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ATTORNEY GENERAL OPINION NO. 84- 4

Marvin R. Webb
Director
Grain Inspection Department
P.O. Box 1918
Topeka, Kansas 66601

RE: Grain and Forage, Grain Storage; Terminal and
Local Warehouses -- Public Warehouseman, License:
Application -- Financial Statements

Synopsis: Kansas law requires applicants for a public grain warehouse license to submit to the state Grain Inspection Department a certified financial statement. When the applicant is a wholly-owned subsidiary of another company, a certified financial statement of the parent company which does not separately identify at least, a current balance sheet, a statement of income (profit and loss), a statement of retained earnings and a statement of retained earnings of the applicant is inadequate. Even the inclusion of a guarantee agreement for the benefit of the state does not cure the defect where the agreement does not expressly purport to protect the rights or interests of creditors or depositors of the applicant. Cited herein: K.S.A. 1983 Supp. 34-228, 34-229, L 1983, ch. 137 § 1.

* * *

Dear Mr. Webb:

You have requested our opinion concerning whether the parent corporation of an applicant for a public warehouseman license may submit the parent company's certified financial statement

to satisfy the requirements of K.S.A. 1983 Supp. 34-228.

We are advised that the Smoot Grain Company seeks a license to operate a public warehouse in this state. Pursuant to statute, it has remitted the appropriate fees and submitted a certified financial statement of its parent company, Archer-Daniels-Midway (ADM). You ask our opinion whether this financial statement and accompanying guaranty satisfy the statutory requirements.

K.S.A. 1983 Supp. 34-228 et seq., sets out the requirements for a license. Among other things, the statute requires in part that:

"Every application for a public warehouse license shall be accompanied by a current financial statement. The statement shall include such information as required by the director to administer and enforce the public warehouse laws of this state, including but not limited to a current balance sheet, statement of income (profit and loss), statement of retained earnings and statement of changes in financial position. The applicant shall certify under oath that the statement as prepared accurately reflects the financial condition of the applicant as of the date specified and presents fairly the results of operations of the applicant's public warehouse business for the period specified." (Emphasis added.)
K.S.A. 1983 Supp. 34-228.

In this case the applicant is the Smoot Grain Company, but the financial statement is that of ADM.

General corporation case law states that "[a] holding or parent company has a separate corporate existence and is treated separately from its subsidiary in the absence of circumstances justifying disregard of the corporate entity." Service Iron Foundry, Inc. v. M.A. Bell Co., 2 Kan.App.2d 662, 673 (1978). See also, Quarles v. Fuqua Industries, Inc., 504 Fed.2d 1358, 1362 (D. Kan. 1974).

In the absence of evidence to the contrary, Smoot Grain and ADM must be viewed as separate and distinct companies, even though Smoot Grain is a wholly-owned subsidiary of ADM. In regard to the financial statements of both companies, we are advised that ADM prepares its financial statement based upon all the profits and losses of all its subsidiary companies. It does not break the statements down to distinguish the status of each subsidiary, nor does each subsidiary prepare

an individual financial statement.

In an effort to satisfy the provisions of K.S.A. 1983 Supp. 34-228, ADM executed a guaranty agreement to the state of Kansas that:

"Archer-Daniels-Midland Company, in consideration of the waiver of the State of Kansas of its requirements that the Smoot Grain Company and each of its subsidiary corporations provide an individual financial statement, will guarantee the prompt payment of such sum or sums of money as may at any time hereafter become due and owing to the State of Kansas from the Smoot Grain Company or any of its subsidiary corporations" Guaranty Agreement of Archer-Daniels-Midland Company, paragraph 2, dated September 27, 1983.

First, contrary to the assumption expressed in the ADM guarantee, Kansas law does not grant, either expressly or by reasonable implication, the authority to the Grain Inspection Department to "waive" the required financial statement. The complete financial statement of each separate warehouse is required. Moreover, the 1983 Kansas Legislature amended this provision to provide greater specificity by designating just which financial information is to be required. See L. 1983, ch. 137 § 1.

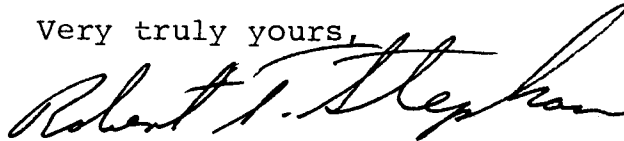
Second, the guarantee, by its own terms, is not broad enough to protect creditors and depositors of grain in the applicant's warehouse. Indeed, the guarantee is less comprehensive than the surety bond required by K.S.A. 1983 Supp. 34-229 which provides that the bond "shall be in favor of the state of Kansas for the benefit of all persons interested, their legal representatives, attorneys or assigns."

Finally, the financial statement of ADM does not disclose the assets of Smoot Grain which could be reached by creditors or depositors in the event of default. We have nothing in the records submitted to us to indicate that the entire assets of ADM are available to satisfy the obligations of the subsidiary corporation. It is, of course, the depositors and creditors of the grain elevator licensee which the legislature sought to protect by these statutory requirements and without such disclosures, we cannot conclude that the financial statement and accompanying guarantee satisfy Kansas law.

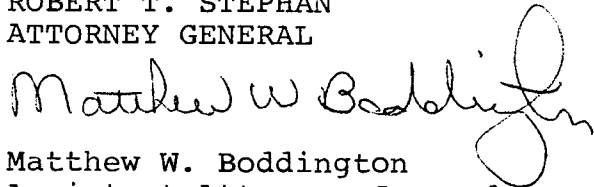
Several possibilities exist that may rectify the problem. ADM may become the applicant, modified guaranty statements may be executed or changes may be made in the law. However

absent such alterations, we have little hesitancy in concluding that when an applicant for a public warehouse license is a wholly-owned subsidiary of another company, and the parent company issues a guaranty agreement on behalf of its subsidiary to the state of Kansas for the payment only of the applicant's debts to the state, and which does not expressly purport to protect the rights and interests of the creditors and depositors of the grain elevator, the applicant's submission of its parent company's certified financial statement and guaranty statement do not satisfy the statutory requirements of K.S.A. 1983 Supp. 34-228.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL



Matthew W. Boddington
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RTS:BJS:MWB:crw