

STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF BROWN )

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ) CIV. 01-807  
GRAIN DEALER'S BONDS ) JUDGMENT AND  
OF WHEETCO, INC. ) ORDER APPROVING PROPOSED  
 ) FINDINGS OF FACT AND  
 ) CONCLUSIONS OF LAW AND  
 ) DECISION OF RECEIVER

### PROCEDURAL HISTORY

This action comes before the Court upon petition of the South Dakota Public Utilities Commission (Commission) to be appointed as a receiver of Wheetco, Inc. (Wheetco) pursuant to SDCL 49-45-16 and SDCL Chapter 21-21, and to take possession of the cash proceeds of the following grain dealer's bonds: (1) the bond commencing July 1, 1998, and ending June 30, 1999; (2) the bond commencing July 1, 1999, and ending June 30, 2000; and (3) the bond commencing July 1, 2000, and ending June 30, 2001. On September 20, 2001, the Commission was appointed receiver.

Pursuant to the order of the Court, the Commission held a hearing to determine claims against the cash proceeds of the grain dealer's bonds. The hearing was held as scheduled on January 16, 2002, beginning at 1:00 p.m., at the Department of Labor Meeting Room, 420 South Roosevelt, Aberdeen, South Dakota.

On February 5, 2002, Jake Schauer filed a notarized Subscription Agreement with the Commission. On February 13, 2002, the Commission received a letter from attorney Jeffrey Sveen, filed on behalf of Arnold Schurr, concerning the stock Subscription Agreement that was signed by Mr. Schurr. On March 1, 2002, the Commission received a claim from Harlan Eisenbraun stating that he had delivered \$3,822.00 of millet to Wheetco on June 30, 2000. On March 5, 2002, the Commission received a Motion to Reopen the Record from Commission Staff. The motion explained that at the hearing held on January 16, 2002, Staff had recommended that Erickson Farms had a valid claim in the amount of \$4,175.62, with \$3,822.00 for millet and \$353.62 for wheat. Following the hearing, Commission Staff learned that the millet was owned by Harlan Eisenbraun and Erickson Farms had merely performed the trucking service. Darrel Erickson confirmed that was the case. Based on further documentation received from Wheetco, Commission Staff stated that Erickson Farms has not been paid for \$353.62 for wheat and Harlan Eisenbraun/First Western Bank has a valid claim for \$3,822.00 for millet. At its March 28, 2002, meeting, the Commission considered Staff's Motion to Reopen Record. No one objected to the motion. The Commission voted to open the record and received into evidence the claim submitted by Harlan Eisenbraun and the additional documentation submitted by Commission Staff.

At its March 28, 2002, meeting, the Commission considered this matter. The Commission voted to make the following recommendations to circuit court:

1. The Commission does not have jurisdiction to consider the four claims received against the bonds covering July 1, 1995 through June 30, 1998. The Commission only received an appointment from the Court to act as a receiver for the bonds covering July 1, 1998, through June 30, 2001;

2. The Commission disagrees with Staff's position that the claimants who entered into stock Subscription Agreements with Wheetco do not have valid claims against the bond for the amount listed in each Subscription Agreement. The Commission finds that the evidence does not support a finding that these claimants converted their grain payables into common stock. No evidence was presented that, after the parties signed the Subscription Agreement, Wheetco accepted the Agreements and actually issued common stock to the claimants;

3. The Commission also disagrees with the bonding company's argument that D & M Grain is limited to the amount of its written claim submitted prior to the hearing. The Commission finds that the evidence presented at the hearing demonstrates that company records show that D & M Grain is entitled to \$1,887.33. The statute cited by the bonding company does not provide that a claim is limited to the written claim submitted prior to the hearing, especially when the evidence presented to the Commission at the hearing shows that the written claim is incorrect;

4. The Commission further disagrees with the bonding company's argument that all of the interest earned on the bonds is the property of the bonding company and must be returned to the company. The Commission finds that when the bond is not sufficient to cover 100% of the claims, the interest earned on the bond money should be distributed on a pro rata basis to the claimants. Thus, the Commission finds that for the bond periods covering July 1, 1999, through June 30, 2001, all interest earned should be distributed on a pro rata basis to the claimants. For the bond period covering July 1, 1998, through June 30, 1999, the interest earned on the bond money shall be distributed to the bonding company since the claimants received 100% of their claims for that bonding period; and

5. Except for its position on the stock Subscription Agreements as stated earlier, the Commission agrees with Staff's recommendations concerning the amount of each claim and the distribution of the bond proceeds. Therefore, the Commission finds that the claims against the bond covering July 1, 1998, through June 30, 1999, should be distributed based on Staff's recommendations regarding the amount and validity of each claim, with all unused bond money and interest earned on that bond returned to the bonding company. For the bond covering July 1, 1999, through June 30, 2000, the Commission first finds that the claim submitted by Harlan Eisenbraun after the hearing is a valid claim. The Commission further finds that the bond money should be distributed based on Staff's recommendations (except for its position on the stock Subscription Agreements as explained earlier) regarding the amount and validity of each claim, on a pro rata basis, including accrued interest. For the bond covering July 1, 2000, through June 30, 2001, the Commission finds that the bond money should be distributed based on Staff's recommendations regarding the amount and validity of each claim, on a pro rata basis, including accrued interest.

The Commission submitted its proposed decision to this Court. The Commission made the following proposed findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. On August 24, 2001, the Commission filed with the Fifth Judicial Circuit a Petition to Appoint South Dakota Public Utilities Commission as a receiver of Wheetco pursuant to SDCL 49-45-16 and SDCL Chapter 21-21, to take possession of the cash proceeds of the following grain dealer's bonds: (1) the bond commencing July 1, 1998, and ending June 30, 1999; (2) the bond commencing July 1, 1999, and ending June 30, 2000; and (3) the bond commencing July 1, 2000, and ending June 30, 2001. On September 20, 2001, the Commission was appointed receiver by the Honorable Larry H. Lovrien of the Fifth Judicial Circuit of South Dakota.

2. Pursuant to the order of the Court, the Commission held a hearing as scheduled on the claims against the bonds as described above on January 16, 2002, beginning at 1:00 p.m., at the Department of Labor Meeting Room, 420 South Roosevelt, Aberdeen, South Dakota.

3. Although the notice of the hearings only mentioned the bonds covering July 1, 1998, through June 30, 2001, the Commission received four claims concerning transactions made outside that time period. One claim was submitted against the bond for July 1, 1995, through June 30, 1996; two claims were submitted against the bond for July 1, 1996, through June 30, 1997; and one claim was submitted against the bond for July 1, 1997, through June 30, 1998.

#### **CLAIMS AGAINST BONDS FOR JULY 1, 1995 THROUGH JUNE 30, 1998**

4. Pursuant to the Court's Order, the Commission finds that it has jurisdiction to receive claims only for the bonds covering July 1, 1998, through June 30, 2001. However, the Commission also notes that Commission Staff reviewed the claims for the earlier bonds and determined that none of the claims would have been valid claims under the bonds in question because the grain concerned deferred payment contracts which are not covered by the bond or the product involved did not fall under the definition of grain. TR. at 20-25. Pursuant to SDCL 49-45-9, a grain dealer's bond "may not benefit any person entering into a voluntary credit sale with a grain dealer." A voluntary credit sale is defined as "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts." SDCL 49-45-1.1(5). Thus, deferred payment contracts are statutorily excluded from bond coverage and the claimants entered into deferred payment contracts may not receive any of the bond proceeds. In addition, the definition of grain under SDCL 49-45-1.1(2) excludes "grain that has been cleaned, processed and specifically identified for intended use of planting for reproduction and for which a grain warehouse receipt has not been issued." The Commission further points out that if any of these claimants believe they have a valid claim they may bring an action in circuit court and sue under the bond. See SDCL 49-45-17.

#### **CLAIMS AGAINST BOND FOR JULY 1, 1998, THROUGH JUNE 30, 1999**

5. Five claims were submitted against the bond for July 1, 1998, through June 30, 1999.

6. Miles Bretsch submitted a claim for \$24,000.00 for sunflowers. Exhibit 1E. Based on company records, Commission Staff submitted documentation supporting \$23,778.24. TR. at 25; Exhibit 3Z. The difference is due to the fact that the claimant had estimated his claim. TR. at 25. The Commission finds that the claimant has a valid claim for \$23,778.24.

7. Kjerstad Farm Partnership/Stephanie Kjerstad submitted a claim for \$18,015.00 of safflowers, which included \$2,423.37 for interest. Exhibit 1F. Commission Staff supported an amount of

\$15,591.63, which excludes the claim for interest. TR. at 26. Commission Staff stated that interest charges are not covered by the bond. Id. The Commission agrees that interest charges are not covered by the bond and finds that the claimant has a valid claim for \$15,591.63.

8. Lazy BS, LLP/Stan Anderson submitted a claim for \$6,464.00 for sunflowers, which included \$964.00 for interest. Exhibit 1G. Commission Staff supported an amount of \$5,500.00, which excludes the claim for interest. TR. at 26-27; Exhibit 3AB. The Commission finds that interest charges are not covered by the bond and finds that the claimant has a valid claim for \$5,500.00.

9. Gary Tiegs submitted a claim for \$8,937.13 for millet. Exhibit 1H. Commission Staff supported this amount. TR. at 27; Exhibit 3AF. The Commission finds that the claimant has a valid claim for \$8,937.13.

10. D & M Grain submitted a claim for \$1,691.25 for durum, which included an amount of \$191.25 for service charges. Exhibit 1I. Commission Staff supported an amount of \$1,887.33. TR. at 27-28; Exhibit 3AH. The higher amount is based on company records that showed an amount of \$2,010.33, less \$123.00 for the claimant's accounts receivable balance. TR. at 27. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3AH. Commission Staff further recommended that the service charges not be recovered from the bond money. TR. at 28. The bonding company objected to the payment of any amount above D & M Grain's claim for \$1,691.25 based on SDCL 49-45-19 that states a claim must be in writing. TR. at 103. The Commission disagrees with the bonding company that D & M Grain's written claim filed prior to the hearing limits D & M Grain to the amount listed in the claim. The evidence presented at the hearing demonstrates that company records show that D & M Grain is entitled to \$1,887.33. The statute cited by the bonding company does not provide that a claim is limited to the written claim submitted prior to the hearing, especially when the evidence presented to the Commission at the hearing shows that the written claim is incorrect. The Commission finds the claimant has a valid claim for \$1,887.33.

11. Based on findings of fact 6 through 10, the Commission finds that the claimants have valid claims totaling \$55,694.33 against the \$75,000.00 bond for July 1, 1998, through June 30, 1999. The bond money shall be distributed to the claimants in the amounts listed above and the remainder of the bond money, plus accrued interest, shall be returned to the bonding company.

#### **CLAIMS AGAINST BOND FOR JULY 1, 1999, THROUGH JUNE 30, 2000**

12. Twenty-four claims were submitted against the bond for July 1, 1999, through June 30, 2000.

13. Bert Raap submitted a claim for \$8,957.16 for sunflowers. Exhibit 1B. Commission Staff supported an amount of \$26.89. TR. at 29; Exhibit 3A. Commission Staff's recommendation was based on a stock Subscription Agreement entered into between Bert Raap and Wheetco. Id. Commission Staff stated that company records showed that \$8,930.27 of the \$8,957.16 owed for this bond period was converted to a Subscription Agreement for common stock, leaving \$26.89. Id. According to the Subscription Agreement, Bert Raap subscribed to 1,434 shares of common stock of Wheetco at the price of \$50.00 per share. Exhibit 3A. The Agreement purported to convert \$71,700.00 of the current account of \$71,726.89 owed to Bert Raap by Wheetco to common stock. Id. The Commission points out that only \$8,957.16 of the \$71,726.89 concerned this bonding year. A Subscription Agreement was given to Commission Staff by Larry Wheeting in September of 2000

and was not dated or notarized. TR. at 81. Commission Staff also submitted a Wheatco Stock Register, dated as of May 31, 2000, which stated that 600 shares were sold to Bert Raap between January 31, 2000, and May 31, 2000. Exhibit 3A. The Commission notes that other claimants who entered into stock Subscription Agreements did not actually sign the agreements until September of 2000. See Findings of Fact 17, 19, 38.

14. The Commission finds the Stock Register compiled by Wheatco is clearly not accurate since the Subscription Agreement referred to 1,434 shares and the Stock Register referred to 600 shares. Exhibit 3A. Further, the Commission notes that the Subscription Agreement stated that Wheatco could reject the application before issuance of stock. Exhibit 3A. Pursuant to paragraph 4 of the Subscription Agreement, "Wheatco, Inc. may reject this application before issuance of stock and conversion of the account by notice to the subscriber and return of any monies paid hereunder." Id. No evidence was presented that, after the parties signed the Subscription Agreement, Wheatco accepted the Agreement and issued common stock to Bert Raap. The Commission finds that the evidence does not support a finding that Bert Raap converted his grain payables into common stock. Thus, the Commission finds the claimant has a valid claim for \$8,957.16.

15. North Central Farmers Elevator submitted a claim for \$12,768.08 for millet and sunflowers. Exhibit 1J. Commission Staff supported an amount of \$12,096.10. TR. at 30; Exhibit 3F. Commission Staff stated the difference in the amounts is due to dockage and a prepaid balance for rye purchased. TR. at 30. The Commission finds that the claimant has a valid claim for \$12,096.10.

16. Kent Holler submitted a claim for \$3,200.55 for sunflowers. Exhibit 1K. Commission Staff supported an amount of \$3,175.02. TR. at 30; Exhibit 3G. The difference in the amounts is due to the sunflower checkoff not being deducted. Id. The Commission finds the claimant has a valid claim for \$3,175.02.

17. Sam Schauer submitted a claim for \$47,749.93 for sunflowers. Exhibit 1L. Commission Staff supported an amount of \$2,488.94. TR. at 30-32; Exhibit 3H. Commission Staff's recommendation was based on a stock Subscription Agreement entered into between Sam Schauer/Schauer Bros. and Wheatco and an error of \$10.99 on an assembly sheet. Id. According to the Subscription Agreement, Sam Schauer/Schauer Bros. subscribed to 905 shares of common stock of Wheatco at the price of \$50.00 per share. Exhibit 3H. The agreement purported to convert \$45,250.00 of the current account of \$47,479.93 owed to Sam Schauer/Schauer Bros. by Wheatco to common stock. Id. A Subscription Agreement was given to Commission Staff by Larry Wheeting in September of 2000 and was not dated or notarized. TR. at 81. Commission Staff also submitted a Wheatco Stock Register, dated as of May 31, 2000, which stated that 1500 shares were sold to the Schauers between January 31, 2000, and May 31, 2000. Exhibit 3H. Sam Schauer testified that he did not sign the Subscription Agreement until September 18, 2000. TR. at 98.

18. The Commission finds the Stock Register compiled by Wheatco is clearly not accurate since Sam Schauer did not enter into the Agreement until September 18, 2000. Exhibit 3H; TR. at 98. Further, the Commission notes that the Subscription Agreement stated that Wheatco could reject the application before issuance of stock. Exhibit 3H. Pursuant to paragraph 4 of the Subscription Agreement, "Wheatco, Inc. may reject this application before issuance of stock and conversion of the account by notice to the subscriber and return of any monies paid hereunder." Id. No evidence was presented that, after the parties signed the Subscription Agreement, Wheatco accepted the Agreement and issued common stock to Sam Schauer. Sam Schauer stated that there was no

stock. TR. at 31. The Commission finds that the evidence does not support a finding that Sam Schauer converted his grain payables into common stock. The Commission also finds there was an error of \$10.99 on an assembly sheet. Thus, the Commission finds the claimant has a valid claim for \$47,738.94.

19. Jake Schauer submitted a claim for \$29,751.42 for sunflowers. Exhibit 1M. Commission Staff supported an amount of \$1.42. TR. at 32-33; Exhibit 3I. Commission Staff's recommendation was based on a stock Subscription Agreement entered into between Jake Schauer/Schauer Bros. and Wheatco. Id. According to the Subscription Agreement, Jake Schauer/Schauer Bros. subscribed to 595 shares of common stock of Wheatco at the price of \$50.00 per share. Exhibit 3I. The agreement purported to convert \$29,750.00 of the current account of \$29,751.42 owed to Jake Schauer/Schauer Bros. by Wheatco to common stock. Id. A Subscription Agreement was given to Commission Staff by Larry Wheeting in September of 2000 and was not dated or notarized. TR. at 81. Commission Staff also submitted a Wheatco Stock Register, dated as of May 31, 2000, which stated that 1500 shares were sold to the Schauers between January 31, 2000, and May 31, 2000. Exhibit 3I. After the hearing, Jake Schauer sent in the dated Subscription Agreement which shows it was notarized and signed on September 18, 2000. Late-filed Exhibit received February 5, 2002. A comparison of the Agreement given to Commission Staff with the Agreement sent in by Jake Schauer shows that the Subscription Agreement given to Commission Staff had the notarized date removed prior to giving the Agreement to Staff. See Exhibit 3I; Late-filed Exhibit received February 5, 2002.

20. The Commission finds that the Stock Register compiled by Wheatco is clearly not accurate since Jake Schauer did not enter into the Agreement until September 18, 2000. Exhibit 3I; Late-filed Exhibit received February 5, 2002. Further, the Commission notes that the Subscription Agreement stated that Wheatco could reject the application before issuance of stock. Exhibit 3I. Pursuant to paragraph 4 of the Subscription Agreement, "Wheatco, Inc. may reject this application before issuance of stock and conversion of the account by notice to the subscriber and return of any monies paid hereunder." Id. No evidence was presented that, after the parties signed the Subscription Agreement, Wheatco accepted the Agreement and issued common stock to Jake Schauer. The Commission finds that the evidence does not support a finding that Jake Schauer converted his grain payables into common stock. Thus, the Commission finds the claimant has a valid claim for \$29,751.42.

21. Jim Schauer submitted a claim for \$9,331.60 for sunflowers. Exhibit 1N. Commission Staff supported this amount. TR. at 33. The Commission finds the claimant has a valid claim for \$9,331.60.

22. Mike Knoll submitted a claim for \$11,613.66 for sunflowers. Exhibit 1Q. Commission Staff supported an amount of \$9,613.16. TR. at 33; Exhibit 3L. The difference between the amounts is that Wheatco's records showed that the claimant also had an accounts receivable balance of \$2,000.50. Commission Staff submitted a letter from Wheatco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3L. The Commission finds the claimant has a valid claim for \$9,613.16.

23. Don Hearnen submitted a claim for \$27,793.36 for sunflowers. Exhibit 1P. Commission Staff supported this amount. TR. at 33-35; Exhibit 3M. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheatco stating that the claimant agreed to lend Wheatco \$22,857.37, at an interest rate of 10%. TR. at 36; Exhibit 3M. However, Commission

Staff also submitted a letter from Wheetco dated October 30, 2000, to the note holders that stated that an exact commencement date on the note payments was not listed and, until confirmation and completion of the loan application was done, no certain date could be listed. TR. at 34; Exhibit 3M. Commission Staff's position was that the letter substantiated a statement made to Staff by Larry Wheeting "that the promissory notes would not be effective unless the financing package was approved." TR. at 34.

24. The Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Thus, the Commission finds the claimant has a valid claim for \$27,793.36.

25. Merritt Patterson & Sons, Dale Patterson, submitted a claim for \$14,845.05 for safflowers. Exhibit 1Q. Commission Staff supported this amount. TR. at 35-36; Exhibit 3O. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheetco stating that the claimant agreed to lend Wheetco \$20,184.21. at an interest rate of 10%. TR. at 36; Exhibit 3O. However, Commission Staff also submitted a letter from Wheetco dated October 30, 2000, to the note holders that stated that an exact commencement date on the note payments was not listed and, until confirmation and completion of the loan application was done, no certain date could be listed. TR. at 35-36; Exhibit 3O. Commission Staff's position was that the letter substantiated "Mr. Wheeting's statement that the promissory notes would not be effective unless the financing package was approved." TR. at 36.

26. With respect to the promissory note signed by the claimant, the Commission first points out that the note was not signed by a Wheetco representative. In addition, the Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Thus, the Commission finds the claimant has a valid claim for \$14,845.05.

27. KSP Farms, Inc., Kevin Swanson submitted a claim for \$3,573.77 for sunflowers. Exhibit 1R. Commission Staff supported this amount. TR. at 36. The Commission finds the claimant has a valid claim for \$3,573.77.

28. Clark Roeber submitted a claim for \$15,246.45 for sunflowers. Exhibit 1S. Commission Staff supported this amount. TR. at 36-37. The Commission finds the claimant has a valid claim for \$15,246.45.

29. Joel Durham/First National Bank of Frederick submitted a claim for \$6,305.10 for sunflowers. Exhibit 1T. Commission Staff supported this amount. TR. at 37-38. The Commission finds the claimant has a valid claim for \$6,305.10.

30. Joe Cameron submitted a claim for \$5,038.57 for millet. Exhibit 1U. Commission Staff supported an amount of \$3,188.49. TR. at 38; Exhibit 3R. The difference between the amounts is that Wheetco's records showed that the claimant also had an accounts receivable balance of \$1,850.08. Id. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which

the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3R. The Commission finds the claimant has a valid claim for \$3,188.49.

31. Owen Elsen submitted a claim for \$9,209.79 for sunflowers. Exhibit 1V. Commission Staff supported an amount of \$8,071.29. TR. at 38-39; Exhibit 3T. The difference between the amounts is that Wheetco's records showed that the claimant also had an accounts receivable balance of \$1,138.50. Id. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3T. The Commission finds the claimant has a valid claim for \$8,071.29.

32. The Bottum Brothers submitted a claim for \$14,656.91 for sunflowers. Exhibit 1W. Commission Staff supported this amount. TR. at 39; Exhibit 3U. The Commission finds the claimant has a valid claim for \$14,656.91.

33. KH, Inc. submitted a claim for \$4,002.11 for sunflowers. Exhibit 1X. Commission Staff supported an amount of \$3,950.00. TR. at 39; Exhibit 3V. The difference in the amounts is due to a deduction for the sunflower checkoff and a transfer fee. Id. The Commission finds the claimant has a valid claim for \$3,950.00.

34. Witten Feed and Grain submitted a claim for \$4,804.80 for milo. Exhibit 1Y. Commission Staff supported an amount of \$4,290.49. TR. at 39-40; Exhibit 3W. The difference in the amounts is based on company records which showed \$4,290.49 for milo and \$511.74 for freight. TR. at 40; Exhibit 3W. Commission Staff recommended that the amount for freight not be included because freight charges are not a valid claim under the bond. TR. at 40. The Commission agrees and finds that the claimant has a valid claim for \$4,290.49.

35. Clarence Wagner submitted a claim for \$21,095.43 for sunflowers. Exhibit 1Z. Commission Staff supported this amount. TR. at 40. The Commission finds the claimant has a valid claim for \$21,095.43.

36. Mark Saunders submitted a claim for \$2,262.54 for sunflowers. Exhibit 1AA. Commission Staff supported this amount. TR. at 40. The Commission finds the claimant has a valid claim for \$2,262.54.

37. Clem Handcock submitted a claim for \$3,005.32, plus interest, for millet. Exhibit 1AB. Commission Staff supported an amount of \$3,005.64 based on company records and recommended no interest charges be allowed. TR. at 40-41; Exhibit 3AC. The Commission finds the claimant has a valid claim for \$3,005.64

38. The Schurrs submitted a claim for \$95,601.11 for sunflowers. Exhibit 1AC. The Schurrs are comprised of Arnold Schurr and his son Steve Schurr. TR. at 89. Commission Staff stated that company records showed an amount of \$96,050.00 but recommended that nothing be paid on this claim. TR. at 41-43; Exhibit 3AD. The difference between the Schurrs' claim of \$95,601.11 and Staff's amount of \$96,050.00 is due to the sunflower checkoff, assembly sheet errors, and a transfer fee. TR. at 41. Commission Staff's recommendation that nothing be paid on the claim was based on a stock Subscription Agreement entered into between the Schurrs and Wheetco. TR. at 41-43. According to the Subscription Agreement, the Schurrs subscribed to 1,921 shares of common stock of Wheetco at the price of \$50.00 per share. Exhibit 3AD. The agreement purported to convert



\$96,050.00 of the current account of \$96,050.00 owed to the Schurrs by Wheatco to common stock. Id. The Subscription Agreement was given to Commission Staff by Larry Wheeting in September of 2000 and was not dated or notarized. TR. at 81. Commission Staff also submitted a Wheatco Stock Register, dated as of May 31, 2000, which stated that 2000 shares were sold to the Schurrs between January 31, 2000, and May 31, 2000. Exhibit 3AD. At the hearing, Arnold Schurr submitted a dated Subscription Agreement which shows it was notarized and signed on September 19, 2000. Exhibit A. A comparison of the Agreement given to Commission Staff with the Agreement submitted by Arnold Schurr shows that the Subscription Agreement given to Commission Staff had the notarized date removed prior to giving the Agreement to Staff. See Exhibits 3AD, A.

39. The Commission finds that the Stock Register compiled by Wheatco is clearly not accurate since Arnold Schurr did not enter into the Agreement until September 19, 2000. Exhibit 3AD; Exhibit A. Further, the Commission notes that the Subscription Agreement stated that Wheatco could reject the application before issuance of stock. Exhibit A. Pursuant to paragraph 4 of the Subscription Agreement, "Wheatco, Inc. may reject this application before issuance of stock and conversion of the account by notice to the subscriber and return of any monies paid hereunder." Id. No evidence was presented that, after the parties signed the Subscription Agreement, Wheatco accepted the Agreement and issued common stock to the Schurrs. The Commission finds that the evidence does not support a finding that the Schurrs converted their grain payables into common stock. Thus, the Commission finds the claimant has a valid claim for \$96,050.00.

40. Rix Farms, Inc. submitted a claim for \$62,672.12 for sunflowers, certified Oxen wheat, certified Ignat wheat, certified Russ wheat, and wheat. Exhibit 1AD. Commission Staff supported an amount of \$14,495.30. TR. at 43-44; Exhibit 3AE. Commission Staff stated that \$14,227.35 of the claim was for certified Oxen wheat, \$13,022.67 of the claim was for Ignat wheat, and \$20,926.80 of the claim was for Russ wheat. TR. at 43; Exhibit 3AE. Commission Staff stated that the certified wheat is not included in the definition of grain and is therefore not covered by the bond. TR. at 43. The Commission agrees that the certified wheat is not grain as defined by SDCL 49-45-1.1(2) which excludes "grain that has been cleaned, processed and specifically identified for intended use of planting for reproduction and for which a grain warehouse receipt has not been issued."

41. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheatco stating that the claimant agreed to lend Wheatco \$60,846.03, at an interest rate of 8%. TR. at 43; Exhibit 3AE. However, Commission Staff also submitted a letter from Wheatco dated October 30, 2000, to the note holders that stated that an exact commencement date on the note payments was not listed and, until confirmation and completion of the loan application was done, no certain date could be listed. TR. at 44; Exhibit 3AE. Commission Staff's position was that the letter substantiated a statement made to Staff by Larry Wheeting "that the promissory notes would not be effective unless the financing package was approved." TR. at 44.

42. The Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Therefore, the Commission finds the claimant has a valid claim for \$14,495.30.

43. Erickson Farms submitted a claim for \$4,650.40 for wheat and millet, which included trucking costs. Exhibit 1AE. Commission Staff supported an amount of \$4,175.62 which was based on

company records that showed \$3,822.00 for millet and \$353.62 for wheat. TR. at 44-45; Exhibit 3AG. Commission Staff excluded the trucking expenses as not covered by the bond. TR. at 44. On March 1, 2002, the Commission received a claim from Harlan Eisenbraun stating that he had delivered \$3,822.00 of millet to Wheetco on June 30, 2000. On March 5, 2002, the Commission received a Motion to Reopen the Record from Commission Staff. The motion explained that at the hearing held on January 16, 2002, Staff had recommended that Erickson Farms had a valid claim in the amount of \$4,175.62, with \$3,822.00 for millet and \$353.62 for wheat. Following the hearing, Commission Staff learned that the millet was owned by Harlan Eisenbraun and Erickson Farms had merely performed the trucking service. Darrel Erickson confirmed that was the case. Late-filed Exhibit 10. Based on further documentation received from Wheetco, Commission Staff stated that Erickson Farms has a valid claim for \$353.62 for wheat and Harlan Eisenbraun/First Western Bank has a valid claim for \$3,822.00 for millet. Late-filed Exhibits 11A, 11B, 12A, 12B. At its March 28, 2002, meeting, the Commission granted Staff's Motion to Reopen Record. The Commission agrees

with Commission Staff that trucking costs are not covered under the bond and finds that Erickson Farms has a valid claim for \$353.62.

44. On March 1, 2002, Harlan Eisenbraun submitted a claim for \$3,822.00 of millet. Late-filed Exhibit 12A. As explained in the preceding paragraph, at the hearing, the \$3,822.00 of millet was originally thought to have belonged to Erickson Farms. Based on documentation received after the hearing, Commission Staff is now recommending that Harlan Eisenbraun has a valid claim for \$3,822.00. Late-filed Exhibits 10, 11A, 11B, 12A, 12B. The Commission agrees and finds the claimant has a valid claim for \$3,822.00.

45. D & M Grain submitted a claim for \$107,036.12 for sunflowers, oats, and millet, which included \$478.00 for service charges. Exhibit 11. Commission Staff supported an amount of \$94,305.29. TR. at 45-46; Exhibit 3AH. The difference in the amounts is due to payments made by Wheetco, the difference in price per pound and per bushel, and an accounts receivable balance for D & M Grain. Id. Commission Staff also recommended denial of recovery of the service charges. TR. at 45-46. The Commission agrees with all of Commission Staff's recommendations and finds the claimant has a valid claim for \$94,305.29.

46. Based on findings of fact 13 through 45, the Commission finds that the claimants have valid claims totaling \$457,974.13 against the bond for July 1, 1999, through June 30, 2000. The bond money, including accrued interest, shall be distributed to the claimants on a pro rata basis.

#### **CLAIMS AGAINST BOND FOR JULY 1, 2000, THROUGH JUNE 30, 2001**

47. Twenty-five claims were submitted against the bond for July 1, 2000, through June 30, 2001.

48. Roger Hurlbert submitted a claim for \$4,436.37 for sunflowers. Exhibit 1AF. Commission Staff supported an amount of \$4,231.50. TR. at 46-47; Exhibit 3C. The difference in the amounts was due to dockage and the sunflower checkoff. TR. at 46; Exhibit 3C. The Commission finds the claimant has a valid claim for \$4,231.50.

49. Russ Hurlbert submitted a claim for \$2,957.58 for sunflowers. Exhibit 1AG. Commission Staff supported an amount of \$2,821.00. TR. at 47; Exhibit 3D. The difference in amounts is due to dockage and the sunflower checkoff. Id. The Commission finds the claimant has a valid claim for \$2,821.00.

50. Gary Meikeljohn submitted a claim for \$23,639.64 for sunflowers. Exhibit 1AH. Commission Staff supported an amount of \$23,468.64. TR. at 47; Exhibit 3E. The difference in amounts was due to the sunflower checkoff and the number of pounds on scale ticket no. 11370. Id. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheetco stating that the claimant agreed to lend Wheetco \$23,468.64, at an interest rate of 10.6%. TR. at 47-48; Exhibit 3E. However, Commission Staff also submitted a letter from Wheetco dated October 30, 2000, to the note holders stating that an exact commencement date on the note payments was not listed and, until confirmation and completion of the loan application was done, no certain date could be listed. TR. at 48; Exhibit 3E. Commission Staff's position was that the letter substantiated a statement made to Staff by Larry Wheeting "that the promissory notes would not be effective unless the financing package was approved." TR. at 48.

51. The Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Thus, the Commission finds the claimant has a valid claim for \$23,468.64.

52. The Duenwald Brothers/Bank of Hoven submitted a claim for \$2,904.18 for sunflowers. Exhibit 1AI. Commission Staff supported this amount. TR. at 48. The Commission finds the claimant has a valid claim for \$2,904.18.

53. Warner Co-operative Co. Elevator submitted a claim for \$4,431.53 for millet. Exhibit 1AJ. Commission Staff supported this amount. TR. at 48. The Commission finds the claimant has a valid claim for \$4,431.53.

54. PENCO of South Dakota submitted a claim for \$24,636.20 for sunflowers, which included \$4,893.56 for trucking expenses. Exhibit 1AK. Commission Staff supported an amount of \$19,742.64 for the sunflowers but recommended denial of the trucking expenses as not covered by the bond. TR. at 49. The Commission agrees and finds the claimant has a valid claim for \$19,742.64.

55. Densley Zambo submitted a claim for \$8,079.75 for sunflowers. Exhibit 1AL. Commission Staff supported an amount of \$7,668.47. TR. at 49; Exhibit 3J. The difference in the amounts is due to dockage and the sunflower checkoff. Id. The Commission finds the claimant has a valid claim for \$7,668.47.

56. Holyoke Coop Association submitted a claim for \$17,315.65 for millet. Exhibit 1AM. Commission Staff supported an amount of \$12,477.73. TR. at 49-50; Exhibit 3K. The difference between the amounts is that Wheetco's records showed that the claimant also had an accounts receivable balance of \$4,837.92. Id. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3K. The Commission finds the claimant has a valid claim for \$12,477.73.

57. Fred Eisenbraun/First Western Bank submitted a claim for \$5,820.00 for safflowers. Exhibit 1AN. Commission Staff supported an amount of \$5,659.15. TR. at 50; Exhibit 3N. The difference in the amounts is due to dockage and the safflower checkoff. Id. The Commission finds the claimant has a valid claim for \$5,659.15.

58. RDZ Farms, Inc. submitted a claim for \$6,138.31 for millet. Exhibit 1AQ. Commission Staff supported this amount. TR. at 50. The Commission finds the claimant has a valid claim for \$6,138.31.

59. Merritt Patterson & Sons/Dale Patterson submitted a claim for \$5,339.17 for safflowers. Exhibit 1Q. Commission Staff supported this amount. TR. at 51-52; Exhibit 3O. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheetco stating that the claimant agreed to lend Wheetco \$20,184.21. TR. at 51; Exhibit 3O. However, Commission Staff also submitted a letter from Wheetco dated October 30, 2000, to the note holders that stated that an exact commencement date on the note payments was not listed and, until confirmation and completion of the loan application was done, no certain date could be listed. TR. at 34; Exhibit 3O. Commission Staff's position was that the letter substantiated a statement made to Staff by Larry Wheeting "that the promissory notes would not be effective unless the financing package was approved." TR. at 51.

60. With respect to the promissory note, the Commission first points out that the note was not signed by a Wheetco representative. In addition, the Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Thus, the Commission finds the claimant has a valid claim for \$5,339.17.

61. Gaylon Goldin submitted a claim for \$4,782.81 for sunflowers. Exhibit 1AP. Commission Staff supported this amount. TR. at 52. The Commission finds the claimant has a valid claim for \$4,782.81.

62. Paoli Farmers Coop Elevator Co. submitted a claim for \$3,190.80 for red millet. Exhibit 1AQ. Commission Staff supported this amount. TR. at 52; Exhibit 3S. The Commission finds the claimant has a valid claim for \$3,190.80.

63. B & L Gorman/First Bank of Gackle submitted a claim for \$14,283.20 for sunflowers. Exhibit 1AR. Commission Staff supported this amount. TR. at 52-53. The Commission finds the claimant has a valid claim for \$14,283.20.

64. Carl Peterson submitted a claim for \$3,076.16 for sunflowers. Exhibit 1AS. Commission Staff supported this amount. TR. at 53. The Commission finds the claimant has a valid claim for \$3,076.16.

65. Leo Naber submitted a claim for \$6,575.56 for millet. Exhibit 1AT. Commission Staff supported this amount. TR. at 53. The Commission finds the claimant has a valid claim for \$6,575.56.

66. Roger Vandervorste submitted a claim for \$29,511.49 for sunflowers. Exhibit 1AU. Commission Staff supported this amount. TR. at 53-54; Exhibit 3P. Commission Staff also pointed out that the claimant had entered into a promissory note with Wheetco stating that the claimant agreed to lend Wheetco \$29,511.49, at an interest rate of 10%. TR. at 53; Exhibit 3P. However, Commission Staff also submitted a letter from Wheetco dated October 30, 2000, to the note holders that stated that an exact commencement date on the note payments was not listed and, until

confirmation and completion of the loan application was done, no certain date could be listed. TR. at 54; Exhibit 3P. Commission Staff's position was that the letter substantiated a statement made to Staff by Larry "that the promissory notes would not be effective unless the financing package was approved." TR. at 54.

67. The Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." SDCL 20-7-6. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant. Thus, the Commission finds the claimant has a valid claim for \$29,511.49.

68. Jim Faulstich/American State Bank of Pierre submitted a claim for \$15,599.82 for sunflowers. Exhibit 1AV. Commission Staff supported an amount of \$11,843.27. TR. at 54-55; Exhibit 3Q. The difference in the amounts is based on Wheetco records that showed a check for \$3,756.55 had been paid to the claimant and had cleared the bank. Id. The Commission finds the claimant has a valid claim for \$11,843.27.

69. Joe Cameron submitted a claim for \$7,884.80 for millet. Exhibit 1U. Commission Staff supported an amount of \$4,293.23. TR. at 55; Exhibit 3R. The difference in the amounts is due to dockage, price per pound, and additional scale tickets. Id. In addition, Wheetco's records showed that the claimant also had an accounts receivable balance of \$3,962.40. Id. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3R. The Commission finds the claimant has a valid claim for \$4,293.23.

70. Clayton Kjerstad submitted a claim for \$19,536.80 for millet, which included \$800.00 for trucking expenses. Exhibit 1AW. Commission Staff supported an amount of \$12,118.15. TR. at 55-56; Exhibit 3AJ. The difference in the amounts is due to dockage, a price difference, and that company records showed that one of the scale tickets had been paid. Id. In addition, Commission Staff recommended that the trucking expenses not be allowed because those expenses are not covered by the bond. TR. at 56. The Commission agrees and finds the claimant has a valid claim for \$12,118.15.

71. Farmers Oil Company submitted a claim for \$5,340.37 for sunflowers. Exhibit 1AX. Commission Staff supported an amount of \$5,072.25. TR. at 56; Exhibit 3X. The difference in amounts is due to dockage and minor weight differences. Id. The Commission finds that the claimant has a valid claim for \$5,072.25.

72. Kerwyn Holsing submitted a claim for \$5,230.62 for sunflowers. Exhibit 1AY. Commission Staff supported this amount. TR. at 56. The Commission finds that the claimant has a valid claim for \$5,230.62.

73. Myron Dieterle submitted a claim for \$8,930.85 for sunflowers. Exhibit 1AZ. Commission Staff supported an amount of \$8,863.65. TR. at 57; Exhibit 3Y. The difference in amounts is due to the sunflower checkoff and dockage. Id. The Commission finds the claimant has a valid claim for \$8,863.65.

74. Equinox Enterprises submitted a claim for \$5,885.98 for millet, which included a deduction for

an accounts receivable balance. Exhibit 1BA. Commission Staff supported this amount. TR. at 57; Exhibit 3AA. Wheetco's records confirmed that the claimant had an accounts receivable balance of \$4,085.76. Id. Commission Staff submitted a letter from Wheetco's Bankruptcy Trustee in which the Trustee agreed to offset the accounts receivable against the accounts payable. Exhibit 3AA. The Commission finds the claimant has a valid claim for \$5,885.98.

75. Clem Handcock submitted a claim for \$23,845.90, plus interest, for millet. Exhibit 1AB. Commission Staff supported an amount of \$23,833.22. TR. at 57-58; Exhibit 3AC. The difference in the amounts is due to the claimant's inclusion of freight and storage charges, plus minor differences in the price and balances on some of the assembly sheets. Id. Commission Staff recommended that recovery of freight and storage charges and the request for interest charges be denied. TR. at 58. The Commission agrees and finds the claimant has a valid claim for \$23,833.22.

76. Based on findings of fact 48 through 75, the Commission finds that the claimants have valid claims totaling \$233,442.71 against the \$75,000.00 bond for July 1, 2000, through June 30, 2001. The bond money, including any accrued interest, shall be distributed to the claimants on a pro rata basis.

### **INTEREST ON BOND MONEY**

77. Commission Staff stated that all the interest earned on the bond money should be distributed on a pro rata basis to the claimants. TR. at 61-62. The bonding company's position was that any interest earned was the property of the bonding company and should be returned to the company. TR. at 104-105. The Commission disagrees with the bonding company's position. As a general rule, "[a]ny profit or benefit accruing from [a receiver's] management of or dealings with the property committed to [the receiver's] charge must inure to the trust estate." 75 C.J.S. Receivers § 182(a). Thus, the Commission finds that for the bond periods covering July 1, 1999, through June 30, 2001, all interest earned should be distributed on a pro rata basis to the claimants. For the bond period covering July 1, 1998, through June 30, 1999, the interest earned on the bond money shall be distributed to the bonding company.

### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter pursuant to SDCL 49-45-16, and SDCL Chapter 21-21.
2. The Commission has jurisdiction over this matter as a receiver appointed by the Court pursuant to SDCL Chapter 21-21, and SDCL Chapter 49-45, specifically 49-45-16.
3. The Commission does not have jurisdiction to consider the four claims received against the bonds covering July 1, 1995 through June 30, 1998. The Commission only received an appointment from the Court to act as a receiver for the bonds covering July 1, 1998, through June 30, 2001.
4. With respect to the promissory notes entered into between some of the claimants and Wheetco, the Commission finds that there is not clear and convincing evidence that the promissory note constituted a novation. A "novation is made by the substitution of a new obligation between the

same parties, with intent to extinguish the old obligation." SDCL 20-7-6. The "[e]ssential elements of novation are: (1) a previous valid obligation, (2) agreement of all parties to the substitution under a new contract based on sufficient consideration, (3) extinguishment of the old contract, and (4) the validity of the new contract." Haggar v. Olfert, 387 N.W. 2d 45, 50 (S.D. 1986). Clear and convincing evidence is needed in order to find a novation. Id. A review of the promissory note shows that no mention is made that the loan was intended to replace the grain payable amount owed to the claimant.

5. Similarly, with respect to the stock Subscription Agreements, the Commission finds that the evidence does not support a finding that the claimants who signed stock Subscription Agreements converted their grain payables into common stock. The Commission finds that the Stock Register compiled by Wheetco which purported to reflect stockholders through May 31, 2000, is clearly not accurate given the Subscription Agreements entered into the record by some of the claimants which showed that the Agreements were not signed until September of 2000. See Exhibit 3AD; Exhibit A. Further, the Commission notes that the Subscription Agreement stated that Wheetco could reject the application before issuance of stock. Exhibit A. Pursuant to paragraph 4 of the Subscription Agreement, "Wheetco, Inc. may reject this application before issuance of stock and conversion of the account by notice to the subscriber and return of any monies paid hereunder." Id. No evidence was presented that, after the parties signed the Subscription Agreement, Wheetco accepted the Agreement and issued common stock to the claimants.

6. The Commission rejects the bonding company's claim that a claimant may not receive any amount above his written claim which is submitted prior to the hearing. The evidence presented at the hearing demonstrates that company records show that D & M Grain is entitled to \$1,887.33. The statute cited by the bonding company, SDCL 49-45-19, does not provide that a claim is limited to the written claim submitted prior to the hearing, especially when the evidence presented to the Commission at the hearing shows that the written claim is incorrect.

7. The Commission finds that when the bond is not sufficient to cover 100% of the claims, the interest earned on the bond money should be distributed on a pro rata basis to the claimants. The Commission disagrees with the bonding company's position that any interest earned was the property of the bonding company and must be returned to the company. As a general rule, "[a]ny profit or benefit accruing from [a receiver's] management of or dealings with the property committed to [the receiver's] charge must inure to the trust estate." 75 C.J.S. Receivers § 182(a). Further, the Commission points out that the Commission was given the authority to invest the bond proceeds in an interest bearing account. "A receiver who has on hand such a sum of money belonging to the estate that if it were his own he would invest it, has been held to have the duty to ask leave of the court to invest it, and to try, in good faith, to keep it invested for the benefit of the persons ultimately entitled." Id. at § 173 (emphasis added). Thus, the Commission finds that for the bond periods covering July 1, 1999, through June 30, 2001, all interest earned should be distributed on a pro rata basis to the claimants. For the bond period covering July 1, 1998, through June 30, 1999, the interest earned on the bond money shall be distributed to the bonding company since the claimants received 100% of their claims.

8. All of the above claims found valid by the Commission in findings of fact 6-10 are legitimate claims on the proceeds of the \$75,000.00 grain dealer's bond, commencing July 1, 1998, and ending June 30, 1999. All such claims shall be paid out of the proceeds of the bond. The

remaining bond money shall be returned to the bonding company, along with accrued interest.

9. All of the above claims found valid by the Commission in findings of fact 13-45 are legitimate claims on the proceeds of the \$75,000.00 grain dealer's bond, commencing July 1, 1999, and ending June 30, 2000. All such claims shall be paid out of the proceeds of the bond, along with accrued interest.

10. All of the above claims found valid by the Commission in findings of fact 48-75 are legitimate claims on the proceeds of the \$75,000.00 grain dealer's bond, commencing July 1, 2000, and ending June 30, 2001. All such claims shall be paid out of the proceeds of the bond, along with accrued interest.

ORDERED:

1. The Commission's Proposed Findings of Fact and Conclusions of Law, and Decision is approved and adopted by this Court. The Commission, as receiver, shall pay the above claims from the grain dealer's bonds in the amounts listed above. Accumulated interest on the grain dealer's bonds for the bonding period of July 1, 1999, through June 30, 2001, shall be distributed on a pro rata basis to the eligible claimants of the bond proceeds. Accumulated interest on the grain dealer's bond for the bonding period of July 1, 1998 through June 30, 1999, and all remaining bond proceeds shall be distributed to the bonding company.

Dated this \_\_\_\_\_ day of April, 2002.

BY THE COURT:

\_\_\_\_\_  
Circuit Court Judge

ATTEST:

\_\_\_\_\_  
Clerk of Courts

(SEAL)