

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> March 28, 2007 CT- 2007-005  Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0002

**PUBLIC VERSION**

CT-2007-005

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-35, as amended;

**AND IN THE MATTER OF** the proposed acquisition by Saskatchewan Wheat Pool Inc. of United Grain Growers Limited, carrying on business as Agricore United;

**AND IN THE MATTER OF** the filing and registration of a Consent Agreement, pursuant to section 105 of the *Competition Act*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**- and -**

**SASKATCHEWAN WHEAT POOL INC.**

**Respondent**

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**CONSENT AGREEMENT**

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**WHEREAS** SWP proposes to acquire all of the outstanding securities of AU, as defined below;

**AND WHEREAS** the Commissioner has concluded, and SWP has agreed, that the SWP/AU Transaction is likely to result in a substantial lessening and/or prevention of competition in the market for port terminal grain handling services on the West Coast of Canada and in certain markets for grain handling services in Western Canada;

**AND WHEREAS** SWP has agreed to resolve the competition concerns identified by the Commissioner by selling the port terminal grain handling facility located on the North Shore of

Burrard Inlet in the Port of Vancouver owned by SWP, as well as certain in-country grain elevators now owned by AU, all as identified in Schedule “A”, to Cargill;

**AND WHEREAS** in the alternative to the sale by SWP of the assets identified in Schedule “A”, SWP will sell all of the SWP Divestiture Assets listed in Confidential Schedule “B” pursuant to the SWP Divestiture Trustee Sale Provisions of this Consent Agreement;

**AND WHEREAS** the Commissioner is satisfied that the implementation of this Consent Agreement will be sufficient to ensure that a substantial lessening and/or prevention of competition will not result from the completion of the SWP/AU Transaction;

**AND WHEREAS** SWP will not contest the jurisdiction of the Tribunal for the purposes of this Agreement or any proceeding initiated by the Commissioner relating to this Agreement, including an application to vary or rescind this Agreement under section 106 of the Act;

**AND WHEREAS** the Commissioner and SWP agree that, upon the signing of the Agreement, the Commissioner may file it with the Tribunal for immediate registration or at such later time as the Commissioner may decide within the three year period following completion of the SWP/AU Transaction.

**NOW THEREFORE** SWP and the Commissioner have agreed to the terms of this Consent Agreement as follows:

## **I. DEFINITIONS**

1. For the purposes of this Consent Agreement, the capitalized terms have the following meanings:

- (a) “**Act**” means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) “**Affiliate**” has the meaning given to it in subsection 2 (2) of the Act;
- (c) “**Agreement**” means this consent agreement entered into by SWP and the Commissioner pursuant to section 105 of the Act, together with all Schedules and Appendices attached hereto;

- (d) **“Agreed Statement of Facts”** means the agreed statement of facts attached hereto as Schedule “E”;
- (e) **“AU”** means United Grain Growers Limited carrying on business as Agricore United, an agri-business in Canada created on November 1, 2001 by the merger of Agricore Cooperative Ltd. and United Grain Growers Ltd., with its headquarters in Winnipeg, Manitoba;
- (f) **“Cargill”** means Cargill Ltd., the Canadian subsidiary of Cargill, Incorporated;
- (g) **“Cascadia”** means the Cascadia port terminal grain handling facility in the Port of Vancouver, currently jointly owned by AU and Cargill;
- (h) **“CBCA”** means the *Canada Business Corporations Act*;
- (i) **“Commissioner”** means the Commissioner of Competition appointed pursuant to section 7 of the Act;
- (j) **“Confidential Information”** means competitively sensitive information not independently known to a Person from sources other than the entity to which the information pertains including, without limiting the generality of the foregoing, any and all competitively sensitive information pertaining to the operation of any assets to be divested pursuant to this Agreement including, but not limited to, competitively sensitive manufacturing, operations and financial information, operating costs and revenues, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets;
- (k) **“Close”**, **“Closed”** and **“Closing”** in respect of the SWP/Cargill Transaction mean the final and irrevocable implementation of the steps necessary for a **“Closing”** as defined in the SWP/Cargill Asset Purchase Agreement;
- (l) **“Divest”** means to implement a Divestiture of any of the SWP Divestiture Assets to be divested pursuant to this Agreement;

- (m) “**Divestiture**” means, the sale, transfer, assignment or other disposal of the SWP Divestiture Assets such that SWP will have no further direct or indirect interest except as permitted herein or upon the consent of the Commissioner, [redacted].
- (n) “**Divestiture Agreement**” means any agreements entered into by the Divestiture Trustee to accomplish the Divestiture of the SWP Divestiture Assets contemplated by Part VI of this Agreement;
- (o) “**Divestiture Trustee**” means the divestiture trustee appointed pursuant to Part VII of this Agreement;
- (p) “**Hold Separate Manager**” means the Person or Persons appointed pursuant to Part IV of this Agreement, and any employees, agents or other persons acting for or on behalf of the Hold Separate Manager;
- (q) “**Hold Separate Monitor**” means the Person appointed pursuant to Part V of the Agreement, and any employees, agents or other persons acting for or on behalf of the Hold Separate Monitor(s);
- (r) “**Hold Separate Period**” means the period necessary to complete any Divestiture contemplated by this Agreement;
- (s) “**Offers**” means the offers by SWP to purchase all of the outstanding limited voting common shares of AU and all of the outstanding Series A convertible preferred shares of AU, as amended, varied, renewed or extended by SWP from time to time;
- (t) “**Pacific Terminal**” means the Pacific Elevators Limited port terminal grain handling facility located in the Port of Vancouver;
- (u) “**Person**” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity;
- (v) “**Purchaser**” means any Person(s) who purchases any of the SWP Divestiture Assets in accordance with any procedure for divestiture set out in this Agreement;

- (w) **“Respondent”** means SWP;
- (x) **“SWP”** means Saskatchewan Wheat Pool Inc., an agri-business existing under the laws of Canada and headquartered in Regina, Saskatchewan, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates under its control;
- (y) **“SWP/AU Transaction”** means the taking up of any securities of AU by SWP pursuant to the Offers;
- (z) **“SWP/Cargill Transaction”** means the purchase by Cargill of the SWP In-country Divestiture Assets and the purchase by Cargill of the SWP Terminal and the purchase by SWP of Cargill's half interest in Cascadia, all of which is detailed in the agreement appended as Confidential Schedule “C” (the “SWP/Cargill Asset Purchase Agreement”);
- (aa) **“SWP In-country Divestiture Assets”** means the In-country elevator assets as described in Confidential Schedule “B”;
- (bb) **“SWP Divestiture Assets”** means [redacted];
- (cc) **“SWP Terminal”** means the port terminal grain handling facility on the North Shore of Burrard Inlet in the Port of Vancouver owned by SWP;
- (dd) **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act* (Canada), R.S.C. 1985, c. 19 (2nd Supp.), as amended;
- (ee) **“Trustee Sale Period”** means the period ending four months after the Trustee is empowered to sell the assets to be divested or such longer period as directed by the Commissioner;
- (ff) **“UGG Terminal”** means the United Grain Growers port terminal grain handling facility located in the Port of Vancouver;

(gg) “**Voting Trustee**” means a trustee selected by the Commissioner for the purposes of paragraph 5 and Schedule “D”.

## **II. APPLICATION**

2. The provisions of this Agreement apply to:

- (a) SWP;
- (b) The Divestiture Trustee;
- (c) The Voting Trustee;
- (d) All other Persons acting in concert or participating with (a) and (b), above with respect to the matters referred to in this Agreement, who shall have received actual notice of this Agreement, including Cargill;
- (e) The Commissioner;
- (f) The Hold Separate Monitor;
- (g) The Hold Separate Manager;
- (h) The Purchaser(s) and the Purchaser (s)’s successors and assigns.

## **III. AGREEMENT**

3. SWP shall not take up any securities pursuant to the Offers unless:

- (a) SWP takes up at least 75% of the outstanding limited voting common shares of AU;  
and
- (b) SWP has first obtained, in writing, from senior management of the Vancouver Port Authority, the assurance that they will recommend to the Board of Directors of the Vancouver Port Authority that it grant any authorizations or consents required by the Vancouver Port Authority to complete the SWP/Cargill Transaction.

4. SWP represents and warrants that, provided it takes up pursuant to the Offers at least 75% of the outstanding limited voting common shares of AU, it will be fully able to effect such steps as are necessary to Close the SWP/Cargill Transaction, including the divestiture of AU assets pursuant thereto, all in accordance with this Agreement. SWP acknowledges and agrees that the Commissioner is entering into this Agreement in reliance on this representation and warranty.

5. If SWP takes up at least 75% of the outstanding limited voting common shares of AU, it will transfer to the Voting Trustee all voting rights and powers attached to all securities taken up pursuant to the Offers such that SWP shall retain no voting or other rights in such securities, other than beneficial ownership, during the period the shares are held in trust, except for the right to direct the Voting Trustee to take such steps as are necessary (and to vote such securities) for the sole purpose of continuing AU under the CBCA and replacing the then current directors of AU with nominees of SWP, all as set out in the voting trust agreement attached as Schedule "D" to this Agreement. Neither SWP nor the Voting Trustee will nominate any Person(s) to the board of directors of AU before AU is continued under the CBCA (other than the Persons nominated by SWP for election to the board of directors of AU following such continuance at the meeting of the shareholders of AU to be called for the purpose of authorizing such continuance).

6. From such time as SWP nominees constitute a majority of the Board of Directors of AU until either the Closing of the SWP/Cargill Transaction or the completion of the Divestiture, except as contemplated by this Agreement, SWP shall cause AU to operate in the ordinary course of business in accordance with past practice and use commercially reasonable efforts to preserve substantially intact the properties, assets and business organization of AU, and maintain its existing relationships and goodwill with material customers, suppliers, distributors, creditors, lessors, lessees, employees and business associates, and shall not merge or amalgamate with AU, take any other step to dissolve, consolidate or reorganize AU or change its status as a separate corporate entity from SWP, or take any other step that would materially negatively affect the ability of the SWP/AU Transaction to be unwound.

7. If SWP has not elected a majority of the Board of Directors of AU within 90 days of taking up any securities pursuant to the Offers, it will sell all of the AU securities it then holds within a further 90 day period, unless the Commissioner in her sole discretion decides otherwise.

8. SWP shall Close the SWP/Cargill Transaction within 90 days of taking up any securities pursuant to the Offers. If SWP does not Close the SWP/Cargill Transaction within 90 days of the date by which SWP has taken up any securities pursuant to the Offers, the divestiture trustee sale provisions under Part VII of this Agreement will apply, unless the Commissioner in her sole discretion decides otherwise.

9. SWP shall terminate the joint venture between SWP and James Richardson International Limited with effect on or before the day on which the SWP/Cargill Transaction has Closed. [redacted].

10. SWP shall provide the Commissioner with progress reports regarding the SWP/Cargill Transaction every two weeks and shall, within three days, respond to any further requests from the Commissioner for further information regarding the SWP/Cargill Transaction.

11. SWP shall notify the Commissioner:

- (a) immediately upon taking up 75% of the outstanding limited voting common shares of AU;
- (b) at least seven days in advance of any meeting called for the purpose of continuing AU under the CBCA; and
- (c) immediately upon SWP nominees constituting a majority of the Board of Directors of AU.

#### **IV. HOLD SEPARATE FOR SWP/AU TRANSACTION**

12. The Commissioner shall appoint one or more Hold Separate Manager to manage and operate the SWP Divestiture Assets independently of SWP, such appointment to be effective at such time as SWP nominees constitute a majority of the Board of Directors of AU. The Hold Separate Period will begin at the effective time of such appointment and shall terminate upon the Closing of the SWP/Cargill Transaction or when the Divestiture is completed. For greater certainty, the provisions of Part IV, V, VI, VII and VIII of this Agreement shall apply only during the Hold Separate Period and the restrictions in Part IV, V, VI, VII and VIII of this Agreement regarding the communication



of Confidential Information related to the SWP Divestiture Assets shall not limit the communication of Confidential Information related to the SWP Divestiture Assets to Cargill, or to personnel of SWP approved by the Commissioner who have executed a confidentiality agreement as contemplated by paragraph 25 below (such personnel of SWP thereafter being Permitted Persons for the purposes of paragraph 25 below), where the communication of such Confidential Information is reasonably necessary in order to facilitate the completion of the SWP/Cargill Transaction.

13. SWP shall be responsible for all fees and expenses charged or incurred by the Hold Separate Manager.

14. SWP shall:

- (a) Take all reasonable steps to ensure that the SWP Divestiture Assets are maintained independent of SWP, including transferring to the Hold Separate Manager all rights, powers and authorities necessary for him to perform his duties and responsibilities under this Agreement;
- (b) Not exercise any direction or control, direct or indirect, over the management or operations of the SWP Divestiture Assets except to the extent that SWP must exercise such direction and control in order to ensure its compliance with this Agreement and except as otherwise provided in this Agreement; and
- (c) Cause the operational manager(s) of the SWP Divestiture Assets to follow the instructions and directions of the Hold Separate Manager given pursuant to the provisions of this Agreement.

15. The Hold Separate Manager shall be responsible for the management of the SWP Divestiture Assets and shall report directly to the Hold Separate Monitor. The Hold Separate Manager will not have any access to any Confidential Information of SWP other than that relating to the SWP Divestiture Assets. During the term of this Agreement, the Hold Separate Manager shall not be involved, in any way, in the operations of the other businesses of SWP.

16. The Hold Separate Manager shall have no financial interests that may be affected by SWP's revenues, profits or profit margins, except that the Hold Separate Managers' compensation for managing the SWP Divestiture Assets shall include economic incentives for him to operate the SWP Divestiture Assets at no less than current rates of operation, to achieve the objectives of this Agreement, and to maintain, and make reasonable efforts to enhance, the competitiveness and customer base of the SWP Divestiture Assets.

17. In addition to those Persons employed within the SWP Divestiture Assets, the Hold Separate Manager may engage such Persons as are reasonably necessary to assist him in managing and operating the SWP Divestiture Assets, including, without limitation, Persons providing administrative services, such as finance personnel, information technology personnel, employee relations personnel, legal services personnel, public relations personnel, regulatory personnel, supply personnel, earnings consolidation and analysis personnel, business performance personnel, and customer relations personnel. All costs associated therewith shall be borne by SWP.

18. The Hold Separate Manager will have the responsibility and resources to implement existing sales, marketing, research and development and product development plans relating to the SWP Divestiture Assets and to modify existing plans consistent with previously approved goals and objectives with the approval of the Hold Separate Monitor. The Hold Separate Manager otherwise will not have access to any SWP confidential marketing materials.

19. The Hold Separate Monitor shall be permitted, with the approval of the Commissioner, to remove the Hold Separate Manager for cause. If the Hold Separate Manager ceases to act in his role, the Commissioner shall select a substitute manager and transfer to the substitute manager all rights, powers and authorities necessary to permit such substitute Hold Separate Manager to perform his duties and responsibilities pursuant to this Agreement.

20. Pending the completion of the Divestiture, the Hold Separate Manager, with oversight and direction from the Hold Separate Monitor, shall take all necessary steps to preserve the independence and competitive viability of the SWP Divestiture Assets, including but not limited to giving all necessary instructions to cause the SWP Divestiture Assets under his or her management, and any employees or agents of the SWP Divestiture Assets, to:

- (a) Operate the SWP Divestiture Assets independently of SWP;
- (b) Operate the SWP Divestiture Assets in compliance with all applicable laws;
- (c) Maintain all material registrations, permits and approvals necessary for the operation of the SWP Divestiture Assets;
- (d) Use commercially reasonable efforts to maintain and enhance the competitiveness and the customer base of the SWP Divestiture Assets and, in particular, to continue to solicit business;
- (e) Maintain and hold the SWP Divestiture Assets in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained by SWP prior to the date of this Agreement;
- (f) Establish all fees, deductions, discounts, credits or allowances with respect to the goods and services provided by the SWP Divestiture Assets;
- (g) Take all commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the SWP Divestiture Assets at the level that exists at the date of this Agreement, save as required by prudent management of the SWP Divestiture Assets;
- (h) Except with the approval of the Hold Separate Monitor and of the Commissioner, ensure that the SWP Divestiture Assets do not engage in any type of business other than the type of business conducted as of the date of this Agreement;
- (i) Not communicate any Confidential Information related to the SWP Divestiture Assets to anyone other than the Hold Separate Monitor, the Commissioner, or as otherwise permitted herein;
- (j) Not knowingly take or allow to be taken any action that materially and adversely affects the competitiveness, operations or financial status of the SWP Divestiture Assets;

- (k) Not materially curtail marketing, sales, promotional or other activities of the SWP Divestiture Assets in connection with the solicitation of existing or prospective customers save as required by prudent management of the SWP Divestiture Assets;
- (l) Not, to any material extent, alter, or cause to be altered, the management of the SWP Divestiture Assets as it existed prior to the date of this Agreement, except as may be necessary to comply with the terms of this Agreement or to replace employees that may resign, save as required by prudent management of the SWP Divestiture Assets; and
- (m) Not terminate or alter any current employment, salary or benefit agreements for any employees working in the SWP Divestiture Assets to any material extent, save as required by prudent management of the SWP Divestiture Assets under his management, in the name of the business(es).

21. In addition to the foregoing, SWP shall provide the SWP Divestiture Assets with sufficient financial resources:

- (a) As are appropriate in the judgment of the Hold Separate Manager, with the concurrence of the Hold Separate Monitor, to operate the SWP Divestiture Assets at least at current rates of operation and to carry on, at least at their scheduled pace, all capital projects, research and development plans, business plans and promotional activities contemplated in the SWP Divestiture Assets' most recent budgets, provided that failure to achieve production or sales goals projected in the SWP Divestiture Assets' respective budgets shall not be deemed to be a violation of this Agreement;
- (b) To continue, at least at their scheduled pace, any additional expenditures for the SWP Divestiture Assets authorized prior to the date of the Transaction;
- (c) To perform all maintenance to, and replacements of, the SWP Divestiture Assets; and

(d) To maintain the viability, competitive vigour, and marketability of the SWP Divestiture Assets.

22. The financial resources to be provided to the SWP Divestiture Assets shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses.

23. SWP shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Manager, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence or bad faith by the Hold Separate Manager.

24. The Hold Separate Manager, and any employee of the SWP Divestiture Assets, shall not communicate any Confidential Information acquired in the performance of the duties to any Person except to the extent required or permitted by this Agreement. The Hold Separate Manager and any managers of the SWP Divestiture Assets will each execute a confidentiality agreement in the form required by the Commissioner.

25. The Hold Separate Manager may provide Confidential Information (with a copy to the Commissioner) to:

- (a) any Person employed by the external auditors of SWP and AU, as the case may be; and
- (b) Senior accountants employed by SWP (the "Permitted Persons") only for the purposes of preparing standard financial and regulatory reports, tax returns and benefits administration, and to comply with applicable law and governmental authorities in Canada or the United States, provided that:
  - (i) Prior to disclosure of any Confidential Information, each Permitted Person shall execute a confidentiality agreement in the form required by the Commissioner; and

- (ii) The Permitted Persons shall use the Confidential Information only for the purposes permitted by this Agreement and shall not disclose such information to any other Person, whether or not an employee of SWP or AU.

26. SWP shall not, directly or indirectly, receive or have access to, or use or continue to use, any Confidential Information relating to the SWP Divestiture Assets, except as may be necessary to comply with the terms of this Agreement or as permitted by this Agreement, and except to the extent that such Confidential Information is reasonably necessary in order to complete the SWP/Cargill Transaction, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating and meeting obligations under agreements to divest businesses or grant licences pursuant to this Agreement, to the extent otherwise required by law, or as otherwise may be permitted by the Commissioner.

27. The SWP Divestiture Assets shall be staffed with sufficient employees to maintain the viability and competitiveness of the SWP Divestiture Assets. Employees of the SWP Divestiture Assets shall include (i) all personnel performing responsibilities primarily in connection with any of the SWP Divestiture Assets as of the date of the SWP/AU Transaction; and (ii) any persons hired from other sources. To the extent that any employees of the SWP Divestiture Assets leave or have left employment with respect to the SWP Divestiture Assets prior to the termination of the Hold Separate Period, the Hold Separate Manager, with the approval of the Hold Separate Monitor, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

28. SWP shall not, during the Hold Separate Period, offer employees of any of the SWP Divestiture Assets positions with SWP until the Purchaser has had a reasonable opportunity to offer employment. A Purchaser shall have the option of offering employment to or retaining any employees of any of the SWP Divestiture Assets. SWP shall not interfere with the employment by the Purchaser of such employees; shall not offer any incentive to such employees to decline employment with the Purchaser or to accept other employment with SWP; and shall remove any impediments that may deter such employees from accepting employment with the Purchaser including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Purchaser, and the

payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of SWP.

29. For a period of one year following completion of the Divestiture, SWP shall not employ or make offers of employment to employees of the relevant SWP Divestiture Assets who have accepted offers of employment with the Purchaser of such assets unless the individual employee has been terminated by the Purchaser.

30. Notwithstanding the requirements of paragraph 28, SWP may offer a bonus or severance to employees that continue their employment with the SWP Divestiture Assets until termination of the Hold Separate Period. The terms of the bonus or severance shall be determined by the Hold Separate Manager acting reasonably, with the concurrence of the Hold Separate Monitor, and shall be in addition to any other bonus or severance to which the employees would otherwise be entitled.

31. SWP shall ensure that employees of the SWP Divestiture Assets receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would have been otherwise entitled.

#### **V. HOLD SEPARATE MONITOR FOR SWP/AU TRANSACTION**

32. Upon registration of this Agreement, the Commissioner may appoint a Hold Separate Monitor responsible for monitoring the compliance of SWP and the Hold Separate Manager with this Agreement. SWP shall be responsible for all fees and expenses charged or incurred by the Hold Separate Monitor or any substitute Hold Separate Monitor appointed pursuant to this Agreement.

33. If the Hold Separate Monitor ceases to act or fails to act diligently and in a manner which is consistent with this Agreement, the Commissioner may appoint a substitute Hold Separate Monitor.

34. The Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents and facilities of the SWP Divestiture Assets or to any other relevant information as the Hold Separate Monitor may request. SWP and the Hold Separate Manager shall cooperate

with any request of the Hold Separate Monitor and neither SWP, nor the Hold Separate Manager, shall interfere with the Hold Separate Monitor's execution of its obligations herein.

35. The Hold Separate Monitor shall serve without bond or other security, at the expense of SWP, on such reasonable and customary terms and conditions as are agreed, with the approval of the Commissioner. The Hold Separate Monitor shall have the authority to engage, at the cost and expense of SWP, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities under this Agreement. The Hold Separate Monitor shall account for all expenses incurred, including fees for his services, and such account shall be subject to the approval of the Commissioner.

36. SWP shall indemnify the Hold Separate Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Monitor, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence or bad faith by the Hold Separate Monitor.

37. The Hold Separate Monitor shall report in writing to the Commissioner (i) no later than 30 days after the completion of the SWP/AU Transaction and every 30 days thereafter until any and all divestitures contemplated by this Agreement are completed, (ii) no later than 30 days from the date all obligations in this Agreement are satisfied, and (iii) at any other time as requested by the Commissioner or her staff, concerning SWP's and the Hold Separate Manager's compliance with this Agreement. The Hold Separate Monitor shall provide such report forthwith.

38. Neither SWP nor the Hold Separate Manager shall exert or attempt to exert any influence, direction or control over the Hold Separate Monitor.

39. This Agreement shall not be construed as providing the Hold Separate Monitor with ownership, management, possession, charge or control of the SWP Divestiture Assets.



40. The Hold Separate Monitor shall execute a confidentiality agreement in the form required by the Commissioner in which the Hold Separate Monitor will undertake not to disclose any competitively sensitive or proprietary information acquired in the performance of the Hold Separate Monitor's duties to any person except to the Commissioner.

41. If the Hold Separate Monitor considers that SWP or the Hold Separate Manager is in default of any of the terms of this Agreement, the Hold Separate Monitor shall immediately notify the Commissioner of the breach, who shall forthwith give notice to SWP and the Hold Separate Manager setting out the particulars of the default.

42. For the purpose of determining or securing compliance with this Agreement, and subject to any valid claim to a legally recognized privilege, the Commissioner may require, upon written request, SWP (including AU) and the Hold Separate Manager to permit the Hold Separate Monitor, any duly authorized representative of the Commissioner, and such advisors and experts as the Commissioner directs:

- (a) Upon a minimum of three days notice to SWP or the Hold Separate Manager, access during office hours of SWP or the Hold Separate Manager, to inspect the SWP Divestiture Assets and inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under control of SWP or the Hold Separate Manager relating to compliance with this Agreement; and
- (b) Upon a minimum of seven days notice to SWP, and without restraint or interference from SWP, to interview directors, officers or employees of SWP on matters in the possession or under the control of SWP relating to compliance with this Agreement.

## **VI. SWP DIVESTITURE ASSETS PROCESS**

43. The sale of the SWP Divestiture Assets shall be completed on the following general terms:

- (a) By sale, assignment, transfer, sale of shares or other disposition necessary to ensure that, by completion of the Divestiture, SWP has, directly or indirectly, no remaining title, right or interest in the SWP Divestiture Assets;

- (b) By way of disposition of the assets to be divested pursuant to this Agreement as a going concern;
- (c) To a Purchaser who is at arm's length to SWP and who meets the following criteria:
  - (i) The Purchaser shall effect the purchase with a demonstrated commitment to carrying on the business and competing effectively in the grain handling services business in Western Canada; and
  - (ii) The Purchaser shall have the managerial, operational and financial capability to compete effectively in the grain handling services business in Western Canada;
- (d) By way of a commercially reasonable public tender, bidding or other procedure instituted in a manner to allow as fair an opportunity as possible within the constraints of this Agreement, including mandated timeframes for divestiture, for one or more *bona fide* prospective Purchasers to obtain notice of the proposed divestiture and to make an offer to acquire the assets to be divested pursuant to this Agreement; and
- (e) On usual commercial terms for transactions of the size and nature of those contemplated in this Agreement.

44. The compliance of the divestiture with these foregoing terms shall be considered and approved solely by the Commissioner.

45. [redacted]

46. Any Person making a *bona fide* inquiry of the Divestiture Trustee regarding the possible purchase by that Person or its principal of the assets to be divested pursuant to this Agreement shall be notified that the sale is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions that are confidential and any attached confidential Appendices.

47. Subject to paragraph 48 below, any prospective Purchaser with a *bona fide* interest in purchasing any of the assets to be divested pursuant to this Agreement shall:

- (a) Be furnished with all pertinent information regarding the assets to be divested pursuant to this Agreement within 14 days of a request therefore; and
- (b) Be permitted to make such reasonable inspection of the assets to be divested pursuant to this Agreement and of all financial, operational or other non-privileged documents and information which may be relevant to the Divestiture, except for any documents which shall at the time of request for the inspection of such documents have been made the subject of an order of confidentiality of the Tribunal.

48. Access by a prospective Purchaser to the information identified in paragraph 47 of this Agreement shall be conditional on the execution of a standard confidentiality agreement in the form required by the Commissioner containing, among other things, non-solicitation terms relating to personnel and suppliers.

## **VII. SWP DIVESTITURE TRUSTEE SALE PROVISIONS**

49. The Commissioner may appoint the Divestiture Trustee pursuant to this Part 75 days after the taking up of any securities pursuant to the Offers. If the Commissioner appoints a Divestiture Trustee prior to the commencement of the Trustee Sale Period, SWP and the Hold Separate Manager shall provide complete access to the Divestiture Trustee to all information relating to the SWP Divestiture Assets in their possession or control. The Commissioner's appointment of the Divestiture Trustee shall be on the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

- (a) The Divestiture Trustee will be a Person(s) with experience and expertise in acquisitions and divestitures and may be the same Person as the Hold Separate Monitor;
- (b) Subject to the exclusive oversight and approval by, and in consultation with, the Commissioner, the Divestiture Trustee shall have the exclusive authority to control the SWP Divestiture Assets Process as described in Part VI of this Agreement by

whatever procedure the Divestiture Trustee believes, in its sole discretion, is suitable to effect the Divestiture in the time allotted under this Agreement; and

- (c) The Divestiture Trustee's obligations and powers under this Agreement shall not expire until the Divestiture is completed;

50. The Divestiture Trustee shall execute a confidentiality agreement in the form required by the Commissioner and shall refrain from communicating any Confidential Information to anyone except to the extent reasonably required to effect the Divestiture.

51. The Divestiture Trustee shall have 120 days in which to accomplish the Divestiture. The Trustee Sale Period may be extended at the sole discretion of the Commissioner.

52. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested or to any other information deemed relevant by the Divestiture Trustee to effect the Divestiture. SWP shall not take any action to interfere with or impede the Divestiture Trustee's accomplishment of the Divestitures.

53. SWP and the Hold Separate Manager shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Upon the appointment of the Divestiture Trustee, SWP shall identify a person responsible for responding to such requests from the Divestiture Trustee.

54. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favourable terms and conditions available at that time, and, if necessary to effect the Divestiture, shall sell the SWP Divestiture Assets at no minimum price. The Divestiture Trustee's opinion of what constitutes the most favourable terms and conditions is subject only to the Commissioner's approval.

55. The Divestiture Trustee shall have the sole authority to determine and to impose all reasonable and ordinary commercial representations and warranties for the purpose of effecting the Divestiture.

56. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of SWP on such reasonable and customary terms and conditions as the Commissioner may determine.

57. The Divestiture Trustee shall have the authority to engage, at the cost and expense of SWP, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall not take any direction from SWP.

58. SWP shall pay all invoices submitted by the Divestiture Trustee on a monthly basis. Any outstanding monies owed to the Divestiture Trustee by SWP shall be paid out from the proceeds of the Divestiture.

59. SWP shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence or misconduct or bad faith by the Divestiture Trustee.

60. If the Divestiture Trustee ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Divestiture Trustee, the Commissioner may appoint a substitute Divestiture Trustee in the same manner as provided in this Part for the initial Divestiture Trustee.

61. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested by the Divestiture Trustee.

62. The Divestiture Trustee shall report in writing to the Commissioner every 21 days, and upon the Commissioner's request within three days, concerning the Divestiture Trustee's efforts to accomplish the Divestiture. Such reports shall contain reasonable detail on the steps being taken by the Divestiture Trustee to effect the divestiture, including but not limited to, the identity of

prospective Purchasers, the status of negotiations with such prospective Purchasers, and any additional information requests by the Commissioner.

63. As the Divestiture Trustee's primary obligation is to divest the SWP Divestiture Assets to a Person(s) approved by the Commissioner, SWP may not object to, or challenge, the SWP Divestiture Trustee Sale on any grounds other than malfeasance, gross negligence or bad faith on the part of the Divestiture Trustee in fulfilling its obligations hereunder. If SWP objects to the terms and conditions of a Divestiture that has been proposed by the Divestiture Trustee on the grounds of malfeasance, gross negligence or bad faith by the Divestiture Trustee, SWP or the Commissioner may apply to the Tribunal for directions.

64. Confidential terms in this Agreement, including Confidential Schedule B, but excluding Confidential Schedule C, shall immediately be made public when the Trustee Sale Period commences.

#### **VIII. FAILURE OF DIVESTITURE**

65. If the SWP Divestiture Assets have not been divested within the Trustee Sale Period (including any extensions), or if the Commissioner is of the opinion that the Divestiture will not likely be completed prior to the expiry of the Trustee Sale Period, the Commissioner may apply to the Tribunal for such order as is necessary to effect an appropriate divestiture, including, without limiting the generality of the foregoing, an order that other assets be offered for sale, additional steps be taken to effect such a divestiture, or that SWP divest its entire ownership interest in AU. SWP unconditionally and irrevocably consents to submit to the Tribunal's jurisdiction to grant such relief as the Tribunal determines is required to effect an appropriate divestiture and acknowledges that the Agreed Statement of Facts will be submitted to the Tribunal as evidence in such an application.

#### **IX. NOTIFICATION**

66. SWP shall provide a copy of this Agreement to each of its officers, employees, or agents that has managerial responsibility for any obligations under this Agreement, no later than 15 days from the date this Agreement is registered.

67. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement, shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties:

(a) If to the Commissioner:

The Commissioner of Competition  
Competition Bureau  
Industry Canada  
Place du Portage, 19<sup>th</sup> floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9  
Attention: Melanie L. Aitken, Acting Deputy Commissioner of Competition  
(Mergers)  
Tel: 819. 994-1863  
Fax: 819. 994-0998

With a copy to:

Director and Senior General Counsel,  
Competition Law Division  
Department of Justice  
Place du Portage, 22<sup>nd</sup> floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9  
Attention: Jeff Richstone

(b) If to SWP:

President and Chief Executive Officer  
Saskatchewan Wheat Pool  
2625 Victoria Avenue  
Regina, Saskatchewan  
Canada S4T 7T9  
Attention: Mayo Schmidt  
Tel: 306-569-4411  
Fax: 306-569-4708

With a copy to:

Torys LLP  
Suite 3000  
79 Wellington Street West  
Box 270, TD Centre  
Toronto, Ontario  
M5K 1N2 Canada  
Attention: R. Jay Holsten  
Tel: 416.865.7523  
Fax: 416.865.7380

## **X. DURATION**

68. SWP shall be bound by the terms of this Agreement until the SWP/Cargill Transaction is Closed or the Divestiture is completed and all other obligations of SWP have been discharged in accordance with this Agreement, or until the Tribunal orders otherwise.

## **XI. GENERAL**

69. SWP agrees to the registration of this Agreement by the Tribunal, on usual terms, covering the matters agreed to herein. The Commissioner may agree to extend any of the time periods contemplated within this Agreement. The Commissioner agrees that, except as otherwise provided in this Agreement, Confidential Schedules "B" and "C" of this Agreement shall not form part of the public version of this Agreement provided that when the Divestiture is completed or the SWP/Cargill Transaction has Closed, the confidential terms of this Agreement, including Confidential Schedule "B" but excluding Confidential Schedule "C", shall be made public.

70. SWP and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to subsection 106 (1) of the Act.

71. SWP agrees it will not, without the consent of the Commissioner, make an application pursuant to subsection 106(1) of the Act, or raise or rely on an argument for a change of circumstances in any other proceedings before the Tribunal with respect to this Agreement, for a period of one year following the signing of this Agreement.



72. SWP agrees that it will not make application to the Tribunal pursuant to subsection 106(1) of the Act seeking any rescission or variation of this Agreement in reliance on or asserting a change in circumstance since the entering into of this Agreement, or any other circumstances relating to:

- (a) the sale or ownership of the UGG Terminal;
- (b) the ownership or terms and conditions of any lease relating to the Pacific Terminal, SWP Terminal or Cascadia; or
- (c) SWP's conduct in relation to, or affecting, the assets of SWP or AU.

73. The computation of any time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purpose of this Agreement, the definition of "holiday" in the *Interpretation Act* shall include Saturday.

74. This Agreement constitutes the entire agreement between the Commissioner and SWP with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral.

75. Notwithstanding any term of this Agreement, nothing in this Agreement shall be construed to abrogate the notification obligations set out in Part IX of the Act.

76. In the event of a dispute as to the interpretation, application or implementation of this Agreement, the Commissioner, the Divestiture Trustee, or SWP shall be at liberty to apply to the Tribunal for a further Order.

77. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

DATED at Ottawa, Ontario this 28th day of March, 2007.

FILED AND REGISTERED BY the Tribunal this 28th day of March, 2007.

“Sheridan Scott”  
Commissioner of Competition

Saskatchewan Wheat Pool Inc.

“Ray Dean”

“Paula Duguid”

## **SCHEDULE "A"**

### **Assets to be sold by SWP to Cargill in the SWP/Cargill Transaction**

#### **In-country Elevators**

##### ***Alberta***

1. The AU elevator located in Blackie, Alberta;
2. The AU elevator located in Equity, Alberta;
3. The AU concrete and steel HTP elevator located at the outskirts of Vermillion, Alberta;
4. The AU concrete HTP elevator and the crop input facility located at Camrose, Alberta;
5. The AU elevator located at Viking, Alberta.

##### ***Saskatchewan***

6. The AU elevator and crop input facility located at Kindersley, Saskatchewan;
7. The AU elevator and crop input facility located at Congress, Saskatchewan;
8. The AU elevator and crop input facility located at Davidson, Saskatchewan.

##### ***Manitoba***

9. The AU elevator and crop input facility located at Elva, Manitoba.

#### **Port Terminal Grain Handling Facility**

##### ***British Columbia***

The port terminal grain handling facility on the North Shore of Burrard Inlet in the Port of Vancouver owned by SWP.

**SCHEDULE "B"**

**[CONFIDENTIAL]**

**SCHEDULE "C"**

**[CONFIDENTIAL]**

**SCHEDULE "D"**

**Voting Trust Agreement**

## VOTING TRUST AGREEMENT

THIS AGREEMENT made the ■ day of April, 2007

**BETWEEN:**

**SASKATCHEWAN WHEAT POOL INC.**

(hereinafter referred to as “SWP”)

**OF THE FIRST PART**

- and -

**[Trustee]**

(hereinafter referred to as the “Trustee”)

**OF THE SECOND PART**

**RECITES THAT:**

**WHEREAS** SWP has made an offer (the “**Offer**”) to purchase all of the issued and outstanding limited voting common shares (the “**Agricore Common Shares**”) of United Grain Growers, carrying on business as “Agricore United” (“**Agricore**”);

**AND WHEREAS** SWP is of the view that the deposit with the Trustee of the Agricore Common Shares taken-up by SWP pursuant to the Offer (the “**Acquired Shares**”), to be held by the Trustee for the benefit of SWP on and subject to the terms contained herein, is an appropriate mechanism to ensure that beneficial ownership of the Acquired Shares vests with SWP while ensuring that all voting and other rights attaching to the Acquired Shares are exercised by an independent, arm’s length party until the completion of the following steps (hereinafter referred to as the “**Trust Termination Event**”)

- (a) a meeting or meetings of the holders of the Agricore Common Shares shall have been convened and shall have approved resolutions (the “**Resolutions**”)
  - (i) authorizing the directors of Agricore to apply for the continuance of Agricore as a corporation under the *Canada Business Corporations Act* (the “**CBCA**”),
  - (ii) upon the continuance of Agricore under the CBCA, removing all of Agricore’s then current directors from office, and
  - (iii) upon the continuance of Agricore under the CBCA, electing as directors of Agricore the nominees of SWP contemplated by the Offer; and

- (b) Agricore's then current directors shall have been removed from office and the nominees of SWP contemplated by the Offer shall have been elected as directors of Agricore;

**AND WHEREAS** the foregoing recitals are those of SWP and not of the Trustee;

**NOW THEREFORE** in consideration of the premises and mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, SWP and the Trustee hereby covenant and agree as follows:

**1. Creation and Purpose of Voting Trust**

Subject to the terms and conditions of this Agreement, a voting trust (the "**Voting Trust**") in respect of Acquired Shares deposited with the Trustee as hereinafter provided is hereby created and established, and the Trustee hereby accepts the trust created hereby and agrees to serve as trustee hereunder.

Subject as provided below, the Voting Trust shall be irrevocable until the Trust Termination Event.

**2. Acquisition and Holding of Deposited Shares**

- (a) Concurrent with the take-up of Agricore Common Shares pursuant to the Offer, SWP shall, subject to any guarantees and security interests granted in favour of any financial institution(s) to secure loans made by such financial institution(s) to SWP, transfer and deliver to the Trustee all Agricore Common Shares taken-up pursuant to the Offer (Acquired Shares so deposited being hereinafter referred to as "**Deposited Shares**") to be held by the Trustee for the benefit of SWP on and subject to the terms of this Agreement. SWP shall ensure that any such guarantees or security interests are subject to any applicable regulatory requirements.
- (b) When so requested by SWP in writing from time to time, the Trustee shall deliver to SWP acknowledgements in writing as to the number of Deposited Shares held by the Trustee at the time of such request.
- (c) Subject to the requirements of any agreement granting any guarantees or security interests in the Deposited Shares in favour of any financial institution(s) to secure loans made by such financial institution(s) to SWP, the Trustee shall retain and hold in **[Ontario]** the share certificates representing Deposited Shares only in accordance with and subject to the terms and conditions set forth in this Agreement. Except where the Deposited Shares are pledged to a financial institution(s) as contemplated in the preceding sentence, all share certificates and other instruments evidencing the Deposited Shares shall at all times be and remain in the possession of the Trustee. As directed in writing by SWP (but without becoming personally liable with respect thereto), the Trustee shall cause the granting of guarantees and security interests (subject to applicable regulatory requirements), or give acknowledgements of any existing guarantees or security



interests referred to in paragraph 2(a) above, in the Deposited Shares securing loans made by one or more financial institutions to SWP. The Trustee shall not cause the execution of any hypothecation agreement unless it contains provisions stating that:

- (i) voting rights for any pledged shares or other interests and all rights of the Trustee hereunder will remain with the Trustee, even in the event of a default by SWP on the loans (a “**Default**”);
- (ii) in the event of a Default, there will be a public or private sale of the pledged shares or other instruments or interests that are Deposited Shares; and
- (iii) prior to the exercise of rights by the secured party or by a purchaser of such shares or other instruments or interests that are Deposited Shares, the prior approval of the Commissioner of Competition (the “**Commissioner**”) appointed under the *Competition Act* (Canada) (if required) will be obtained.

The Trustee shall have no authority to sell, transfer, assign, pledge or otherwise dispose of or encumber the Deposited Shares, except to the extent otherwise specifically provided in this Agreement.

### **3. Maintenance of Records**

The Trustee shall maintain such records and books as are necessary or appropriate to enable the Trustee to carry out the terms and conditions of this Agreement.

### **4. Voting and Other Actions by Trustee**

- (a) During the term of the Voting Trust, all voting rights with respect to the Deposited Shares, and the right as shareholder to take part in or consent to any corporate or shareholder action of any kind with respect to Agricore and its subsidiaries, shall be solely vested in and exercised by the Trustee, who shall vote or cause the Deposited Shares to be voted:
  - (i) to cause a meeting or meetings of holders of the Agricore Common Shares to be convened for the purpose of approving the Resolutions, to approve the Resolutions, and to removed from office Agricore’s then current directors and to elect as directors of Agricore the nominees of SWP contemplated by the Offer; and
  - (ii) otherwise, in such manner as may be necessary to ensure that Agricore shall maintain the continuity of the operations and general character of the businesses of Agricore and its subsidiaries in the ordinary course (and not make or permit any changes out of the ordinary course), including preserving the relationships of Agricore and its subsidiaries with their

respective customers, suppliers and others, and satisfying commitments that are legally binding on Agricore or its subsidiaries.

- (b) Other than as expressly provided in this agreement, no person other than the Trustee shall have any voting or other rights in respect of any of the Deposited Shares during the term of the Voting Trust; provided that the Trustee may appoint a proxy to vote the Deposited Shares solely in the manner directed by the Trustee. The Trustee shall have no direct or indirect beneficial interest in or right to the Deposited Shares in his capacity as Trustee or otherwise.
- (c) Promptly following the Trust Termination Event, the Trustee shall cause the certificates and all other documents evidencing the Deposited Shares then held by the Trustee to be delivered to SWP (or as SWP may otherwise have directed in writing), properly endorsed for transfer to or to the order of SWP, and shall take all other actions appropriate to effectuate the transfer to SWP (or as it may otherwise have directed in writing) of the Deposited Shares and all other property then held by the Trustee pursuant to this Agreement.
- (d) Other than as expressly provided in this agreement, the Trustee shall not nominate any person to the board of directors of Agricore before Agricore is continued under the CBCA (other than the persons nominated by SWP for election to the board of directors of Agricore following such continuance at the meeting of the shareholders of Agricore to be called for the purpose of authorizing such continuance) or otherwise interfere with the Agricore board as it is currently constituted.

## **5. Concerning the Trustee**

- (a) Subject to the provisions of this Agreement, the Voting Trust shall be managed by the Trustee. The Trustee shall be selected by the Commissioner.
- (b) The Trustee shall be entitled to receive compensation for his services hereunder at such times and in such amounts as may be agreed upon in writing by the Trustee and SWP; provided that the compensation of the Trustee shall be subject to the prior approval of the Commissioner.
- (c) The Trustee is expressly authorized to incur and pay all reasonable charges and other expenses which the Trustee deems necessary and proper in the performance of the Trustee's duties under this Agreement, including for legal counsel and other advisors of his choosing retained on a per diem or hourly basis as the Trustee deems appropriate. SWP hereby agrees to reimburse and to indemnify the Trustee against all claims, costs of defence or claims (including reasonable attorneys' fees and disbursements), expenses and liability incurred by the Trustee in connection with the performance of the Trustee's duties under this Agreement, except those incurred as a result of the Trustee's gross negligence, intentional wrongful action or willful misconduct. SWP agrees to make any payments to the Trustee pursuant to this paragraph within fourteen (14) days of submission by the

Trustee of an invoice or bill therefor, plus appropriate supporting documentation. In the case of any fees and disbursements of any legal or other advisor retained by the Trustee, the Trustee will arrange for copies of the accounts therefor to be provided to SWP and to set out therein in reasonable detail a description of the services rendered together with appropriate supporting documentation.

- (d) The Trustee shall be free from liability in acting upon any paper, document or signature believed by the Trustee, to be genuine and to have been signed by the proper party. The Trustee shall not be liable for any error of judgment in any act done or omitted, nor for any mistake of fact or law, nor for anything which the Trustee may do or refrain from doing in good faith.
- (e) The rights and duties of the Trustee hereunder shall terminate upon the Trustee's bankruptcy, insolvency or death, and no interest in any of the Deposited Shares held by the Trustee nor any of the rights and duties of a Trustee may be transferred in any manner except as provided in this Agreement. The trustee or other personal representatives of a bankrupt, insolvent or deceased Trustee shall, however, have the right and duty to convey the Deposited Shares held by the Trustee to one or more successor Trustees.
- (f) The Trustee may resign by giving fourteen (14) days' prior written notice of resignation to SWP; provided that a successor Trustee has been appointed and such appointment has been approved by the Commissioner and any orders granting such approval have become final orders with respect to which no actions, requests for stay, petitions for rehearing or reconsideration, or appeals are pending, and as to which the time for filing any such request, petition or appeal has expired. SWP shall not unreasonably delay in the appointment of a successor Trustee.
- (g) Subject to the prior approval of the Commissioner, in the event of the resignation, bankruptcy, insolvency or death of the Trustee, he shall be succeeded by a successor Trustee chosen by SWP. Any successor Trustee shall succeed to all of the rights and obligations of the Trustee replaced hereunder upon the execution by such successor Trustee of a counterpart of this Agreement.

## **6. Dividends: Distribution of Proceeds of Sale of Shares or Assets**

Subject to the requirements of any agreement granting any security interest in the Deposited Shares in favour of any financial institution or institutions to secure loans made by such financial institution(s) to SWP, SWP or its designee shall be entitled to receive, from time to time, payments of dividends, interest, or other distributions if any, collected or received by the Trustee with respect to the Deposited Shares. Such payments shall be made to or to the order of SWP by the Trustee as soon as practicable after the receipt of such dividends, interest or other distributions. In lieu of receiving such dividends, interest or other distributions and paying them to SWP or its designee, the Trustee may instruct Agricore in writing to pay such dividends or other distributions directly to SWP or its designee. If any such instruction is given to Agricore, all liability of the Trustee with regard to the payment or such dividends or other distributions

shall cease, unless and until such instruction is revoked. The Trustee may at any time revoke such instruction by written notice to Agricore and direct it to make subsequent payments to the Trustee.

**7. Commencement of Trust and Termination**

The obligations of the parties hereunder shall commence upon SWP taking-up any Agricore Common Shares under the Offer (which SWP shall be under no obligation to the Trustee to do), and shall terminate upon the Trust Termination Event. If the Trust Termination Event has not occurred prior to ■ [three months after the Trust is implemented], SWP and the Commissioner may terminate the Voting Trust by joint notice in writing to the Trustee, and the Voting Trust will terminate upon receipt of such notice by the Trustee.

**8. Communications**

- (a) When requested in writing by SWP, the Trustee shall communicate with and provide reports to SWP concerning the implementation of the Resolutions and the business, maintenance and the operation of Agricore and its subsidiaries. A copy of any such written request by SWP and any Trustee report shall concurrently be provided to the Commissioner.

Notwithstanding the foregoing, during the term of the Voting Trust, the Trustee shall not communicate to SWP any competitively sensitive information regarding the SWP Divestiture Assets (as defined in the consent agreement dated ■, 2007 between the Commissioner and SWP).

- (b) Any communication permitted by paragraph 8(a) hereof shall be in writing to the extent reasonable practicable.
- (c) Any notice, direction, request or other instrument required or permitted to be given hereunder shall be in writing (including telecopier, telex, or any other means of communication by which words are capable of being visibly reproduced at a distance point of reception) and given by delivering or sending it by telecopy or other similar means of communication addressed:

- (i) if to SWP at:

■

Attention: ■  
Telecopier: ■

- (ii) if to the Trustee at:

■

Attention: ■  
Telecopier: ■

Any such notice, direction or other instrument given as aforesaid shall be effective upon receipt, unless received on a day which is not a business day in which event it shall be deemed to be received on the next business day. Any party may change its address for service from time to time by notice given in accordance with the foregoing and any subsequent notice shall be sent to the party at its changed address.

**9. Miscellaneous**

- (a) Except for the written agreement between the Trustee and SWP as to the Trustee's fees for so acting, this Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral or written agreements, commitments or understandings with respect to the matters provided for herein.
- (b) This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and their respective personal representatives, permitted successors and permitted assigns. Subject to paragraph 5(f) above, neither this Agreement nor the Voting Trust shall be assignable by the Trustee.
- (c) This Agreement, the rights and obligations of the parties hereto, and any claims and disputes relating thereto, shall be governed by and construed exclusively in accordance with the laws of the Province of **[Ontario]**.
- (d) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same Agreement.

**IN WITNESS WHEREOF** the parties have executed this Agreement.

**SASKATCHEWAN WHEAT POOL INC.**

Per: \_\_\_\_\_  
■

SIGNED, SEALED AND DELIVERED )  
in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Witness

\_\_\_\_\_  
■  
Trustee



**SCHEDULE "E"**

**Agreed Statement of Facts**

**PUBLIC VERSION**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-35, as amended;

**AND IN THE MATTER OF** the proposed acquisition by Saskatchewan Wheat Pool Inc. of United Grain Growers Limited, carrying on business as Agricore United;

**AND IN THE MATTER OF** the filing and registration of a Consent Agreement, pursuant to section 105 of the *Competition Act*;

**AND IN THE MATTER OF** an application pursuant to paragraph 65 of the Consent Agreement.

BETWEEN:

**THE COMMISSIONER OF COMPETITION**

**Applicant**

- and -

**SASKATCHEWAN WHEAT POOL INC.**

**Respondent**

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**AGREED STATEMENT OF FACTS**

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## I. DEFINITIONS

The following definitions and abbreviations will be used in this Agreed Statement of Facts:

- (a) “**Act**” means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) “**AU**” or “**UGG**” means United Grain Growers Limited, carrying on business as Agricore United, an agri-business in Canada created on November 1, 2001 by the merger of Agricore Cooperative Ltd. and United Grain Growers Ltd., with its headquarters in Winnipeg, Manitoba;
- (c) “**UGG Terminal**” means the Port Terminal grain handling facility located in the Port of Vancouver, which is currently subject to a divestiture process being conducted pursuant to a consent agreement entered into by the Commissioner of Competition and UGG and registered with the Competition Tribunal on October 17, 2002;
- (d) “**Cargill**” means Cargill Ltd, the Canadian subsidiary of Cargill, Incorporated;
- (e) “**CGC**” means the Canadian Grain Commission;
- (f) “**Cascadia**” means the Cascadia Port Terminal grain handling facility in the Port of Vancouver currently jointly owned by AU and Cargill;
- (g) “**Commissioner**” means the Commissioner of Competition, appointed pursuant to section 7 of the Act;
- (h) “**Consent Agreement**” means the agreement entered on March 2\_, 2007, by the Commissioner and Saskatchewan Wheat Pool Inc. pursuant to section 105 of the Act, together with all Schedules and Appendices attached hereto;
- (i) “**CWB**” means the Canadian Wheat Board;
- (j) “**CWB Grain**” means wheat and barley for export and domestic human consumption;

- (k) “**Diversión Premium**” means a per-tonne payment made by an Integrated Grainco to a Non-Integrated Grainco in order to attract the Non-Integrated Grainco’s grain to the Integrated Grainco’s Port Terminal;
- (l) “**Grainco**” means a grain company;
- (m) “**Integrated Grainco**” means a grain company that owns both primary elevators in Western Canada and an interest in a Port Terminal elevator on the Canadian West Coast;
- (n) “**JRI**” means James Richardson International Limited;
- (o) “**Non-CWB Grains**” means canola, lentils, peas, and other specialty crops;
- (p) “**Non-Integrated Grainco**” means a grain company that may own a primary elevator(s) in Western Canada but does not own an interest in a Port Terminal on the Canadian West Coast;
- (q) “**Pacific Terminal**” means the Pacific Elevators Limited Port Terminal grain handling facility located in the Port of Vancouver;
- (r) “**Port Terminal**” means a grain elevator located in a port, the principal purposes of which are the receipt of grain on or after its official inspection and weighing, and the cleaning, storage and treatment of grain before it is loaded onto a vessel;
- (s) “**PRG**” means the Port Terminal located in Prince Rupert, British Columbia;
- (t) “**Primary Grain Elevator**”, also know as “In-Country Elevator”, means an elevator, the principal purposes of which are to receive grain directly from producers, and then elevate, grade, segregate, store, forward, and possibly clean, dry, and blend grain;
- (u) “**Process Elevator**” means an elevator, the principal purpose of which is the receipt and storage of grain for direct manufacture or processing into other products;

- (v) **“Proposed Acquisition”** means the proposed acquisition of AU by SWP;
- (w) **“SWP”** means Saskatchewan Wheat Pool Inc., an agri-business existing under the laws of Canada and headquartered in Regina, Saskatchewan, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates under its control.

All the above definitions are intended to be consistent with the definitions contained in the Consent Agreement. Any capitalized term not specifically defined herein, shall have the same meaning as set out in the Consent Agreement.

## **II. INTRODUCTION**

1. The Applicant and the Respondent have agreed to the submission of this Agreed Statement of Facts, as proof of the facts set out herein. The Respondent agrees that the facts herein shall be treated as admissions and shall not be subject to cross examination. This Agreed Statement of Facts is filed in accordance with the Consent Agreement entered into on March 28, 2007 between the Commissioner and SWP (“Consent Agreement”). This Agreed Statement of Facts will only be used in an application to the Competition Tribunal pursuant to paragraph 65 of the Consent Agreement. In particular, the Agreed Statement of Facts is without prejudice to, and will not be used in, the section 92 Application of the Commissioner before the Competition Tribunal challenging the joint venture between SWP and JRI.
2. The Commissioner and SWP agree that the SWP/AU transaction will result in a substantial lessening or prevention of competition as further detailed below.

## **III. THE PARTIES**

3. The Applicant is the Commissioner, appointed under section 7 of the Act and charged with the administration of the Act.
4. The Respondent, SWP, is a publicly traded agri-business cooperative which has its head office in Regina, Saskatchewan. SWP provides a wide range of goods and services to farmers and services to other grain handling companies in Western Canada and also

markets agricultural commodities domestically and internationally. SWP operates businesses in three distinct but related areas: (1) grain handling and marketing at both the Port Terminal and Primary Grain Elevator levels, (2) agri-business (crop inputs) supplies and services and (3) agri-food processing. SWP operates 44 Primary Grain Elevators in the Prairies, owns Port Terminals in Vancouver and Thunder Bay, and has an interest in a Port Terminal in Prince Rupert, British Columbia.

#### **IV. THE TRANSACTION**

5. SWP proposes to acquire all of the outstanding securities of AU, in the manner described in the Consent Agreement.
6. On March 28, 2007, the Commissioner and SWP entered into a Consent Agreement, to which this Agreed Statement of Facts is attached as Schedule "E".

#### **V. THE GRAIN INDUSTRY**

7. The grain industry in Western Canada has a number of elements and various participants, including:
  - (a) Farmers, who produce grain. The vast majority of their grain that is destined for export is delivered to Primary Grain Elevators located within a limited geographic area surrounding their farms;
  - (b) The CWB, which is by law the sole marketer of wheat and barley for export and domestic human consumption. Wheat and barley sold for non-human consumption in Canada (e.g. livestock feed or ethanol production) are traded outside the jurisdiction of the CWB. The CWB is a farmer-controlled marketing organization, incorporated pursuant to the provisions of the *Canadian Wheat Board Act*. All the sales revenue earned by the CWB, after deducting operational costs, is returned to the approximately 85,000 producers of CWB Grain;
  - (c) The CGC, which is responsible for establishing standards for grain sold domestically and for export. CGC inspectors monitor grain quality and assign official grades in respect of grain delivered to Port Terminals. In order to respond

to different customer demands for specific quality characteristics of grain (primarily wheat), the CGC has, pursuant to section 16 of the *Canada Grain Act*, established in recent years an increasing number of grain “segregations”, currently numbering in the hundreds, each of which is generally handled and stored separately. Segregations are made on the basis of factors such as grain type, grade and protein content;

- (d) Grain companies, which purchase grain at Primary Grain Elevators from farmers. When purchasing CWB Grain they act as agents for the CWB. The majority of all Non-CWB Grains are purchased at Primary Grain Elevators from farmers by grain handling companies on their own account at market prices. At Primary Grain Elevators, grain is elevated, graded, and segregated, and may be cleaned, dried, blended and stored;
  - (e) Railways (i.e. Canadian National Railway (“CN”) and the Canadian Pacific Railway (“CP”)), which transport CWB and Non-CWB Grain from Primary Grain Elevators to, among other places, Port Terminals located in Vancouver, Prince Rupert (connected only to CN), and Thunder Bay;
  - (f) Port Terminals, which receive grain from the Prairies and earn fees for storage, elevation and, if necessary, blending and cleaning of grain before it is loaded into a vessel; and
  - (g) Ocean-going vessels, onto which grain is loaded for export.
8. Non-Integrated Graincos require access to Port Terminals owned by Integrated Graincos in order to get their grain to offshore markets.
9. As Integrated Graincos earn revenue for elevating, storing, blending and cleaning grain at their Port Terminals, they may seek to increase the volume of grain handled at their Port Terminals by offering Diversion Premiums.

10. These Diversion Premiums are confidential and set out in grain handling agreements. The Non-Integrated Graincos receive Diversion Premium payments on both CWB and Non-CWB Grains.
11. For Non-Integrated Graincos to compete effectively with Integrated Graincos, it is essential that they have regular and predictable access to Port Terminal grain handling services.
12. In order to secure rail cars, Primary Grain Elevator operators must first obtain terminal authorization from a Port Terminal. Terminal authorization for transporting product to a port may be denied if the Port Terminal is unable to accommodate further “unloads” of grain. The ability of Port Terminals to receive more grain relative to demand is subject to a number of variables such as seasonality, crop yield and vessel arrivals. In periods of high demand, Non-Integrated Graincos become more vulnerable to potential access issues as Integrated Graincos have a preference to handle their own grain first. The railway delivers rail cars to the terminal specified in the terminal authorization. However, in the circumstances where the authorized terminal cannot accept the grain, alternate arrangements may need to be made to have the grain delivered to another terminal.

## **VI. COMPETITIVE ANALYSIS**

### **In-Country Elevators**

13. The relevant product market is grain purchasing and handling services at Primary Grain Elevators.
14. The relevant geographic markets are limited to local draw areas around each Primary Grain Elevator in Western Canada.
15. In-Country Elevators are limited to local draw areas due to transportation costs. Each In-Country Elevator also has a unique local draw area due to characteristics such as road conditions, crop output and local topography. On average, the vast majority of grain received by an In-Country Elevator originates within 75 kilometres of that elevator.

Integrated and Non-Integrated Graincos compete in purchasing CWB and Non-CWB Grain from farmers via the Integrated and Non-Integrated Graincos' Primary Grain Elevators.

16. A farmer's grain is generally transported by truck from the farm to a Primary Grain Elevator where the grain is elevated, graded, and segregated and may be cleaned, dried, blended and stored. The farmer is then issued a cheque for the grain delivered, based upon the current market price for the grade, less charges for delivery (if made by the grain company), elevation, dockage and cleaning (if applicable). At Primary Grain Elevators, the grain is then generally loaded onto railway hopper cars, assembled into a train and moved to a Port Terminal if the grain is destined to off-shore markets.
17. There are no acceptable substitutes for Primary Grain Elevators in Western Canada:
  - (a) Process Elevators are not acceptable substitutes because the grain handled in each facility is limited to a specific grain type and Process Elevators have a limited presence in Western Canada. In addition, since the majority of Process Elevators source their grain through the Primary Grain Elevator system, Process Elevators are not acceptable substitutes for Primary Grain Elevators.
  - (b) Producer car facilities are not acceptable substitutes because of their limited influence in Western Canada. On average, producer car facilities only account for a very small percentage of rail car movements of grain.
18. *De novo* entry into the Primary Grain Elevator market requires 15 to 20 million dollars of capital expenditure and a one to three year time frame for construction.
19. For each of the in-country markets where SWP has agreed to divest Primary Grain Elevators, there is limited effective competition remaining which would have the capability to respond to the exercise of market power, thereby removing the substantial lessening or prevention of competition brought about by the Proposed Acquisition.
20. AU and SWP have been effective competitors, pre-merger, in the provision of primary grain handling services in the local markets in which SWP has agreed to divest elevators.

In the absence of the agreed upon divestitures, the merged entity would be able to exercise market power, resulting in higher handling fees and lower grain prices or financial inducements offered to farmers.

21. The divestiture of the SWP In-Country Divestiture Assets, as defined in the Consent Agreement, resolves the substantial lessening and/or prevention of competition in those local markets.

## **Canadian West Coast Port Terminals**

### **Market Definition**

22. The relevant product market is Port Terminal grain handling services. The primary function of a Port Terminal is the handling of grain for offshore export. This can include elevation, cleaning, segregation, storage, grading, blending and loading onto a vessel. Shippers are dependent upon Port Terminals for these bundles of services. Thus, In-Country Elevators are not substitutes to Port Terminals.
23. Port Terminals differ significantly from other port loading facilities in their physical characteristics, means of production, uses and pricing.
24. Even though grain is sometimes exported using containers, containerized shipments of grain are not a competitive alternative to bulk shipments of grain, and thus are not included in the relevant product market.
25. The relevant product market does not include “Direct-Hit” shipments. “Direct-Hit” shipping is the operation by which grain shipments from In-Country Elevators are directly unloaded from railcars onto ocean-going vessels at the port. This requires extremely precise logistics including “just-in-time delivery” and vessel availability.
26. While the Vancouver Wharves terminal has handled small volumes of mostly specialty grains, the services that it offers do not form part of the relevant product market. This facility handles various other bulk commodities including mineral concentrates, sulphur and fertilizers. With respect to conventional grains, such as wheat, barley and canola,



Vancouver Wharves has limited storage capacity. This acts as a severe constraint on its ability to handle significant volumes of these grains.

27. The relevant geographic market is the Canadian West Coast. This definition includes the Port of Vancouver and, arguably, the Port of Prince Rupert.
28. Even if PRG is in the relevant geographic market, it is not an effective independent competitor to the Port of Vancouver Port Terminals. This issue, as it relates to effective remaining competition, is discussed in paragraphs 44 to 46 below.
29. The relevant geographic market excludes the Port of Churchill, Thunder Bay, and the St-Lawrence Seaway ports, as well as U.S. ports, as these ports are not close substitutes to Canadian West Coast ports.
30. Direct truck and rail shipments to continental markets are also excluded from the relevant geographic market, for reasons including, but not limited to, the fact that these two transportation modes are used to reach continental end-customers while Canadian West Coast Ports reach customers located in non-continental export markets.

### **Concentration**

31. On the Canadian West Coast, there are five Port Terminals in Vancouver and one at Prince Rupert. In Vancouver, the following three Port Terminals are located on the South Shore of Burrard Inlet:
  - (a) Cascadia Terminal, with 282,830 tonnes of licensed storage capacity. Cargill and AU each own 50% of Cascadia;
  - (b) Pacific Terminal, with 199,150 tonnes of licensed storage capacity. AU owns and operates the Pacific Terminal;
  - (c) UGG Terminal, with 102,070 tonnes of licensed storage capacity, is presently wholly owned and operated by AU. Pursuant to a consent agreement between the Commissioner and AU, filed with the Tribunal on October 17, 2002, AU was required to select either Pacific Terminal or the UGG Terminal for divestiture to

an arm's length purchaser. AU subsequently elected to divest the UGG Terminal. The sale of the UGG Terminal is ongoing.

On the North Shore of Burrard Inlet, there are the following facilities:

- (d) SWP Terminal, with 237,240 tonnes of licensed storage capacity, is wholly owned by SWP;
- (e) JRI Terminal, with 108,000 tonnes of licensed storage capacity, is wholly owned by JRI.

32. The SWP and JRI Terminals have been operated jointly by SWP and JRI since July 11, 2005, through their joint venture corporation Pacific Gateway Terminals Ltd. This joint venture has been contested by the Commissioner pursuant to section 92 of the Act, and a hearing is pending.

33. As of March, 2007, the capacity of the five Vancouver Port Terminals was as follows:

<b>Terminals</b>	<b>Existing Ownership interest</b>	<b>Storage Capacity (Tonnes)</b>	<b>Share of Storage Capacity</b>
Cascadia	50% AU 50% Cargill	282830	30.4%
Pacific	100% AU	199150	21.4%
UGG	100% AU	102070	11%
SWP	100% SWP	237240	25.5%
JRI	100% JRI	108000	11.6%

34. The PRG Terminal, with licensed storage capacity of 209,510 tonnes, is operated under a co-tenancy agreement [redacted]. The PRG Terminal handles mostly CWB Grain.

35. Assuming a divestiture of the UGG Terminal, SWP and AU combined would control directly or indirectly 89% of the licensed storage capacity of the grain terminals at the Port of Vancouver. Moreover, SWP and AU combined would become the majority shareholder of PRG with a [redacted] interest.

36. The acquisition of AU by SWP would increase the concentration in the ownership and operation of Port Terminals on the Canadian West Coast to an unprecedented level. All Port Terminals in this market would have ownership or operational ties with SWP until the UGG Terminal is divested. SWP would jointly own the Cascadia terminal with Cargill, continue to be a joint venture partner with JRI at the Port of Vancouver, and become the majority and co-shareholder of PRG with Cargill and JRI.

### **Barriers to Entry**

37. Barriers to *de novo* entry into the operation of Port Terminals are high.
38. Capital costs for construction of a new Port Terminal are high and would involve significant sunk costs. The numerous grain segregations established by the CGC in response to demand for specific protein content and other quality measures, impose a need for considerable storage capacity.
39. Port Terminals require adequate deepwater loading sites which involve significant regulatory hurdles. Moreover, a Port Terminal can only be built in a location that has adequate rail access. Due to these factors, there are limited or no locations available upon which a new Port Terminal could be built on the Canadian West Coast.
40. Based on the foregoing, the potential for entry of a new Port Terminal on the Canadian West Coast in the foreseeable future is extremely low.

### **Removal of a Vigorous and Effective Competitor**

41. Measured by licensed storage capacity or by receipts, AU is the largest provider of Port Terminal grain handling services on the Canadian West Coast. AU currently owns two Port Terminal grain handling facilities and has a 50% ownership interest in a third Port Terminal grain handling facility in the Port of Vancouver. Along with three other grain handling companies, it jointly owns Prince Rupert Grain Ltd. AU is also the largest grain handler in Western Canada, operating 82 Primary Grain Elevators.
42. Measured by licensed storage capacity or by receipts, SWP owns the second largest Port Terminal at the Port of Vancouver. Since July 2005, this Port Terminal has been

operated jointly with the adjacent Port Terminal owned by JRI through Pacific Gateway Terminals Ltd., a corporation jointly owned by SWP and JRI. As mentioned above, this joint venture is currently being challenged before the Competition Tribunal pursuant to section 92 of the Act.

43. The acquisition of AU by SWP would eliminate competition between the two largest integrated participants in the Canadian West Coast Port Terminal grain handling services market. This would likely result in: a) the reduction in, or elimination of, Diversion Premiums; b) an increase in tariffs charged for port handling services; and c) an increased likelihood of port access problems. The negative impact on competition would be exacerbated by the fact that this market is already very highly concentrated with a limited number of competitors, all of whom presently have joint ownership in PRG.

#### **Effective Remaining Competition**

44. With the SWP acquisition of AU there would not be sufficient competition remaining in the Canadian West Coast Port Terminal grain handling services market to effectively constrain the market power of the merged entity. With the merged entity's 50% interest in Cascadia, the effectiveness and independence of Cargill in soliciting grain volume from Non-Integrated Graincos will continue to be limited as it jointly owns and operates its Port Terminal with SWP. JRI owns one of the two smallest Port Terminals at the Port of Vancouver, which is currently operated jointly with the adjacent Port Terminal owned by SWP. Furthermore, following its acquisition of AU, SWP would be the majority shareholder of PRG.
45. In addition to being owned by the owners of the Vancouver Port Terminals, PRG has been used almost exclusively for the shipment of CWB-Grain. Furthermore, PRG is only connected to the CN rail network. CP's published rates to Prince Rupert are substantially higher than its rates to Vancouver. Hence, PRG has attracted only small volumes of CP originated grain over the years, with the exception of the period of the Vancouver lockout in the Fall of 2002.
46. Thus, PRG would not likely discipline the Port Terminals in the Port of Vancouver.

### **Foreign Competition**

47. US Port Terminals in the Pacific North-West are not close substitutes for Port Terminal services at Canadian West Coast ports. Rail rates are on average \$13 per tonne, or 40%, higher from Western Canada to Portland or Seattle as compared to Vancouver. The cost of rail transportation is by far the largest cost component involved in the movement of grain from farms to markets. As a result of these large rail cost differentials, US Port Terminals do not constitute competitive alternatives for Canadian western grain shippers.

### **Countervailing Power**

48. Neither the CWB nor any of the Non-Integrated Graincos have sufficient countervailing power to constrain the possible exercise of market power by SWP post merger. The CWB has not been able to constrain steady price increases for Port Terminal services over time, even in periods of low demand for such services.

### **Competitive effects**

49. As noted above, the market for Port Terminal grain handling services is already highly concentrated. In the absence of one of the two divestitures outlined in Schedules A and B of the Consent Agreement, the Proposed Acquisition would create an even more highly concentrated market. This increased concentration in the Port Terminal grain handling services market would also reduce the ability of the Non-Integrated Graincos to compete in primary grain elevator markets.

## **VII. CONCLUSION**

50. Based on the above, the Proposed Acquisition is likely to result in a substantial lessening and/or prevention of competition in the market for Port Terminal grain handling services on the West Coast of Canada and in the provision of grain handling services in certain local markets in Western Canada.
51. The anticipated acquisition of the UGG Terminal by an independent competitor is clearly insufficient to remedy the substantial lessening or prevention of competition that would result from the acquisition of AU by SWP. The divestiture of this terminal was ordered

by the Tribunal in October 2002 to remedy a then less, albeit highly, concentrated market in which more independent competitors remained post-merger compared to the current dynamic.

52. Either structural remedy set out in Schedule A or B of the Consent Agreement will remedy the substantial lessening or prevention of competition that would likely result from the Proposed Acquisition in the market for Port Terminal grain handling services on the West Coast of Canada and in certain markets for grain handling services in Western Canada.

Dated: March 28, 2007.

“Jonathan Chaplan” for  
Commissioner of Competition

Saskatchewan Wheat Pool Inc.

“Ray Dean”

“Paula Duguid”