has requested additional briefing. Banghart herein will focus primarily on the jurisdictional argument, and requests that the Commission first rule on this matter as a ruling in favor of Banghart on the jurisdictional/title issue will accordingly be dispositive of the following issues as moot:

1. Whether or not Banghart should receive a financial penalty?

2. Whether or not purchasing over $5,000,000 is "good cause" to deny the class B license?

3. Whether or not Banghart did indeed violate the terms of the January 12, 2023 cease and desist letter issued by staff?

4. And, lastly, whether or not Banghart violated the terms of a memorandum of adjustment as newly requested in staff's responsive brief? (Banghart disputes that this argument has been properly noticed, pleaded, or placed in controversy.

As stated, once the jurisdictional/title issue is resolved, and assuming it is resolved in Banghart's favor, many issues are thereby mooted, with the exception of ruling on the appropriateness of granting a Class B license and the appropriate resolution of the failure to pay

within 30 day claims. Resolving the claims in this matter is the most efficient and sensible approach to resolving the noticed issues before the Commission.

Banghart's jurisdiction/title argument, centers around a logical application of the the Uniform Commercial Code, hereinafter referred to as the "UCC"; basic and well-settled contract interpretation rules; and caselaw focusing on the lack of authority for individual state governments to regulate interstate commerce, a plenary power reserved strictly for the federal government under Commerce Clause of the United States Constitution. Banghart requests that the Commission carefully review the following analysis as to this crucial and novel argument.

1.) The $5,000,000.00 question: Can the South Dakota PUC regulate Banghart's interstate commerce transactions?

A. The Uniform Commercial Code governs the grain purchase contracts made by Banghart with producers.

The first question that must be resolved is whether or not the UCC found in SDCL title 57A governs the grain sale contracts between Banghart and the in state or out of state producers?

The UCC only applies to the *sale* of *goods*. *City of Lennox v. Mitek Industries, Inc*. 519 N.W.2d 330, 332 (S.D. 1994). In support of this conclusion, the Supreme Court cited SDCL 57A-2-106(1) states as follows:

> In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a contract for sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (§ 57A-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

It appears to be agreed upon by the parties that Banghart contracts via contract for sale agreements for the purchase of harvested grain and grain yet to be harvested from growing crops. In order for the UCC to govern these contract for sale agreements, both grain and harvested grain must be within the UCC definition of goods. SDCL 57A-2-105(1) states:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 57A-8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the sections on goods to be severed from realty (§ 57A-2-107).

Because the harvested grain is "movable" at the time of contracting, and likewise, because definition of "goods" also specifically includes "growing crops", it follows that the contract for sale agreement between producers and Banghart for the sale of grain, or growing crops is contract for sale of goods subject to the Uniform Commercial Code.

Given that the UCC applies to all Banghart/producer contract for sale agreements and sale agreements, we can look to the regulations within the UCC to evaluate passing of title, risk of loss, and specific definitions of designations used on the various contracts.

B. Under the UCC, title to the grain passes to the buyer based upon the written agreement of the contracting parties.

As set forth in SDCL 57A-2-106(1), a "sale" occurs when the title of the goods passes from seller (producer) to buyer (Banghart). SDCL 57A-2-401(2) of the UCC governs the default rules for the passing of title on movable goods that need to be delivered. That statute states as follows:

> *Unless otherwise explicitly agreed* title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery

> of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading
>
> (a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> (b) If the contract requires delivery at destination, title passes on tender there.

Emphasis added.

SDCL 57A-2-401 essentially provides default rules for the passing of title, absent an agreement between the parties for the passing of title. In order to determine the agreement of parties, an analysis of the Banghart contract for sale agreements must be undertaken.

With very limited exception, all form contracts prepared by Banghart contain the following language:

"TITLE SHALL PASS UPON THE ACCEPTANCE OF THE GOODS AT THE DESTINATION."

Based upon this contract term, the parties to the contract for sale agreement have agreed that title will not pass until the grain is delivered *and* accepted. Jeremey Frost has previously testified that "acceptance" has to deal with the certain industry standards for the individual crops. At the evidentiary hearing on April 27, 2023, the undersigned counsel and Jeremey Frost engaged in the following colloquy:

Q (Konrad): So that paragraph about taking title to grain, is it your intent that you not take title until its physically delivered?

A (Frost): We don't take title until its accepted at delivery. I mean, if it goes to delivery and they have an issue with the quality even though they are dumping it, its still the farmer's grain until it's accepted. The grain has to meet quality at destination to be accepted.

Q (Konrad): That rule sounds a bit strict.

A (Frost): That's the industry standard.

April 27, 2023 transcript 320:14-23. (*See also 320:1-13).*

Based upon the explicit agreement of the parties in the contract for sale agreement, the UCC defaults to the agreement of the parties on the passing of title to grain, and title clearly passes at delivery, which as the Commission is aware, is more often than not, outside the state of South Dakota.

C. Staff has incorrectly argued that title to the grain passes within South Dakota because of the South Dakota FOB delivery location set forth on each contract.

Staff has argued in its Post Hearing Brief that title of the grain passes within South Dakota because the "destination designated in the contract is the FOB South Dakota location specified in the contract." Staff brief 14. In reaching that conclusion staff also argues that "when looking at the specific contract language between the producer and Banghart, the language is clear." Staff brief 13.

Banghart and staff agree that the Banghart's grain sale contracts all include an "F.O.B." designation followed by a South Dakota location. However, Banghart argues that "F.O.B." has a statutorily defined meaning which governs the parties under the contract for sale agreement. In the alternative, and at worst, the contract for sale agreements are ambiguous, thereby requiring the application of contract rules of construction.

By way of illustration, Respondent's Exhibit 22 from the April 27th and May 9th hearing contains the "F.O.B." language cited by the parties. For the Commission's recollection, Exhibit 22 was referred to by the parties as the "North Dakota Contract" in the various hearings. The North Dakota Contract, in addition to the standard agreement that title passes upon acceptance and delivery, contains the following language:

"DELIVERY LOCATION: F.O.B. Ludlow, SD"

Staff and Banghart disagree over the interpretation of this language. While Exhibit 22 states "Ludlow, SD", all Banghart contract for sale agreements state F.O.B. followed by the location of the grain when contracted such as "farm," bin site, or the address of the producer. None of the contract for sale agreements set forth an out of state delivery location, despite the fact the more than 54% of Banghart's grain is delivered out of state. *See chart below on page 16.* It is also important to recognize that in the language above, "DELIVERY LOCATION" is typewritten and appears to be part of the form fill-in-the-blank contract utilized by Banghart; and "F.O.B. Ludlow, SD" is handwritten, and this is consistent with all other Banghart contract for sale agreements. With that, analysis of delivery location language can begin.

As stated above, the UCC governs this agreement between the parties for the sale of goods. Specifically, the UCC sets forth the definition of "F.O.B." SDCL 57A-2-319 states:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> *(a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (§ 57A-2-504) and bear the expense and risk of putting them into the possession of the carrier; or*
>
> (b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (§ 57A-2-503);

(c) When under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (§ 57A-2-323)....

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (§ 57A-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

Based upon this statutory definition of free on board or "F.O.B." for short, the UCC provides that F.O.B. be first defined as agreed upon by the parties. A complete reading of the Exhibit 22 contract for sale agreement does not indicate an alternative or agreed upon definition of F.O.B., therefore, the definition in SDCL 57A-2-319 applies. However, in looking at the contract for sale agreement, it is a bit confusing as to whether or not the contract language represents "F.O.B. the place of shipment" under SDCL 57A-2-319(1)(a) or "F.O.B. the place of destination" under SDCL 57A-2-319(1)(b). Regardless of whether or not it is F.O.B destination or F.O.B. origin, "F.O.B Ludlow, SD" is to be interpreted as a trade term designating the shifting or risk of loss, responsibility for shipping, and payment of the same. "F.O.B" under its UCC definition does not indicate a specific delivery location.

Despite that conclusion, Banghart will concede that an argument exists that the "F.O.B Ludlow, SD" language (and consequently all F.O.B. language in the various Banghart contract for sale agreements) is a bit confusing and likely subject to different interpretations. Staff has taken the position, albeit contrary to the UCC law stated above, that the F.O.B. designates a

delivery location, likely focusing more on the "Delivery Location" typewritten language. Banghart takes the position that the UCC definition should apply, focusing more on the handwritten "Ludlow, SD" language. Given the prospect of differing interpretations, an ambiguity analysis is needed, and the process for resolving ambiguity invokes the application of the rules of contract construction.

The South Dakota Supreme Court has defined "ambiguity" in contracts as follows:

> [a] contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.

Pesicka v. Pesicka, 2000 SD 137, ¶10, 618 N.W.2d 725, 727.

Assuming, arguendo, that staff's interpretation of the contract is objectively reasonable, and given Banghart's reliance on the statutory F.O.B definitions, then the contract may be ambiguous. Upon a finding of ambiguity, the "proper interpretation of a contract must give effect to the intention of the contracting parties."

Looking again at Exhibit 22, the producers address is in Scranton, ND, and the "Delivery Location" is set as "Ludlow, SD". A basic map review shows that the producer's physical address is just a few miles from the "Delivery Location" of Ludlow, SD. Based upon a quick Wikipedia search, which the undersigned counsel submits is not the best of authorities, the population of Ludlow in 2018 was approximately thee (3), and the only business in town is a bar. (See https://en.wikipedia.org/wiki/Ludlow,_South_Dakota). At the June 21, 2023 hearing, Jeremey Frost will present evidence to the Commission that Ludlow does not have a grain scale, much less a grain elevator. Further, Banghart does not maintain a business address in Ludlow,

SD; rather its sole place of business is on office located in Gettysburg, SD. April 27, 2023 transcript 190:8-14. For these reasons, it seems highly unlikely that the parties intended to ship to a delivery location in Ludlow as Banghart has no principal place of business in Ludlow, and there is no scale or elevator.

If there are still remaining doubts about the intention of the parties as to the "Delivery Location" line, Wade Hardes testified at the May 9, 2023 hearing that the wheat purchased came from a bin site in Ludlow, SD despite the fact that the producer had a ND address. May 9, 2023 transcript 32:18-34:7. Based upon the location of the grain at the time of the execution of contract for sale agreement, it makes little sense to think that Banghart or the producer intended to transfer grain from the Ludlow, SD producer's bin site, and have it delivered to the same bin site. If there is ambiguity in the contract, it makes no logical conclusion to conclude that the parties intended to deliver the grain to exactly where it was. Based upon the 10-11 hours of testimony presented to the Commission thus far, this Commission should have a very good understanding of the basic business model of Banghart. Banghart makes producers money by finding grain buyers, most of the time out of state, that are willing to pay higher prices while bypassing the traditional grain elevator structure. This is accomplished by trucking the grain out of state. *See Generally the testimony of Austin Gross - April 27, 2023 transcript 149:7 - 150:25.* Finally, the parties clearly intended to ship the grain another destination as Wade Hardes testified that the grain *was* shipped to another destination in Watertown, SD. May 9, 2023 hearing 37:2-18. It follows, that if the contract term "Delivery Location: F.O.B. Ludlow" is determined to be ambiguous, then the logical intention of the parties clearly indicates that Ludlow was never

intended to be the dentition; it was written pursuant to is UCC definition for setting the terms of shipping and risk of loss.

By engaging in the analysis above, Banghart is not conceding that the contract term is ambiguous. "The fact that the parties differ as to the contract's interpretation does not create an ambiguity." *Zochert v. Nat'l Farmers Union Prop. & Cas. Co.*, 1998 S.D. 34, ¶ 5, 576 N.W.2d 531, 532 (citing *Alverson v. Nw. Nat'l Cas. Co.*, 1997 S.D. 9, ¶ 8, 559 N.W.2d 234, 235). In *Halls v. White,* 2006 S.D. 47, ¶8-16, 715 N.W.2d 577, 581-584, the Supreme Court looked at statutory definitions of "mobile home" when a restrictive covenant did not contain language defining "mobile home." *Id.* In that case, the Court found that engaged in a thorough analysis of the statutory changes to the phrase "mobile home" and ultimately concluded that if a word or phase is statutorily defined, that statutory definition should be applied to the contract. Here, staff disagrees with Banghart as the the meaning of "F.O.B. Ludlow, SD," but never addresses the statutory definition of "F.O.B." SDCL 57A-2-319(1)(a) states:

> When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (§ 57A-2-504) and bear the expense and risk of putting them into the possession of the carrier; or…..

Given that Ludlow, SD was the origin and current location of the grain at the time of executing the contract for sale agreement, "F.O.B. Ludlow, SD" is clearly an F.O.B. origin designation, thus controlled by the definition in SDCL 57A-2-319(1)(a). Banghart's position and argument is that "F.O.B. Ludlow, SD", utilizing the UCC definition, indicates that the producer is responsible to place the grain with the shipment carrier (truckers) and the producer bears the risk of loss until loaded with the carrier. This interpretation squares perfectly with the statutory definition, the overall business practices of Banghart, and makes sense given all other contextual

matters offered by the parties at the various hearings. Staff's position that "F.O.B. Ludlow, SD" represents a delivery destination, lacks supporting authority, ignores the statutory definition of "F.O.B.", fails as a common sense reading of the contract, and self-serving.

As this Commission is aware, Banghart has engaged in numerous contracts with several producers. Several of these contracts are in the record as part of staff's exhibits, the Affidavit of Jan Banghart in Support of Motion to Allow Delivery on Open Contracts, or in the parties' exhibits at trial. Banghart respectfully urges the Commission to carefully review the "F.O.B." designation on each and every contract. With very limited exception, every Banghart contract for sale agreement contains an F.O.B location that is either the prouder's address, nearest town, or their bin site. Banghart has engaged in the Ludlow analysis by example herein as it was discussed at hearing, and perhaps the most confusing of all. However, the same analysis works on all other contract for sale agreements as they are generated on the same contract form, and essentially involve the same type of transaction.

In summary of this sub-issue, because the UCC controls, the statutory definition of "F.O.B." should be controlling absent another agreement of the parties. The subsequent conduct of the parties and common sense both point to an unambiguous contract for sale agreement that calls for title to change at the time of delivery and the producer bears the responsibility of loading the grain onto the carrier and bearing risk of loss on the same until loaded. When the grain is loaded, the producer retains title until delivered, despite the trucker having physical possession of the grain. Title, possession, and risk of loss are not the same thing.

D. Staff's implied argument that the grain sale contracts must have a delivery location is flawed, as the UCC contains default rules in the absence of delivery location specifics.

Staff also argues that "F.O.B. Ludlow, SD" must be the delivery location because "[t]he only destination designated in the contract is the FOB-South Dakota location specified in the contract." Staff brief 14. Staff's conclusion is incorrect, and it seems to imply that the contract for sale agreement must have a delivery destination listed. Staff's arguments on page 14 of its brief are unsupported by controlling law and flatly ignore the application of the default rules of the UCC.

Because the F.O.B. designation is an origin designation as set forth in SDCL 57A-2-319(1)(a), then subsection (3) of that same statute applies, which states in pertinent part:

> (3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (§ 57A-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

This subsections requires that Banghart must provide to the producer reasonable instructions for making delivery. Looking at the contract as a whole, it is apparent that the no instructions for delivery have been "reasonably" provided. In that event, SDCL 57A-2-319(3) allows the producer in his discretion to treat the failure to provide delivery instructions as a "failure of cooperation" under SDCL 57A-2-311, the same not restated here, as there is no evidence presented on the record that any producer customer of Banghart has utilized this option. Thankfully, the UCC provides default delivery options in situations where delivery instructions

are not agreed upon by the parties. In other words, the contract for sale agreement does not fail because the delivery terms are unstated.

SDCL 57A-2-308 provides the default rules for taking delivery when the delivery terms are not provided. That statute states:

> *Unless otherwise agreed*
> (a) The place for delivery of goods is the seller's place of business or if he has none his residence; but
> (b) In a contract for sale identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
> (c) Documents of title may be delivered through customary banking channels.

Emphasis added. The default UCC rules give first preference to the subsequent agreement in the language "unless otherwise agreed." *Id.* Staff states in its brief that "[n]either Staff, nor the Commission, has the ability to look into the minds of each grain seller to determine whether a contract adequately reflects the agreement made between buyer and seller, and under the law, inquiry is not appropriate." Staff brief 12. Banghart almost agrees with this statement. Banghart agrees that mind reading is not possible or necessary, because same information can be gleaned from the evidence on the record.

1. No evidence has been entered on the record indicating that any producer has voiced a problem with the delivery instructions in any Banghart contract for sale agreement. To the contrary, the record does indicate that millions of dollars of South Dakota grain were sold out of South Dakota, despite the lack of delivery instructions.

2. The is no evidence on the record to conclude that any producer has elected under SDCL 57A-2-308 to deliver grain to Banghart's principal place or any other personal residence.

3. It is clear from Respondent's Exhibits 17 and 18 at the April 27, 2023 hearing that approximately the following amounts of grain were sold by Banghart outside of South Dakota:

Summary of Banghart's Exhibits 17 and 18

	Licensing Year 2021-2022 Exhibit 17	Licensing Year 2022-2023 Exhibit 18
Total Grain Purchased by Banghart (all states, all purchases, all goods)	$10,512,251.66	$8,958,135.86
Subtotal of Grain Originating from South Dakota Producers	$8,637,364.80	$8,161,113.25
Percentage of Banghart's grain originating from SD	82.16%	91.10%
Total of all grain from all states sold by Banghart to SD Buyers	$4,834,810.42	$3,761,266.59
Total of all grain from all states sold by Banghart to out-of-state Buyers	$5,677,441.24	$5,196,869.27
Percentage of Banghart's total grain sold to out-of-state buyers	54.01%	58.01%

4. There is no record evidence that any producer has voided the contract, treated the delivery instruction failure as a breach of cooperation under the UCC, or initiated a lawsuit against Banghart. No testimony has been offered than any producer has been harmed by Banghart.

Based upon the four logical deductions above, it is clear that despite the lack of delivery instructions to South Dakota producers, between 54 and 58% of that grain was delivered to out of state buyers. It can be logically deduced that Banghart was able to, after the contract for sale agreement was drafted, convey to the producers clear delivery and trucking instructions. The producers obviously agreed with those instructions as the sales were consummated out of state. Looking at the chart above, more than 80% of Banghart's customers (by dollar amount) are from South Dakota, and more than 54% of those goods were shipped out of state. This squares perfectly with staff's contention that "Austin Gross … testified that he was aware that the grain he sold to Banghart would likely be resold outside of South Dakota."

For the above-stated reasons, the absence of specific delivery instructions or locations can be cured by the subsequent agreement of the parties under SDCL 57A-2-308. Obviously, Banghart would not have been able to operate a successful business, pay all producers, and keep all its customers such as Austin Gross happy if it did not subsequently provide mutually agreed upon shipping instructions to its consumers. Furthermore, given the options under UCC 57A-2-308, these SD producers could, quite technically, have dumped the grain in Banghart's office driveway in Gettysburg. Rather, due to the implied agreement, subsequent contract with Banghart, and their course of dealing, the contract for sale agreements were supplemented with delivery instructions for mostly out of state delivery, all in accordance with the UCC.

E. Banghart's participates in interstate commerce, which the State of South Dakota cannot regulate.

Now that it has been established that the UCC governs the contracts between Banghart and producer, and that various UCC provisions provide default rules allowing for the parties to

subsequently agree on delivery terms and location, the Commission must decide if it has authority to regulate Banghart's conduct outside of South Dakota.

Pursuant to the commerce clause of the United States Constitution, Art. 1, s 8, cl. 3, no state statute may obstruct or burden the exercise of the privilege of engaging in interstate commerce transactions. The determination of whether or not a transaction is in interstate commerce is dependent upon the interpretation of the Federal Constitution and upon that question, the determination of the United States Supreme Court is final. *Oskey Brothers Petroleum Corporation v. Gorder, et al.*, 79 S.D. 168, 109 N.W.2d 893.

Given the uniqueness of this issue raised by Banghart and the nature of its business, South Dakota has no caselaw on point directly analyzing the PUC's ability to regulate grain dealers engaged in interstate commerce. In looking to other authorities, as suggested in *Oskey*, the United States Supreme Court has interpreted North Dakota regulation of grain buyers shipping large quantities of grain to a neighboring state.

In *Lemke v. Farmers Grain Co.,* 258 N.W.2d 50 (1922), the Supreme Court took up an appeal of a North Dakota cooperative association that bought and sold grain from North Dakota producers for the primary purpose of selling to out-of state (mostly Minnesota) buyers. Prior to the appeal, the North Dakota passed several laws that regulated grain buyers. The cooperative association appealed the 8th Circuit Court of Appeal decision to reverse an injunction of the North Dakota Laws. The United State Supreme Court engaged in an analysis of whether the statutes regulated interstate commerce. The Court looked looked carefully at the cooperative's "course of dealing in the buying of grain." *Id.* at 55. The Court stated that "[W]e have defined the beginning of interstate commerce as that time when goods begin their interstate journey by

delivery to a carrier or otherwise." *Id.* It was argued by the appellee that the the North Dakota regulatory statutes were "essential to protect [the grain growers] from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. *Id.* at 60-61. "This may be true, but [the United States] Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed." *Id.* at 61. The *Lemke* court also took note that there were effectively no in-state, end-user markets for the wheat crops purchased by the cooperative, essentially requiring the cooperative to sell the grain out of state under any conditions. *Id.* at 53. Ultimately the Court determined that the North Dakota regulatory statutes were "beyond the power of the State, as it is a regulation of interstate commerce when applied to [the cooperative association's] business." *Id.* at 61.

The *Lemke* case is analogous to the instant matter before this Commission. Like the North Dakota cooperative, Banghart is buying grain from its in-state producers, for eventual sale, mostly occurring out of state. The majority of Banghart's business model is shipping grain out of state as evidenced in the summary chart above. Arguably, this chart does not take into account the interstate commerce transactions that occur as a result of out-of-state producers selling grain within South Dakota. Regardless, it is undisputed the Banghart's course of dealing is significantly vested in interstate commerce, and given the specialty crops (sunflowers, millet, confection sunflowers, and others) there is little to no end-user market within South Dakota for the ultimate selling of these specialty crops. Based upon the holding in *Lemke,* SDCL 49-45-7.1 places a burden on Banghart's ability to engage in interstate commerce and Banghart's transactions in interstate commerce are not subject to PUC regulation or state statute.

Staff will likely argue in response that the grain purchased by Banghart was loaded in South Dakota, and the initial transportation of the grain out of state was made by traveling through South Dakota. However, a similar argument has been made by the North Dakota PUC in a similar case. In the 1983 case of *Northwest Term. Elevator Ass'n v. Minnesota P.U.C.* 576 F. Supp. 22 (D.Minn 1983), the United States District Court of Minnesota ruled that arguments of that nature are not convincing. The Court analyzed a PUC regulatory statute that a the plaintiff elevator argued was an unlawful restriction on interstate commerce. The Court ultimately stated:

> The right to buy [grain] for shipment, and to ship it, in interstate commerce is not a privilege derived from state laws, and which they may fetter with conditions, but which is a common right, with regulation of which is committed to Congress and denied to the state by the Commerce Clause of the Constitution.

Id. At 34 (quoting *Shafer v. Farmers Grain Co.,* 268 U.S. 189, 199, 45 S.Ct. 481, 485, 69 L.Ed. 909 (1925). This holding from the District Court of Minnesota is precisely the argument made by Banghart. The primarily specialty grains purchased by Banghart are subjectively and objectively known by the producer and Banghart to be ultimately shipped out of state to better markets. The course of business and course of conduct of Banghart is consistent with this knowledge. Banghart never takes title to the grain until it is out of state *and accepted* by the out of state buyer. Banghart's business model has been clear, and the UCC provisions stated above supplement that contract for sale agreements, supporting the conclusion that title transfers in interstate commerce. The ability to regulate interstate commerce rests with the federal government and not the states.

A substantial portion of Banghart's business transactions take place in interstate commerce as set forth in the table above, compiled from Banghart's exhibits 17 and 18. These

transactions most often involve specialty grains going to unique out of state purchasers. It is this direct to end user, "eliminate the middle man" business model that provides the significant price boost to the producers, and allows Banghart to be a successful business. Limiting Banghart's interstate commerce to $5,000,000.00 is an unlawful restriction on its business. While in-state transactions are subject to regulation, it is clear from the table above that Banghart never exceeded $5,000,000.00 in annual sales if the out-of-state purchases are excluded for the reasoning above.

F. Banghart's arguments presented herein are consistent with staff's prior arguments, most specifically with regard to the Anderson Seed matter.

As discussed at the evidentiary hearing, Jeremey Frost was an employee at CHS when the Anderson Seed matter was addressed by this commission. (See Spink County File CIV12-44, and Grain Warehouse Docket Number GW12-002.) A copy of staff's March 12, 2012 Anderson Seed Response and Objection is included in this record as Exhibit 20. In that filing, staff repeatedly made clear that its position is that out of state transactions are not covered by a South Dakota grain buyers bond. Staff stated: "Because Anderson Seed had locations outside of South Dakota, the evidence submitted by HS supports Staff's determination that the disputed loads were in fact delivered to facilities out of state. Sales outside of South Dakota are not covered by the bond." Exhibit 20, pages 5-6. It is imperative, and implied within this Commission's authority that its application of the law be even-handed, and not resulting in unwarranted disparity.

In *Anderson Seed*, staff argued against bond coverage for a South Dakota corporation, simply by focusing on the ultimate place of delivery. There was no argument concerning where

title transferred, or the nuances of the contract, rather the argument was strictly focused on the delivery location. Likewise, in all Banghart interstate commerce transactions, delivery certainly occurred out of state, with title transferring at the same time. Simply put, staff's opinion in *Anderson Seed* does not square with its opinion in staff's brief. Moreover, given the fact that Jeremey Frost was involved in *Anderson Seed* as an employee of CHS, it makes sense why he would rely upon staff's opinion in that instance.

G. In the alternative, if the Commission does not agree with Banghart's legal arguments herein, Banghart's good faith reliance upon staff emails, passed inspections, and *Anderson Seed* militate for a minimal fine or punishment.

The arguments presented by Banghart herein set forth its logical reasoning at to why UCC and the prohibition of state regulation on interstate commerce do not authorize this Commission to count its transactions in interstate commerce toward the $5,000,000.00 cap for its Class B license. Should the Commission overrule these arguments, it certainly should not be made with a finding that Banghart intentionally, maliciously, or flagrantly violated the law.

Banghart relied upon not only Staff's position in *Anderson Seed* but also on emails from the staff members. As set forth in Exhibit 23, Cody Chambliss told Jeremey Frost in writing: "I feel like we have been over this time and time again. If title passes in South Dakota there is bond coverage with your current license." Banghart's Exhibit 23 from April 27, 2023 hearing. Cody's comments at that time were consistent with staff's opinion in *Anderson Seed,* again informing Jeremey Frost that staff's legal position on that issue had not changed.

Staff also dialed back on its demand that Banghart strictly comply with the January 12, 2023 cease and desist letter. At the March 28, 2023 hearing on Banghart's Motion to Allow

Delivery on Open Contracts, staff indicated: "If Banghart truly believes that they hold a valid grain buyer license, and they can do business in this state, then why did they file this motion?" Audio transcript of March 28, 2023 hearing at 2:12:14. By offering this question, staff has conceded that the cease and desist letter is certainly not an order of the commission or district court, and that in the end compliance with the cease and desist is only really necessary if the Commission decides the case against Banghart. Based upon the caselaw, UCC provisions, *Anderson Seed* and the arguments herein, Banghart has never violated the cease and desist order. Despite taking delivery in April of the Ludlow loads, the approximately $42,000.00 value of those loads, treated as in state transactions, do not put Banghart near the $5,000,000.00 threshold for licensing year 2022-2023. Should Banghart prevail on the arguments presented herein, the issue of whether or not Banghart violated the cease and desist should be denied as moot and not taken into consideration as grounds for denying any Class A or B license. The opposite question to staff would be: If staff was so sure that Banghart violated the law, then why did it not move the commission or circuit court to issue an injunction or other protective order? The answer to both questions is that this matter has been disputed from the get-go, and has yet to be fully resolved.

Lastly, Banghart passed its inspections, complied with the discovery process, did not damage any producer, and participated in all hearings. Despite the PUC staff trying to shut down their operations, Banghart has maintained sufficient financial ability, continued to try to work with staff, and has moved to renew its class B license.

I. Conclusion

As to this issue, staff will not be able to meet its burden to show that Banghart purchased in excess of $5,000,000.00 in either licensing year. The UCC establishes that title transfer takes place upon the agreement of the parties, and the "destination" language presented in the contract for sale agreements certainly is not reasonably interpreted as a true destination. Lastly, the business practices of Banghart, coupled with the specialty grains they purchase, and their out-of-state markets clearly result in Banghart doing the vast majority of its business in interstate commerce, an area that only the federal government can regulate. Banghart concedes it would be subject to federal regulation on those transactions, but not SD PUC regulation.

2.) Did Banghart late pay producers in violation of SDCL 49-45-10?

The complaint points out 8 alleged violations of Banghart failing to pay producers as required by SDCL 49-45-10, said statute stating:

> A grain buyer shall pay the purchase price to the owner or the owner's agent for grain upon delivery or demand of the owner or agent unless payment is to be made in accordance with the terms of a voluntary credit sale which complies with the requirements of this chapter and rules promulgated thereto. Full payment of any cash purchase shall be made by the grain buyer within thirty days of *final* delivery.

Emphasis added. The complaint, nor Cody Chambliss's testimony at the April 27, 2023 hearing provide many details on these alleged 8 violations. The basis summary of staff's argument is that Cody reviewed the records and he found that Banghart late payed. However, staff did not exactly articulate which contracts, producers, or provide context as to these violations.

However, Banghart introduced Exhibit 21 and Jeremey Frost provided much needed context. Frost indicated that producer 1062M Beastrom was paid two days late, and this was due in part to the producer asking Frost to hold on writing the check, to which Frost states in his recent affidavit is wrong. Furthermore, producer 1017G Madsen was paid 12 days late, and this was due in part health issues with Jan, and, at the same time, Madsen was pre-paid for other loads. Austin Gross testified that he believed he was paid within 30 days of final delivery on the last two contracts set forth on Exhibit 21. April 27, 2023 transcript 153:16-157:11.

Staff seems to want Banghart to pay for all grain delivered within 30 days; however, that is not what SDCL 49-45-10 requires. Payment must be made with 30 days of "final" delivery, and based on the testimony of Austin Gross and Frost, that is when the contract for sale agreement is delivered in full. Jeremey provided in his testimony a complete explanation of all loads, and based on the requirement of "final" delivery, only two payments were made late.

Banghart concedes two minor incidents of late payments: one at producer request, and another partly due to health issues with Jan. Those two instances were isolated incidents, particularly when viewed against the vast number of grain transactions that Banghart handles. SDCL 49-45-10 does not set forth a specific monetary penalty for these violations. Banghart submits that a private reprimand or warning is sufficient deterrent to keep this from happening again. Banghart urges the Commission to read the recent affidavit of Jeremey Frost as it pertains to his understanding of this statute.

In conclusion, the Commission should find the Banghart late payed only two times, and the the remaining six occasions were not late as the producers failed to make final delivery, thus triggering the 30 day payment clock

3. Banghart's brief responses to staff's post hearing brief.

A. Staff's statement of jurisdiction and authority.

Banghart takes issue with staff's contention that it has full jurisdiction over "licensed and unlicensed grain buyers." This statement is not entirely accurate. SDCL 49-45-1 states that "Before transacting the business of grain buyer *in this state*, a person shall obtain a grain buyer license from the commission." Emphasis added. This statute confers jurisdiction only on those transactions within SD, not partially in South Dakota. Banghart hereby restates its arguments that a vast majority of Banghart's transactions occur in interstate commerce. Staff does not offer any case law or authority providing that this Commission can regulate interstate commerce. Therefore, staff's conclusion of all encompassing jurisdiction is not an accurate statement of the law.

B. Staff's statement of the facts.

The facts of this case have been properly presented to the Commission by testimony and Exhibits, the same to be supplemented at the June 21, 2023 hearing. Staff's statement of the facts is taken out of context and does not provide a complete summary of all things presented to the Commission.

C. Staff's statement of the issues?

Banghart takes umbrage with staff's statement of issues #5 and #6 pertaining to making officers liable for alleged violations and whether or not Banghart violated the terms of a memorandum of adjustment. Banghart objects to these two issue being argued before this commission on the grounds that they were never pleaded in the complaint, and staff never moved to amend the complaint. Allowing staff to seek the requested relief in these two issues as this

juncture deprives Banghart of its right to notice, right to due process under the 5th and 14th amendment, and also deprives Banghart of sufficient time, resources and discovery opportunities to contest the same.

Without waiving said objections, Banghart will respond to those issues in the order presented in staff's brief.

D. Burden of Proof

Banghart agrees that the burden of proof rests with staff to show that is has jurisdiction and that it has proven by a preponderance of the evidence all issues presented in the complaint.

E. Staff's argument that Banghart purchased in excess of $5,000,000.00

Staff takes the position that by allegedly purchasing more than $5,000,000.00, Banghart's license was automatically terminated. This contention is not supported by the law. Banghart has never received notice from the PUC revoking, terminating, suspending, or cancelling its currently held Class B license (Expiring June 30, 2023). Banghart is listed as an active licensee on the PUC webpage, and a picture of that web-listing is below:

South Dakota Grain Warehouses/Grain Buyers

As of Friday, May 5, 2023

This list is subject to change on a daily basis. **Licenses in effect until June 30, 2023.**

Permit Type Key: B-Buyer Only, Federal Warehouse, S-State Warehouse, W-Warehouse Only

Licensee	Doing Business As	Location	Permit
BANGHART PROPERTIES LLC-SEE SDPUC DOCKET GW23-001	IN THE MATTER OF PUC STAFF'S COMPLAINT AGAINST BANGHART	GETTYSBURG	B

(See https://puc.sd.gov/commission/warehouse/Grain License Info.pdf)

Banghart currently maintains physical possession of its grain dealer license. Accordingly, Banghart has not been asked to return the license. Banghart remains a licensed grain dealer under the rules, and is listed as so on the PUC's website. On top of that, Banghart was sent a renewal license application by email, and that is what prompted Banghart's pending application for Class B license.

SDCL 49-45-16 sets forth the formal procedure for suspending a grain dealer license as follows:

> The commission may immediately suspend the license of a grain buyer and the grain buyer shall surrender the license to the commission if:
> (1) The grain buyer refuses, neglects, or is unable, upon proper demand, to redeem any scale ticket issued by the grain buyer, through redelivery or cash payment;
> (2) The grain buyer refuses, neglects, or is unable to provide a bond in an amount required by the commission;
> (3) The commission has knowledge of any act of insolvency, including the filing of a petition in bankruptcy naming the grain buyer as debtor; or
> (4) The grain buyer refuses to submit to an inspection or cooperate with the lawful requests of a commission inspector, including requests for access to and copies of the books and records of the grain buyer.
> Within fifteen days the grain buyer may request a hearing pursuant to chapter 1-26 to determine if the license should be revoked. If no request is made within fifteen days, the commission shall revoke the license.

It has not been even alleged that Banghart has violated any of the four enumerated violations in SDCL 49-45-16 thereby triggering the PUC's ability to immediately suspend Banghart's licensing. Despite the allegations made by the PUC staff in the Complaint in this matter, the allegations made in the pending complaint (not yet ruled upon) of purchasing in excess of the five million dollar cap does not trigger suspension authority under SDCL 49-45-16. Had legislators considered excess purchases (or even the allegation of excess purchases) to be sufficient grounds for immediate suspension, such a violation would have been

included in this statute. In summary, Banghart's license has not been suspended, and the allegations raised in the complaint do not support relief under SDCL 49-45-16.

SDCL 49-45-3 also permits the PUC to "at any time for cause shown" to revoke or suspend any grain buyer license. At this time, nor previously, as Banghart been in receipt of any request, order, or notice that proceedings have been initiated to revoke or suspend its grain dealer license.

The fact remains, as established at trial, that Banghart was duly issued a license. Under the law, the license can be self surrendered (which Banghart has not done), it can be immediately suspended, or revocation proceedings can be started. To date, none of those thee options have occurred.

Because a license was issued and never suspended, revoked, or surrendered, it logically follows that Banghart remains licensed. PUC staff can take whatever position they want, but staff is different than the Commission, and even then the Commission is subject to Court review. The PUC staffs arguments for "no license" have been basic and vague, unsupported by controlling law. A complete and through review of the docket GW23-1 shows that no action or decision was made to revoke or suspend the license. Banghart remains licensed through at least June 30, 2023.

Finally, staff's contention that the license can effectively be taken away without due process of law if fatally flawed. In *Rushmore State Bank v. Kurylas, Inc,* 424 N.W.2d 649 (S.D. 1988) the South Dakota reviewed a case where a bank tried to exercise a security interest in a liquor license. In its analysis of the case, the Court stated:

> We note that the license holder is granted fundamental due process rights such as a hearing, notice thereof and a right to be heard at such proceedings when consideration is given to grant, renew or revoke a license. However, such due process rights are guaranteed by the Constitution to license holders as well as property owners.

Id. at 653. (Quoting: *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), and *Affiliated Distillers Brands Corp. v. Gillis*, 81 S.D. 44, 130 N.W.2d 597 (1964).

In *Bell*, the United State's Supreme Court reviewed a case where a Georgia law intended to automatically suspend a driver's license upon occurrence of an accident by an uninsured driver. The Court ultimately held that the licenses are afforded "due process" and that the opportunity for hearing must be "meaningful." *Bell v. Burson*, 402 U.S. 535, 541, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971).

In reviewing these cases, it is apparent that taking away a license without a meaningful hearing is contrary to the intent of the constitution. In this case, a revocation proceeding is required to take the current license from Banghart. It make sense that the SD legislature would require the hearing under SDCL 49-45-16 as stated above, as it knew that a hearing would be required to take a license. Given such a hearing was not held, nor waived, Banghart still maintains its license.

Finally, staff contends that because Banghart did not have a grain buyer license, it violated SDCL 49-45-1 by purchasing without a license. This reasoning is also flawed, and a self-serving attempt to avail itself of the opportunity for a $50,000.00 penalty. Simply put staff's claim that Banghart violated 49-45-1 fails as Banghart was at all times, and currently is licensed. If at some point the license is revoked, not renewed, or otherwise suspended, then Banghart

would agree that a subsequent gain purchase would be a violation of that statute. Lastly, the SD legislature had the opportunity to include "excessive purchases" in its grounds for immediate suspension under SDCL 49-45-16, but did not do so, thus bolstering Banghart's position that alleged excessive purchases by a bonded grain buyer are not serious violations.

Staff seeks to discuss statutory intent, but such analysis is not needed as the statutes are not on their face ambiguous. Staff states it is "unreasonable to accept a position that the Legislature would establish specific limitations on a Class B license, and task the PUC with implementing those limitations, but fail to provide a mechanism for the PUC to enforce the limitation nor stop or punish transactions which violate those limits." Staff brief 9. However, the PUC had that authority in SDCL 49-45-6 which allows PUC to promulgate rules for the "procedures and requirements for license suspension, revocation, transfer of ownership, or insolvency by a grain buyer." As such, the PUC can make rules pertaining to excessive purchases, and if it has failed to specifically do that, the answer is not lump this into the SDCL 49-45-1 penalty; rather, it is go back and promulgate rules to address this situation. PUC staff to Banghart's knowledge, has never advised the existence of a promulgated rule that addresses excessive purchases. The lack of a specific penalty is likely the result of that fact that this case is a nuanced issue, and the issue has not arisen to this level before. Banghart hopes that the PUC will promulgate rules in this subject area to better allow all grain buyers to understand how such alleged violations will be treated in the future.

F. Staff's arguments that Banghart exceeded $5,000,000.00 in purchases in each of the two licensing years.

This issue has been throughly briefed above in section 1 by Banghart.

G. Staff's argument that Banghart engaged in late paying producers.

Banghart adamantly rejects staff's claim that "testimony clearly calls into question whether contracts were altered to change a required payment date." Furthermore, as stated in Cody's affidavit, his knowledge is all second hand from Sara McIntosh, who did not testify for staff. Cody has no first hand knowledge of late payments, and staff did not cite specific contracts or examples of the same (such as checks, contracts, or bank records). No producers testified that they were paid late. No evidence was presented that contracts were changed, but even if so, the terms of Banghart's contract for sale agreements are able to be amended by the mutual agreement of the parties. The implication of fraud or deceit is seriously misplaced, pure conjecture, and unsupported by the record.

Otherwise, Banghart rests on its argument in section 2 above.

H. Staff claims Banghart provided false or misleading information multiple times.

Banghart disagrees with this assessment. Banghart did provide some inaccurate information based upon whether or not the information came from quick books of the various accountants. Nothing was proven to be intentional, and staff cannot show how any person or producer was put at risk by misleading information. In many cases, Banghart underrepresented its financial strength. Banghart has met or exceeded all financial requirements, and those allegations were summarily dismissed by the Commission on May 9, 2023 as the class A license was denied on alternative grounds, other than financial condition.

I. Banghart did not keep records as required by law.

Due to the length of the record and this brief, suffice it to say, that Banghart's alleged violations in this area are fairly minor. Again, no producer was injured or harmed, the violations did not cause major confusion. Recently filed affidavits of Jan Banghart and Jeremey Frost address several record keeping changes to rectify staff's concerns. Jeremy and Jan have both met with PUC staff to try to figure out what is needed, but staff has been vague and not as forthcoming as need be. For instance, Cody Chambliss promised to send an example financial statement containing the categories he would like to see, but he has failed to send that document.

The allegations in this section of argument are minor, and do not by themselves constitute grounds for denying a license.

J. Banghart and Frost have prior violation history.

Banghart's Nebraska PSC case does not need to be restated here. The case has been appealed, argued, and the parties are awaiting decision. Based upon the briefs, arguments, and oral argument presented, the undersigned counsel is confident that the Nebraska Court of Appeals will overturn the oppressive and illegal civil penalty the Nebraska PSC imposed. However, the $290,000.00 fine is accounted for in Banghart's financial documents, and Banghart still exceeds all financial requirements.

Lastly, this case is against Banghart. Neither Jan Banghart personally nor Banghart Properties, LLC was a party to Mr. Frost's previous involvement with the PUC. Furthermore, there is no indication in the record that Banghart in Nebraska nor Fearless in South Dakota have engaged in subsequent violations of the law. Jeremey Frost is not a party to this matter.

K. Criminal Culpability

Banghart argues that Rick Banghart is neither an employee, owner, nor manager of Banghart. Referral of criminal charges against Rick would be easily dismissed, and therefore the referral should not be made. Likewise, Jeremey is an independent contractor. Regardless of the labels used on letterhead, the 1099 documentation, payroll documentation, and Secretary of State records to be introduced by Banghart at the June 21 hearing will clearly establish that Rick and Jeremey have no business being referred for criminal prosecution.

That being said, because no significant violations of the SDCL Charter 49-45 occurred, criminal referral serves nothing more than a retaliation. The decision of criminal referral serves no legitimate purpose, is a waste of judicial resources, and further fosters the divide between the parties. If a referral is made, Banghart, its employees, subcontractors, and managers will defend the case completely. If referrals are made without proper grounds, such as a referral for Rick's prosecution, a possible claim for malicious prosecution lingers.

L. Staff claims Banghart violated the memorandum of adjustment.

As stated above, this claim has not been properly noticed in the complaint. Banghart argues that this matter is moot once the Commission decides that Banghart did not exceed its statutory $5,000,000.00 purchasing power as its transactions predominately in interstate commerce. As such, staff's claim will be denied as moot, notwithstanding Banghart's previously stated objections.

M. Staff's Conclusion

In its conclusion, Staff proposes additional terms or suggestions for a conditional Class B license. Banghart is not completely opposed to the list of conditions, however more explanation and clarification is needed before Banghart could accept those terms. Some questions are:

1. What type of quarterly financial is requested (reviewed, audited, CPA prepared)?

2. Will staff approved of the proposed contract language that seeks to clarify those out-of-state contracts and make the process easier to follow for staff and producers?

3. Regarding automatic termination, is this for SD in-state only or all purchases?

4. Staff cannot circumvent Banghart's opportunity to have a meaningful hearing on terminating a grain buyer license.

CONCLUSION

Banghart has presented a clear argument for its position that it predominately operates in interstate commerce, an arena that the SD PUC cannot regulate. Both staff and Banghart need finality to this issue to determine the remaining claims. Banghart's arguments are based in settled UCC law and long standing Supreme Court authority as to regulation of interstate commerce.

The remaining issues before the Commission are more minor. Banghart believes that a warning, private or public, as to the two instances of late payments is sufficient. Regarding other matters, should the Commission ultimately decide against Banghart, Banghart submits that a fine of $1.00 is appropriate given Banghart's good faith reliance upon settled law, representations of staff (Cody and Paul K.A.), and staff's previous position in *Anderson Seed.*

Banghart asks that this Commission overrule and deny staff's complaint as to excess purchases. With regard to late purchases, Banghart concedes two late purchases, but asks the Commission to deny staff's complaint as to the remaining allegations. Finally, Banghart asks that it be granted an unfettered Class B Grain Buyer license, and in the alternative, a conditional Class B license with conditions that make sense in achieving a healthy working relationship with

staff. Banghart desires finality to this matter, and respectfully requests that the Commission rule on these requests at the June 21, 2023 hearing to avoid interruption in its Class B license, and allow the SD producers to finally take advantage of their lucrative marketing decisions made by and through Banghart Properties, LLC.

Dated this 19th day of June, 2023.

/s/ Robert T. Konrad

BY: Robert Thomas Konrad
1110 East Sioux Avenue
Pierre, SD 57501
605-494-3004
rob@xtremejustice.com
Attorney for Banghart Properties, LLC.