

1 APPEARANCES BY TELEPHONE

2 John Brakke
3 Caren Stanley

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5 TRANSCRIPT OF PROCEEDINGS, held in the
6 above-entitled matter, at the South Dakota State Capitol
7 Building, 500 East Capitol Avenue, Pierre, South Dakota,
8 on the 15th day of January, 2013, commencing at 3:08 p.m.

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1 CHAIRMAN NELSON: GW12-002, In the matter of the
2 grain dealers bond of Anderson Seed Company, Inc. And
3 here we have a number of questions. I think these we can
4 take in order.

5 The first one being how shall the Commission
6 rule on the Martinmaas claim? And if I remember back a
7 month ago when we last visited about this, I thought that
8 maybe Commissioner Hanson was on the verge of a Motion?
9 Is that accurate or not?

10 COMMISSIONER HANSON: On the verge of a
11 breakdown? Is that what you're --

12 Well, this has been an -- thank you,
13 Mr. Chairman. This has been an extremely interesting --

14 (John Brakke joins the meeting)

15 COMMISSIONER NELSON: Thank you, John. This is
16 Commissioner Nelson. Thanks for joining us. My
17 understanding is you are not here to visit about the
18 Martinmaas claim question; is that correct?

19 MR. BRAKKE: That is correct.

20 CHAIRMAN NELSON: Okay. Thank you.

21 Go ahead, Commissioner Hanson.

22 COMMISSIONER HANSON: Well, there's a lot of
23 twists and turns on this particular issue, and I'm not
24 going to get into them to any great extent.

25 As I was reviewing all of my notes on it and

1 looking over it, there's a lot of conflictions in that
2 regard. And I for one like to rule for the benefit of
3 the party when there's conflictions.

4 But for me it boils down to the fact that I
5 think this was originally a voluntary credit sale. At
6 least it started out that way, and it certainly would
7 have been construed that way.

8 The challenge was that when the Anderson Seed
9 Company sent out the letter, which was presented -- I
10 believe it was Exhibit 2, it changed the entire story for
11 me at that point. Because it stated that if you do not
12 sign and return the contract, it is not considered to be
13 a valid contract.

14 And so when I look at the statute of frauds and
15 the requirement for certain things to be in writing, we
16 have one party that is saying that if you don't sign
17 this, we no longer have an agreement.

18 And from Martinmaas's standpoint, if you were to
19 go into court and attempt to argue his case on the other
20 side and say that he did have a contractual arrangement,
21 it would have been pretty difficult because Anderson
22 would have rightly been on the other side saying, hey, we
23 sent out the letter to him. It stated that he had to
24 sign it. The contract that he had was not signed.
25 There's a number of arenas in which they could support

1 their contention that there was not a contractual
2 arrangement.

3 And so it boils down for me to the fact that
4 originally there was a voluntary credit sale, but
5 Anderson was the one who acted to change that. And they
6 changed the rule. So for me I made remarks so I won't
7 make a Motion at this juncture. But I think
8 Mr. Martinmaas should be included.

9 CHAIRMAN NELSON: Is there a Motion? I will
10 move that the Martinmaas claim be denied. And let me say
11 this. This turned out to be a much more difficult
12 decision than what I originally thought it was going to
13 be. The hearing itself was very, very helpful to me. It
14 brought some things to light that I hadn't considered
15 previously. I wrestled with this greatly.

16 But at the end of the day I believe that the
17 claim must be denied, and here's my reasoning: It was
18 very clear in the hearing and Mr. Martinmaas readily and
19 through his credit acknowledged that he verbally entered
20 into a deferred payment contract. There's no question
21 about that.

22 We have SDCL 49-45-11 that requires a voluntary
23 credit sale to be in writing. We also have
24 Administrative Rule 20:10:12:13 that requires it to be
25 signed. But then we have the statute of frauds,

1 SDCL 57A-2-201(3)(d), which applies that statute to the
2 sale of grain.

3 And I found Mr. Domm's testimony very
4 compelling. I am somewhat concerned about the fact that
5 when the grain exception was added to that statute that
6 there was no discussion in front of the legislature about
7 it applying to a voluntary credit sale. But,
8 nonetheless, I think the plain wording of that statute
9 tells me that it must apply to a voluntary credit sale
10 contract also.

11 The statute of frauds provides an exception to
12 the requirement in SDCL 49-45-11 that the contract must
13 be signed, and that exception was met by Anderson when
14 the contract was mailed to Martinmaas and no objection
15 was made by Martinmaas in the allowed 48 hours.

16 Because of that, I find that a voluntary credit
17 sale contract was in place between Anderson and
18 Martinmaas and, therefore, Martinmaas is not entitled to
19 bond proceeds per state law.

20 Additional discussion on the Motion?

21 Commissioner Fiegen.

22 COMMISSIONER FIEGEN: Mr. Chairman, first of
23 all, this has been extremely difficult because you keep
24 on looking back at the transcript to try to put your arms
25 around it and really look at state law. And when we take

1 the oath of office as a Public Utilities Commissioner,
2 of course, we are to adhere to the law. And the big
3 issue in front of us is not about credit because I know
4 Ray Martinmaas continues to talk about, well, he didn't
5 want to give credit.

6 Well, the issue before the Commission today is
7 if it was a deferred payment or voluntary credit sale.
8 And when I look at 49-45-9 it certainly states that
9 voluntary credit sales may not participate in bond
10 proceeds.

11 So then you go back and look at the transcript
12 because I thought I heard what I heard, but you always
13 want to go back and look at the transcript. And on
14 page 14, line 11, Ray Martinmaas testimony states that at
15 the delivery time, yes, it was deferred payment.

16 And then he talks about getting, of course, the
17 written contract around December 19. And, of course,
18 there was a memo, a generic memo, didn't have a date on
19 it, didn't have who it was to, but did say something
20 about not being signed within five days.

21 Well, when you listen to the testimony it
22 certainly appears to me that Ray Martinmaas was still
23 committed to deferred payment after the first of the year
24 even if he received that letter. And even in the
25 testimony he continued to say -- he even stated that he

1 doesn't like to sign contracts because he doesn't want it
2 to be held against him.

3 And that's why we have the laws we do. And the
4 South Dakota statute is that we have an exception in
5 grain and a signature is not necessarily needed when all
6 the other items are processed.

7 So at this time although I would absolutely love
8 to support a producer that lost money in a transaction
9 with Anderson Seed, it appears to me in the state law
10 that I need to deny that today.

11 CHAIRMAN NELSON: Thank you.

12 Additional discussion?

13 Commissioner Hanson.

14 COMMISSIONER HANSON: Thank you, Mr. Chairman.
15 I do not disagree with the premises from either of my
16 fellow Commissioners.

17 I interpret this -- and this is very much up to
18 interpretation. Certainly state law is state law.
19 However, the two-day rule is not like a stop sign or a
20 speed limit sign that farmers or ranchers or whomever
21 driving down the road can readily see and know what the
22 apparent law is. It's 57A-2-201(3)(d)(iii). How many
23 farmers and ranchers are walking around with all of the
24 law books and know what's taking place all the time?

25 I think when we look at it from a fairness

1 standpoint we need to understand that farmers and
2 ranchers are working to farm and ranch, and they're not
3 attorneys. And they don't know what all of the laws are.
4 I don't know what all the laws are. And it's -- they
5 receive a letter from their processing where they had
6 left their seeds, and they had a contract in front of
7 them at one juncture that said that it's not -- they
8 don't have a contract unless they sign it. They didn't
9 sign that.

10 The intention may have been that that's what he
11 thought he had. But the fact is that then he received a
12 letter stating that please review this deferred payment
13 contract. So he knew he had the contract.

14 He was asked to sign by the blue Xs. He was
15 also asked to sign a lower right-hand corner and review
16 that paragraph. It stated quite obviously if you do not
17 sign and return the contract, it is not considered to be
18 a valid contract.

19 From his standpoint, and understanding the
20 challenges that we have had here, that our advisors and
21 our attorneys have had in trying to weigh all of these
22 different issues, is it any wonder that we should think
23 that a farmer or rancher -- and I don't mean to say
24 anything derogatory about farmers or ranchers, especially
25 since our Chair is a rancher.

1 But the challenge is that we don't know all the
2 laws. I know I've been around too many cases to know
3 ignorance of the law is no excuse, but the fact is that
4 there are just so many laws we can't -- we can't finely
5 weigh the law in a fashion that injures the innocent
6 people of our state.

7 And whether he's totally innocent or not, the
8 fact is that we have in black-and-white that Anderson
9 Seed changed the agreement. They said you don't have a
10 contract with us unless you sign this, and he didn't sign
11 it.

12 So that's my weight of it. Thank you,
13 Mr. Chair.

14 CHAIRMAN NELSON: Thank you. Additional
15 discussion.

16 You know, I would simply reinforce Steve Domm's
17 testimony. And the reason that the grain exception was
18 added to the statute of frauds was because the grain
19 industry in South Dakota relies upon a man's word. In
20 order for it to operate and operate properly a man's word
21 has to mean something.

22 And does it subsequently have to be followed up
23 in writing? Yep, it does. But in the first instance it
24 has to mean something. And from the testimony it was
25 very clear -- and, again, I give credit to Mr. Martinmaas

1 for readily admitting that he intended to enter into a
2 voluntary credit sale, that everything leading up to when
3 things went south the first part of January indicated
4 that he had a voluntary credit sale based on his word.
5 And that needs to mean something here also.

6 Additional comments? Commissioner Fiegen.

7 COMMISSIONER FIEGEN: The additional comment I
8 have is when we looked at that memo in the five days that
9 Anderson was giving them, when asked he did not ask for a
10 straight open sale. He continued to really -- it appears
11 to me through his testimony he still appeared to believe
12 in the deferred credit -- deferred payment.

13 And if he would have asked for an open sale,
14 then I would agree with Commissioner Hanson. But today
15 I'm just going to respectfully disagree.

16 CHAIRMAN NELSON: Thank you. Additional
17 discussion.

18 Seeing none, all those in favor of the Motion to
19 deny the Martinmaas claim will vote aye.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Aye.

24 CHAIRMAN NELSON: And Commissioner Nelson votes
25 aye. The claim is denied.

1 COMMISSIONER HANSON: Oh.

2 COMMISSIONER FIEGEN: I waited for you to
3 change.

4 COMMISSIONER HANSON: I forgot you had made the
5 substitute Motion. Have you called the vote yet?

6 COMMISSIONER FIEGEN: And he hit the gavel.

7 COMMISSIONER HANSON: And you hit the gravel. I
8 respectfully request that my vote -- I forgot that you
9 changed the -- made a substitute Motion.

10 CHAIRMAN NELSON: No. There was no Motion. I
11 made the original Motion.

12 COMMISSIONER HANSON: Oh. Well, Mr. Chairman, I
13 would like to change my vote to a no.

14 CHAIRMAN NELSON: We will allow that.

15 COMMISSIONER HANSON: We can go through the
16 parliamentary process.

17 CHAIRMAN NELSON: No. I am certainly good with
18 that.

19 COMMISSIONER HANSON: The parliamentary process
20 is the person who was in the majority, which I would be,
21 would make a motion to and we'd go through the entire
22 thing. Otherwise, I can simply request that it be
23 changed.

24 CHAIRMAN NELSON: I will grant that request.
25 And seeing no objection, the request is granted. It is a

1 2 to 1 vote. The Motion passes.

2 COMMISSIONER HANSON: Thank you for your
3 consideration.

4 CHAIRMAN NELSON: The next question that we will
5 deal with is how shall the Commission distribute the bond
6 proceeds? And for that I will turn to Staff.

7 MS. EDWARDS: Staff had previously prepared a
8 recommendation which we sent out to all the claimants
9 last week. Our recommendation was based upon totalling
10 up the total amount of the claim and figuring the
11 percentage of each claimant's amount and applying that
12 percentage to the bond. As of this afternoon it appears
13 that we have a party that would like to contest that. So
14 if the Commission wants to take that matter up
15 separately --

16 CHAIRMAN NELSON: I do. But I'd like for you
17 to -- and maybe there is really no argument, but make
18 your argument as to why what you've proposed is what we
19 ought to accept. And then I'll take additional
20 arguments.

21 MS. EDWARDS: Certainly.

22 Staff's findings were sent out to the claimants
23 on October 9, 2012. And the time for contesting those
24 findings expired on November 16, 2012. Claimants were
25 told that if they wished to challenge Staff's findings,

1 they must do so by November 16. Only one claimant
2 requested a hearing to challenge Staff findings, and that
3 was Martinmaas Dairy.

4 Therefore, Staff recommends that the Commission
5 not accept further testimony or evidence submitted by CHS
6 or any other claimant at this time and accepts -- and
7 requests that the Commission accept Staff's
8 recommendation as proposed.

9 Thank you.

10 CHAIRMAN NELSON: Thank you. And we had a very,
11 very recent filing from Mr. Brakke on behalf of CHS.

12 Mr. Brakke, we will at this time allow you to
13 make argument on your filing.

14 MR. BRAKKE: Thank you. Good afternoon,
15 Commissioners, Staff, and counsel. My name is
16 John Brakke, and I represent Midwest Co-op CHS.

17 COMMISSIONER FIEGEN: I have a procedural
18 question.

19 CHAIRMAN NELSON: Go ahead.

20 COMMISSIONER FIEGEN: General Counsel, is he an
21 attorney in the State of South Dakota?

22 MR. BRAKKE: No. I am not licensed in
23 South Dakota.

24 COMMISSIONER FIEGEN: What is the process? What
25 is the process of bringing attorneys into Public

1 Utilities Commission hearings? I don't know exactly
2 the --

3 MR. SMITH: Well, normally you'd have a local
4 counsel and all of that. You know, for this purpose,
5 again, it's a little different than normal because we're
6 acting under a receivership aegis. So I don't know that
7 it's quite the same as it normally would be.

8 I'm a little bit concerned about being too tough
9 on the -- and the reason why? A human -- a person can
10 appear for himself. A corporation, by South Dakota Law
11 if it's a legal proceeding, theoretically only state
12 admitted lawyers are supposed to be able to represent an
13 entity other than a human being that has protoplasm, you
14 know.

15 But here's the only concern I have is partially
16 due to the nature of this thing so far at least, we did
17 allow Ray Martinmaas to appear on behalf of Martinmaas
18 Dairy, which is also a corporation. So I'm a little
19 reluctant to be too tough on the rules of disciplinary --
20 you know, of attorney disciplinary procedure right here.

21 But really that's maybe up to you, I mean, to
22 just let him speak on behalf of them today. I guess I'm
23 not going to say no, you can't do it. We've already let
24 one person in this thing do that.

25 COMMISSIONER FIEGEN: Okay. Thank you.

1 MR. BRAKKE: If it would be of help to the
2 Commission, I do have one of my partners who is licensed
3 in the State of South Dakota who is immediately next door
4 and that could appear as local counsel.

5 MR. SMITH: Well, that wouldn't hurt maybe.
6 Could you do that?

7 MR. BRAKKE: I'll be right back.

8 MR. SMITH: Give us a little cover with the
9 Disciplinary Board anyway.

10 (Discussion off the record)

11 MS. STANLEY: Good afternoon.

12 CHAIRMAN NELSON: Good afternoon. This is Chair
13 Nelson, and who do we have joining us?

14 MS. STANLEY: Hi. My name is Caren Stanley.
15 I'm an attorney with the Vogel Law Firm. I'm in the
16 office right next to Mr. Brakke.

17 CHAIRMAN NELSON: And it's my understanding that
18 you are admitted to practice law in the state of
19 South Dakota; correct?

20 MS. STANLEY: Yes, I am. I had to look up my
21 License No. It's 4166, if you need that.

22 CHAIRMAN NELSON: Thank you. And will you be
23 making arguments or Mr. Brakke?

24 MS. STANLEY: Mr. Brakke will be making the
25 arguments, but I will remain.

1 CHAIRMAN NELSON: Thank you. And, Mr. Brakke,
2 if you could speak up just a little bit louder, that
3 would be helpful on this end. Go ahead.

4 MR. BRAKKE: Thank you.

5 Midwest Co-op timely filed a claim in this
6 proceeding for \$687,117.59. On October 9, 2012
7 Mr. Mehlhaff from the Commission wrote to Milton Handcock
8 of Midwest Co-op indicating it was the Commission's
9 belief that portions of the claim concerned either crop
10 delivered outside of the State of South Dakota or losses
11 on contracts where no delivery was made.

12 Unfortunately, Mr. Handcock believed a copy of
13 Mr. Mehlhaff's letter had been sent to me and that I was
14 addressing the matter. He did not discover his error
15 until he received last week the agenda for today's
16 meeting and the proposed payout schedule for bond
17 proceeds.

18 Midwest Co-op's full claim is, in fact, based on
19 crop that was delivered. There is no portion of the
20 claim that relates to simply losses on contracts where no
21 delivery was made. Midwest Co-op does agree that
22 \$243,250.40 of its claim or roughly 35 percent of that
23 claim concerns out-of-state deliveries and that that
24 portion of the claim would not be entitled to share as to
25 the bond.

1 However, the balance -- and I've provided as an
2 attachment to my letter the additional bills of lading.
3 That balance would be \$443,867.19 -- is for deliveries to
4 Anderson Seed in the State of South Dakota.

5 My client, Midwest Co-op, does acknowledge it
6 could have raised this dispute earlier. However, I
7 believe its failure to do so was excusable. I don't
8 believe that any party has been prejudiced. And I
9 believe that this Commission has made accommodations on
10 deadlines for at least one other claimant in these
11 proceedings.

12 As a consequence Midwest Co-op would
13 respectfully request that its allowed claim amount be
14 adjusted upward \$448,867.19.

15 CHAIRMAN NELSON: Thank you, Mr. Brakke. I'll
16 allow Staff to respond.

17 MR. MEHLHAFF: Thank you, Mr. Chair. Jim
18 Mehlhaff with Staff. This was received just today. Is
19 that working? Okay.

20 This request was received today. I haven't had
21 a chance to go through it thoroughly. Obviously, there's
22 not been enough time. But just briefly as I've gone
23 through it they've provided eight additional bills of
24 lading to be considered. Two of those were previously
25 presented in their original claim. So six of these are

1 new.

2 Of the six that have been provided, none of them
3 had a specified place of delivery. Now when we did our
4 original audit of the claim we did credit Cenex Harvest
5 States for some loads that we discovered were delivered
6 to the Redfield plant that did not have a corresponding
7 bill of lading in their original claim.

8 We feel that we've accounted for all of the
9 grain that was delivered to Redfield, and there's nothing
10 in these bills of lading to indicate beyond a shadow of a
11 doubt that this grain indeed did go to Redfield. So I
12 think there's a good chance that if we upset the
13 proceedings and kind of halt it, we'll continue to delay
14 making the distributions, and there's a good chance that
15 the outcome would remain the same, in Staff's opinion.

16 CHAIRMAN NELSON: Thank you.

17 Mr. Brakke, any response?

18 MR. BRAKKE: The bills of lading that do not
19 specify a destination, which we acknowledge, does list
20 the truckers. And based on where those truckers are
21 located and the other loads that they handled for Midwest
22 Co-op, we believe that those loads were delivered to
23 Anderson Seed in South Dakota.

24 We are aware that the Commission did previously
25 consult Anderson Seed assembly sheets. Based on

1 litigation -- I have a proceeding against Anderson Seed
2 in Minnesota -- I have great questions as to whether many
3 of the records that Anderson Seed -- or that they
4 generated are accurate.

5 So we would simply ask for the opportunity to be
6 able to consult with Staff and provide any additional
7 information Staff requests on this matter here,
8 Commissioners.

9 Thank you.

10 CHAIRMAN NELSON: Thank you. Questions from the
11 Commission?

12 Seeing no questions, is there a Motion on the
13 question of how shall the Commission distribute the bond
14 proceeds?

15 I will move that the Commission approve the plan
16 presented by Staff with no additions.

17 Discussion on the Motion?

18 Let me first address Mr. Brakke's attempt to get
19 involved today. This is nearly two months past the
20 deadline that we provided, and we believe that we gave
21 adequate notice to your client of the deadline to dispute
22 the findings of our Staff.

23 Whether there was a miscommunication within your
24 organization, there may have been. I don't know. But I
25 think we were very clear about what the deadline was.

1 And we are far, far down the track. We've just resolved
2 the last of the disputes. We have a complete plan from
3 our Staff that we are prepared to vote on.

4 The other thing that I would mention, it's
5 painfully obvious to me throughout this entire proceeding
6 that this is a zero sum game. And your contention that
7 nobody would be harmed by this, your involvement at this
8 late date, unfortunately, is not true because if you get
9 involved, there are others that lose, probably 30 others
10 that lose. And so it's not something that you can simply
11 be added at the end and it won't make any difference.

12 And so based on the fact that the deadline is
13 far passed for disputing the claim and the fact that I
14 approve of the plan that our Staff has put together for
15 us to carry to Circuit Court, I would support my Motion
16 to approve.

17 Other discussion?

18 Seeing none, all those in favor of the Motion
19 will vote aye.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Fiegen votes aye.

24 CHAIRMAN NELSON: Nelson votes aye. Motion
25 carries.

1 MR. BRAKKE: Appreciate the opportunity to
2 appear before you on phone today.

3 CHAIRMAN NELSON: Thank you, Mr. Brakke.

4 And the last question then that we have to deal
5 with on this particular docket, shall the Executive
6 Director and General Counsel be authorized to seek
7 approval from Spink County Circuit Court to execute the
8 distribution of bond proceeds?

9 Any additional comment?

10 MS. EDWARDS: Staff would just request that the
11 Commission grant the Executive Director and General
12 Counsel the authority to schedule with the Spink County
13 Circuit Court a date to go before the court and request
14 acceptance of the Commission's proposal.

15 Thank you.

16 CHAIRMAN NELSON: Thank you.

17 Questions from the Commission?

18 Is there a Motion?

19 Commissioner Hanson.

20 COMMISSIONER HANSON: In Docket GW12-002 I move
21 that the Executive Director and General Counsel be
22 authorized to seek approval from the Spink County Circuit
23 Court to execute the distribution of the bond proceeds.

24 CHAIRMAN NELSON: Discussion on the Motion.

25 Seeing none, all those in favor will vote aye.

1 Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 CHAIRMAN NELSON: Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Fiegen votes aye.

5 CHAIRMAN NELSON: And Nelson votes aye. The

6 Motion carries.

7 (The proceeding is concluded at 3:38 p.m.)

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1 STATE OF SOUTH DAKOTA)

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CERTIFICATE

3 COUNTY OF SULLY)

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5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 15th day of
11 January, 2013, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 22nd day of
14 January, 2013.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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