IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

LP6 CLAIMANTS LLC, Plaintiff, v. SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM and THE STATE OF SOUTH DAKOTA, Defendants and SDRC, INC., SD INVESTMENT FUND LLC6, and JOOP BOLLEN, Defendants-Third Party Plaintiffs v. HENRY GLOBAL CONSULTING GROUP a/k/a HENRY GLOBAL GROUP, a/k/a HENRYGLOBAL CONSULTING, USA incorporated under the laws of the People's Republic of China	Supreme Court Case No. 29129

Appeal from the Circuit Court, 6th Judicial Circuit

The Hon. John Brown Judge Presiding

BRIEF FOR PLAINTIFF-APPELLANT

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The Notice of Appeal was filed on the 18th day of September, 2019.

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JURISDICTIONAL STATEMENT

Plaintiff has appealed from the Memorandum Decision and Order of the Sixth Circuit Court, Judge John Brown, both dated July 18, 2017, which granted the motion of Appellees State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development and South Dakota Department of Tourism[1] to dismiss plaintiff's amended complaint as against them on the pleadings, as made final by the Judgment of Dismissal of the Sixth Circuit Court, Judge Klinger, dated August 15, 2019. This Court has jurisdiction over this matter pursuant to S.D. Codified Laws § 15-26A-3(1).

LEGAL ISSUES

1. Where South Dakota was responsible for a program soliciting investment in commercial projects located in South Dakota, is the State immune from suit by investors for misrepresentations made in soliciting their investments from out of state?

The Court below held that South Dakota was immune from suit.

Authorities Most Relevant to the Issue:

[1] Defendants State of South Dakota, the South Dakota Department of Tourism and State Development, the South Dakota Governor's Office of Economic Development, and the South Dakota Department of Tourism, are

Atlantica Holdings Inc. v. Sovereign Wealth Fund Samruk-Kazyna, JSC, 813 F.3d 98 (2d Cir. 2016)
Aune v. B-Y Water Dist., 464 N.W.2d 1 (S.D. 1990)
City of Cincinnati, Ohio v. Commonwealth ex rel. Reeves, 292 Ky. 597, 167 S.W.2d 709 (1942)
EIG Energy Fund XIV, LP v. Petroleo Brasileiro, S.A., 894 F.3d 339 (D.C. Cir. 2018)
L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n, 399 N.W.2d 340 (S.D. 1987)
R.L. Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir. 1984)
State v. City of Hudson, 231 Minn. 127, 42 N.W.2d 546 (1950)
Wasserstein Perella Emerging Markets Finance, LP. v. The Province of Formosa, 2000 WL 573231 (S.D.N.Y. 2000)

2. Where the State of South Dakota was responsible for a program soliciting investment in commercial projects located in South Dakota, does the legislature's express waiver of sovereign immunity for claims relating to violations of South Dakota securities statutes preclude South Dakota from raising sovereign immunity as a defense to claims based on misrepresentations in the offering materials to investors?

The Court below held in the negative.

Authorities Most Relevant to the Issue

Arcon Constr. Co., Inc. v. South Dakota Cement Plant.,349 N.W.2d 407 (1984)
L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n, 399 N.W.2d 340 (S.D. 1987)
S.D. Codified Laws §47-31B-102(20)
S.D. Codified Laws § 47-31B-102(28)(D) and (E)

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collectively referred to herein as "South Dakota."

S.D. Codified Laws § 47-31B-503
S.D. Codified Laws §47-31B-509

STATEMENT OF THE CASE AND FACTS

The immigrant investment program (the "EB5 Program") is a federal program which provides preferred immigration status to foreign nationals who invest over $500,000 in projects designed to boost employment in designated areas of the United States. See Amended Complaint ("AC"), par.12, AA0012.[2]

The State of South Dakota, through various agencies operating as commercial enterprises[3], oversaw the EB5 Program in South Dakota. AC pars. 15-19, AA0012-0013. In 2009, South Dakota engaged defendant SDRC, Inc., a corporation wholly owned by a former South Dakota employee, defendant Bollen, to administer and promote the EB5 program in South Dakota. AC pars. 8-9, AA0011. Together, the defendants were in the

[2] Citations to Appellants' Appendix are abbreviated "AA," with a corresponding Appendix page number. Citations to the Brown County Circuit Court Clerk's Index are abbreviated "CI," with a corresponding Clerk's Index page number. There was no trial of the underlying action, but transcripts of the hearing on defendant-appellees' motion to dismiss were prepared and is included in Appellants' Appendix and are referenced by Appendix and transcript page numbers.

[3] Defendants State of South Dakota, the South Dakota Department of Tourism and State Development, the South Dakota Governor's Office of Economic Development, and the South Dakota Department of Tourism, are

business of soliciting investments in EB5 projects in South Dakota, a commercial activity regularly engaged in by *private* commercial parties.

Plaintiff is a limited liability company whose members, Chinese nationals, were induced by the misrepresentations in defendants' offering memoranda (the "Offering Memos") to make an EB5 investment of over $500,000 each (collectively over $18 million), through a limited partnership, SDIF Limited Partnership 6 ("LP6") in a security, to wit an interest in a beef processing plant which could not succeed (the "Project"). AC, pars.3, 22-26, AA0010, 0013-0016.

At the time plaintiff's members were induced to invest, the beef processing plant was undercapitalized and lacked the financial wherewithal to be a viable investment. Not only was none of this disclosed to plaintiff's members, but defendants' Offering Memos contained numerous affirmative misrepresentations. See e.g. AC, pars. 22-25, AC0013-0016.

After plaintiff served its amended complaint in or about December 2015, South Dakota made a pre-answer motion to dismiss on the pleadings. South Dakota did not contest that plaintiff's members were duped into investing in the foredoomed Project, or that South Dakota had participated

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collectively referred to herein as "South Dakota."

in deceiving them. Rather South Dakota argued, *inter alia*, that plaintiff's claims were barred by sovereign immunity.

By memorandum decision (AA002) and Order (AA001), both dated July 18, 2017 (collectively the "Dismissal Order"), the Court below granted South Dakota's motion to dismiss on the pleadings on the basis of sovereign immunity, despite decisions of this Court, adhering to the rule followed almost universally in the United States, holding that sovereign immunity does not bar claims based on commercial activities, including the solicitation of investments in a business enterprise. The Court below also ignored that the legislature has expressly waived sovereign immunity for claims relating to South Dakota's securities laws. *See* Point II, *infra*.

Plaintiff's petition to allow an immediate appeal of the Dismissal Order was denied by this Court's Order dated September 8, 2017. CI913. Accordingly, after plaintiff's claims against all defendants other than South Dakota was resolved by settlement and a Judgment of Dismissal was entered on or about August 15, 2019 (the "Judgment", CI957), plaintiff filed a notice of appeal from the Dismissal Order (as made final by the Judgment) on or about September 18, 2018 (CI965). This appeal followed.

POINT I

SOUTH DAKOTA'S SOLICITATION OF INVESTMENT IN SECURITIES RELATED TO THE PROJECT IS A COMMERCIAL ACTIVITY TO WHICH SOVEREIGN IMMUNITY DOES NOT APPLY

Plaintiff has alleged facts demonstrating that South Dakota was acting in furtherance of a commercial enterprise when defendants made misrepresentations to plaintiff's members and induced them to invest in the Project. *E.g.* AC pars. 1, 4-7, 12, 15-17, AA009-0013. Sovereign immunity does not shield South Dakota from claims arising from its operation of a commercial enterprise, such as promoting and soliciting investors for South Dakota EB5 projects. "Where the State elects to operate a business enterprise solely for commercial purposes, it ought not be permitted to avoid its legal responsibility by invoking the doctrine of governmental immunity. [It] should be amenable to suit for mismanagement, bad faith actions and negligent conduct, just as the private sector is made responsible." *L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 346 (S.D. 1987) (sovereign immunity did not bar claims). *Accord Aune v. B-Y Water Dist*., 464 N.W.2d 1, 2-3 (S.D. 1990) ("Where a state creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily held subject to suit, the same as any private corporation

organized for the same purpose.") (citations, internal quotations and brackets, omitted); *Olesen v. Town of Hurley*, 2004 S.D. 136, 25, 691 N.W.2d 324, 330 (2004) concurring) ("We have consistently held that sovereign immunity does not apply to a business enterprise run by the government.") (citations omitted).

This Court has made it clear that it adheres to the general rule followed in state and federal courts across the United States, including the United States Supreme Court - that sovereign immunity does not bar claims arising from the sovereign's engagement in commercial activities. *State of Ga. v. City of Chattanooga*, 264 U.S. 472, 479–80, (1924) ("Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation."); *Bank of U.S. v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824) ("[W]hen a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."); *Junior Coll. Dist. of St. Louis v. City Of St. Louis*, 149 S.W.3d 442, 448-49 (Mo. 2004), *as modified on denial of reh'g* (Nov. 23, 2004) ("The water that flooded was not being used ... for a[ ] public purpose. *** In supplying this

water, the City was engaged in a proprietary function, ... so that sovereign immunity principles do not apply.") (internal quotations omitted); *Pierson v. Cumberland Cty. Civic Ctr. Comm'n*, 141 N.C. App. 628, 632, 540 S.E.2d 810, 813 (2000) (sovereign immunity did not apply where "the evidence demonstrates that defendant's operation of the Coliseum is a commercial enterprise."); *California Sand & Gravel, Inc. v. United States*, 22 Cl. Ct. 19, 29 (1990), *aff'd*, 937 F.2d 624 (Fed. Cir. 1991) ("Whenever the United States casts off its cloak of sovereign immunity to engage in a business-type activity with a business-minded purpose, it must be treated as a private commercial contractor. ") (citation omitted); *Nestman v. S. Davis Cty. Water Imp. Dist.*, 16 Utah 2d 198, 201, 398 P.2d 203, 205 (1965) ("Where a public body, which would otherwise be entitled to sovereign immunity, engages in an activity of a commercial or proprietary character, the protection does not exist."); *Hutton v. Martin*, 41 Wash. 2d 780, 784-85, 252 P.2d 581, 584 (1953) (sovereign immunity did not apply where the sovereign "was charging for the service it rendered ... and was in business ... .")

Here plaintiff's factual allegations, which must be taken as true on a motion to dismiss on the pleadings, show that the activities in which South Dakota engaged in soliciting investment in the Project are precisely the

commercial activities to which sovereign immunity does not apply.

Moreover, numerous courts have held that a sovereign's solicitation of investments and/or misrepresentations concerning securities, like South Dakota's solicitation of plaintiff's members to invest in the Project and misrepresentations about, *inter alia*, the Project's financial viability, are commercial activities to which sovereign immunity does not apply. For example, in *Wasserstein Perella Emerging Markets Finance, LP. v. The Province of Formosa*, 2000 WL 573231 (S.D.N.Y. 2000) the plaintiff, an investment bank, sought to recover fees allegedly due from a sovereign in connection with the sovereign's attempt to raise money. The Court held that sovereign immunity did not bar the claim because "[r]etaining a private investment bank to raise money for a loan, like borrowing money and issuing debt instruments, is an inherently commercial transaction."[4] The Court recognized that "the question is not whether the ... government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather the issue is whether the particular actions the ... state performs (whatever the motive behind them) are the type of actions

[4] 2000 WL 573231 at *9.

by which a private party engages in trade and traffic or commerce."[5] Here, South Dakota's actions in soliciting investments in a security are clearly "actions by which a private party engages in trade and traffic or commerce."

Similarly, *R.L. Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1459 (9th Cir. 1984) involved an investor's claim, *inter alia*, that a sovereign had "misled him in violation of [federal securities statutes]" in connection with the sovereign's sale of Certificates of Deposit. The Court held that the claims were not barred by sovereign immunity because "the sale of the certificate of deposit ... was clearly a commercial activity ... ." 731 F.2d at 1460 (internal quotations omitted). Also on point is *Atlantica Holdings Inc. v. Sovereign Wealth Fund Samruk-Kazyna, JSC*, 813 F.3d 98, 102 (2d Cir. 2016), in which the plaintiff asserted a claim that "an instrumentality of a foreign sovereign ... violated federal securities laws by making misrepresentations ... concerning the value of securities ... ." The Court held that the claim based on misrepresentations of the value of a security was not barred because such acts fell within the commercial activities exception to sovereign immunity codified in 28 U.S.C. §1605(a)(2), which provides in pertinent part that sovereign immunity does

[5] 2000 WL 573231 at *8 (citations, internal quotations, and emphasis

not bar a claim against a foreign sovereign which "is based upon ... an act ...in connection with a commercial activity of the [sovereign] ... ." Likewise, in *EIG Energy Fund XIV, LP v. Petroleo Brasileiro, S.A.*, 894 F.3d 339 (D.C. Cir. 2018), an investor asserted a claim that it had been fraudulently induced by a sovereign into investing in a Brazilian crude oil project The Court held that the claim, much like plaintiff's claim, was not barred by sovereign immunity because it arose from the sovereign's "commercial activity ... ." 894 F.3d at 349. *See Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578, 584 (E.D. Pa. 1985) ("Advertising and promotion of an industry are activities in which a private party could engage and which are customarily carried on for profit. They are thus commercial activities ... .") (citations, internal quotations, omitted).[6]

In the cases cited above, including *L.R. Foy* and *Aune,* this Court set

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omitted).

[6] It is also well settled that sovereign immunity does not bar claims against a sovereign based on activities conducted beyond its borders, such as South Dakota's extraterritorial solicitation of Chinese nationals to invest in the Project (See AC par.3, AA10 and Hearing Transcript p.27, lines 17-18, AA00138). *See State v. City of Hudson,* 231 Minn. 127, 131, 42 N.W.2d 546, 549 (1950) ("Even a state may not claim sovereign immunity for its business enterprises conducted beyond its borders.") (citation, internal quotations, omitted); *City of Cincinnati, Ohio v. Commonwealth ex rel. Reeves*, 292 Ky. 597, 167 S.W.2d 709, 714 (1942) ("Even a state may not claim sovereign immunity for its business enterprises conducted beyond its

forth its adherence to the well-settled rule that sovereign immunity will not bar a claim based on the commercial activities of the sovereign. The Court below attempted to distinguish *Aune* on the faulty basis that "a water district, such as that in *Aune*, is much more like a municipality, and far removed from the sovereign immunity that the state enjoys." Dismissal Order, p.6, AA007. The attempted distinction by the Court below ignores that this Court repeatedly referred to the *state level sovereign immunity* at issue in *Aune*. For example, this Court expressly held in *Aune* that "[t]hese extensive, independent powers compel the conclusion that a water user district is like a private enterprise and distinct from the state, and, consequently, is outside the ***state's sovereign immunity*** shield" (464 N.W.2d at 4, emphasis added) and "[h]aving concluded that B–Y is a business enterprise with a commercial purpose, it follows that the legislature cannot extend the ***state's sovereign immunity*** to shield B–Y from damages arising in contract or tort." (*id*, emphasis added).

The lower court also tried to distinguish both *Aune* and *L.R. Foy* on the mistaken basis that those cases involved express legislative waivers of sovereign immunity. See Dismissal Order, p 6-7, AA007-008. However, as

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borders.") (citation omitted).

set forth more fully in Point II below, the legislature has enacted an express waiver of sovereign immunity covering the claims asserted here as well, in a legislative scheme virtually identical to that at issue in *L.R. Foy*. Moreover, *Aune* was not decided based on a legislative waiver, but rather based on this Court's holding that "the function of a water user district is commercial and it should be treated the same as any other commercial enterprise" 464 N.W.2d at 4.

It is South Dakota's burden to establish the affirmative defense of sovereign immunity. *Masad v. Weber*, 2009 S.D. 80, ¶ 15, 772 N.W.2d 144 (S.D. 2009). Here, South Dakota has not and cannot meet that burden. To the contrary, plaintiff's allegations that its claims arise from South Dakota's operation of a commercial enterprise (as well as all of plaintiff's other allegations) must be accepted as true for purposes of this motion. "A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (S.D. 2008) (citations, internal quotations, omitted). For purposes of this motion, it must

be accepted as true that plaintiff's claims arise from South Dakota's operation of a commercial enterprise, and thus sovereign immunity does not shield South Dakota from suit.

POINT II

THE LEGISLATURE EXPRESSLY WAIVED SOUTH DAKOTA'S SOVEREIGN IMMUNITY FOR CLAIMS, LIKE THOSE AT BAR. ARISING FROM THE SALE OF SECURITIES

The gravamen of plaintiff's claims is that South Dakota participated with the other defendants in inducing plaintiff's members to invest in the Project through false and misleading representations in, and material omissions from, the Offering Memos. The interest in the Project acquired by plaintiff's members is a security pursuant to the Uniform Securities Act of 2002 (the "Act"). S.D. Codified Laws § 47-31B-102(28)(D) and (E), defines a Security as including, *inter alia*, as "an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a common enterprise means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors" and "interest in a limited partnership ... ." The investments of plaintiff's members in the Project, "a common enterprise with the

expectation of profits to be derived primarily from the efforts of a person other than the investor", through their acquisition of interests in LP6, a "limited partnership" fits both of these definitions perfectly.

The Act also provides that "[a] person is liable to the purchaser if the person sells a security in violation of § 47-31B-301 or, ***by means of an untrue statement of a material fact or an omission to state a material fact*** necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading ... ." S.D. Codified Laws §47-31B-509 (emphasis added). Such liability may be enforced in a civil suit, as expressly contemplated in S.D. Codified Laws § 47-31B-503 ("In a civil action or administrative proceeding under this chapter ... ." "Persons" whom the Act makes liable for selling a security by means of an untrue statement, and against whom the Act allows enforcement by means of a civil suit, includes "government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity." S.D. Codified Laws §47-31B-102(20). Thus, by enacting the Act, the legislature expressly waived sovereign immunity for any government entity which sells a security by means of an untrue statement of material fact or omission to state a material fact.

Virtually the same legislative scheme was involved in both *L.R. Foy, supra,* and *Arcon Constr. Co., Inc. v. South Dakota Cement Plant.,*349 N.W.2d 407 (1984), which the Court below cited as examples of cases in which sovereign immunity was expressly waived by statute. Both cases involved Article 2 of the U.C.C., which expressly provided an aggrieved buyer with the right to sue a seller (just as the Act makes a "person" liable to an aggrieved purchaser), and defines "seller" to include governments or government subdivisions or agencies (just as the Act defines "person" to include government or government subdivisions or agencies).[7] Thus, just as the legislature's enactment of the U.C.C. was held in both *L.R. Foy* and *Arcon* to be an express waiver of sovereign immunity because the definition of who could be liable under it included government entities, so too does the legislature's enactment of the Act expressly waive sovereign immunity by

[7] "[T]he UCC provisions expressly apply to the state. In its general definitions, the UCC defines "organization" to include "government or governmental subdivision or agency." SDCL 57A–1–201(28). Because it is a governmental agency, the cement plant is an organization within the meaning of the UCC. As an organization, the cement plant is a "person" under SDCL 57A–1–201(30), and, as a "person who sells or contracts to sell goods," it is a "seller" within the context of UCC–Sales. SDCL 57A–2–103(1)(d). ***
Third, the UCC grants a buyer specific rights and remedies against a breaching seller, and these rights include lawsuits." *Arcon, supra*, 349 N.W.2d at 410 (citation omitted).

defining persons who can be liable under it to include government entities.

CONCLUSION

For all the foregoing reasons, it is urged that the Dismissal Order be reversed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I mailed by first class United States mail, postage prepaid, two copies of the foregoing document to which this certificate is attached and the Appendix attached hereto to:

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CERTIFICATE OF COMPLIANCE WITH SDCL 15-26A-66

I hereby certify that the foregoing brief complies with the type-volume limitation of SDCL 15-26A-66(B)(2). The brief contains a proportional-spaced typeface in 14 point Times New Roman font, and a Microsoft 2010 Word Count of 3,987 words.

CERTIFICATE OF MAILING

I hereby certify that I mailed by first class United States mail, postage prepaid, the original and 2 copies of the foregoing Brief of Plaintiff-Appellant to which this certificate is attached and the Appendix attached hereto, to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501-5070 on the 2nd day of December, 2019.

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STATE OF SOUTH DAKOTA :ss COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LP6 CLAIMANTS LLC, Plaintiff, v. SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, THE STATE OF SOUTH DAKOTA, SDRC INC., SD INVESTMENT FUND LLC 6, AND JOOP BOLLEN Defendants,		Civ. No. 15-312 ORDER GRANTING MOTION TO DISMISS

The Court, having considered the Motion of the Defendants' State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development and South Dakota Department of Tourism; the briefs filed herein, the arguments of counsel; and having issued its Memorandum Decision on this date, it is hereby

ORDERED that the Motion to Dismiss based on Sovereign Immunity is Granted.

Dated at Pierre, South Dakota, this 18th day of July, 2017.

BY THE COURT:

John L. Brown
Circuit Court Judge

ATTEST:

By: /s/TaraJo Deuter-Cross
Deputy

EXHIBIT
A

Filed on:07/18/2017 Hughes County, South Dakota 32CIV15-000312

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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Re: Hughes County Civ. No. 15-312: *LP6 Claimants LLC v. South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development, South Dakota Department of Tourism, The State of South Dakota, SDRC Inc., SD Investment Fund LLC 6, and Joop Bollen*

MEMORANDUM DECISION

Defendants in the above captioned matter, State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development and South Dakota Department of Tourism, have filed a Motion to Dismiss the Plaintiff's Complaint pursuant to SDCL § 15-6-12(b)(5) for failing to state a claim upon which relief can be granted. Specifically, Defendants assert that sovereign immunity bars this suit against the State.

BACKGROUND

Plaintiff is a limited liability company who claims its members were fraudulently induced by the Defendants' misrepresentations to invest over $500,000 each through a limited partnership, SDIF Limited Partnership 6 ("LP6"), in a beef processing plant ("Project"). Opposition to Defendants' Motion to Dismiss at 1. Said Project was intended to comply with a federal program known as the immigrant investment program ("EB5 Program") which provides preferred immigration status to foreign nationals who invest over $500,000 in projects designed to boost employment in designated areas of the United States. Id. This includes the area of South Dakota where the beef processing plant was located. Id.

Plaintiffs contend that at the time its members were induced to invest, the beef processing plant was "undercapitalized and lacked the financial wherewithal to be a viable investment". Id. at 2. Plaintiff goes on to allege,

> "The State of South Dakota, through various agencies operating as commercial enterprises[1], oversaw the EB5 Program in South Dakota. In 2009, South Dakota engaged defendant SDRC, Inc., a corporation wholly owned by a former South Dakota employee, defendant, Bollen, to administer and promote the EB5 program in South Dakota. Together, the defendants were in the business of soliciting investments in EB5 projects in South Dakota, together they induced plaintiffs members to invest in the Project through misrepresentations, and together they are liable for the damages they caused."

Id.

During oral arguments held on March 10, 2016, in front of Honorable Judge Mark Barnett, Sixth Circuit, Defendants acknowledged that though they initially

[1] Plaintiff refers to 'State of South Dakota', 'South Dakota Department of Tourism and State Development', 'South Dakota Governor's Office of Economic Development', and 'South Dakota Department of Tourism' collectively as "South Dakota".

had three reasons to dismiss the Complaint, they were only focused on one: sovereign immunity. Reason number two was the applicable statute of limitations, which counsel agreed was a defense that must be affirmatively pled in an Answer or other responsive pleading. Hr'g Tr. at 5:17-23. Judge Barnett and Counsel then agreed that a Motion to Dismiss was not a responsive pleading, and therefore there was no reason to address statute of limitations until it was affirmatively pled. Id. at 5:24-6:10. Further, Defendants' Counsel concedes that the issue of notice under SDCL § 3-21-2 is a secondary issue. Id. at 9:21-22. The primary issue in determining the Motion to Dismiss is whether the State of South Dakota is entitled to sovereign immunity. Id. at 9:22-24. As such, this Memorandum Decision will focus on the issue of sovereign immunity.

QUESTION PRESENTED

I. Whether this suit against the State of South Dakota is barred by sovereign immunity?

LEGAL STANDARD

Sovereign Immunity is the right of public entities to be free from liability for tort claims unless waived by legislative enactment. *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 7 n. 3, 658 N.W.2d 64, 67 n. 3 (citing *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 2247, 144 L.Ed.2d 626 (1999)). Whether sovereign immunity applies is a question of law. *Bickner v. Raymond Township*, 2008 SD 27, ¶ 10, 747 N.W.2d 668, 671.

ANALYSIS

I.

Whether this suit against the State of South Dakota is barred by sovereign immunity?

In South Dakota, the Legislature has the authority to direct how the State of South Dakota may be sued. As provided by our State's Constitution, "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. Art. 3, § 27. In the absence of constitutional or statutory authority, an action *cannot be maintained* against the State. *Public Entity Pool for Liability v. Score, supra*, (citing generally *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979); *Darnall v. State*, 79 S.D. 59, 108 N.W.2d 201 (1961); *Griffis v. State*, 68 S.D. 360, 2 N.W.2d 666 (1942); *Mullen v. Dwight*, 42 S.D. 171, 173 N.W. 645 (1919)) (emphasis added).

Defendants take the position that "[t]he South Dakota Department of Tourism and State Development, the Governor's Office of Economic Development and the South Dakota Department of Tourism are State agencies and thus entitled to sovereign immunity." Motion to Dismiss at 4. The South Dakota Supreme Court has "consistently held that it is the exclusive province of the legislature and not the courts to abrogate or limit the doctrine of sovereign immunity. In the absence of an express statutory waiver, [they] strictly adhere to this constitutionally mandated doctrine." *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407 (see also *Kringen v. Shea*, 333 N.W.3d 445 (S.D. 1983); *Merrill v. Birhanzel*, 310 N.W.2d 522 (S.D. 1981); *High-Grade Oil Co., Inc. v. Sommer, infra; Arms v. Minnehaha County*, 69 S.D. 164, 7 N.W.2d 722 (1943).

Plaintiffs make two distinct arguments against the applicability of sovereign immunity in this case. One is that sovereign immunity was waived pursuant to SDCL § 21-32A-1. Opposition to Defendants' Motion to Dismiss at 3. The second is that "sovereign immunity does not apply to commercial enterprises such as South Dakota's efforts to get people to invest in EB5 projects in South Dakota." Id. Each of these arguments will be addressed in turn.

A. Did the State waive sovereign immunity pursuant to SDCL § 21-32A-1?

Defendants argue that the State agencies have not waived sovereign immunity, nor could they because the authority to waive sovereign immunity is vested *solely* in the Legislature. Motion to Dismiss at 4 (emphasis added). Moreover, Defendants hold out to this Court that "at no time has the Legislature, in accordance with Article III, § 27, enacted a waiver of the State's sovereign immunity." Id.

Plaintiff's argument of waiver is rooted in SDCL § 21-32A-1, which reads,

> "To the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented to suit in the same manner that any other party may be sued. The waiver contained in this section and §§ 21-32A-2 and 21-32A-3 is subject to the provisions of § 3-22-17."

SDCL § 21-32A-1.

Plaintiffs point to a Consulting Agreement providing for SDRC to administer and market the EB5 program. Opposition to Defendants' Motion to Dismiss at 5, n.

4. Plaintiffs contend that this Agreement required SDRC to "purchase at least $3 million of insurance, naming [South Dakota Department of Tourism and State Development] as an additional insured, to cover 'SDRC's obligations to indemnify provided for herein ... .'." Id. Plaintiff's position then, is that the State agencies participated in a "risk sharing pool" and "coverage was afforded thereunder," and the State has thus waived any protections which sovereign immunity might have otherwise provided. Id.

However, this Court looks to *High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, in which the South Dakota Supreme Court addressed the issue of whether the purchase of liability insurance constitutes a waiver of immunity. The Supreme Court declined to rule that the purchase of liability insurance constituted a waiver of governmental immunity. *High-Grade Oil Co., Inc.* at 739. The Court first found that there was no statutory authority for the departments or agencies to purchase the policies. *Id.* Similarly, in the current case, the Plaintiffs have not directed this Court to anything other than a Consulting Agreement which allowed for the purchase of insurance. The *High-Grade* Court went on to hold that neither of the agencies that purchased the insurance had "constitutional or statutory authority to waive the governmental immunity by purchasing liability coverage." *Id.* The Court goes on to hold that it is "*only the legislature*, expressing the will of the sovereign people, that is authorized to make this decision. No state official or board can usurp that authority." *Id.* (emphasis added).

In the case before this Court, there has been no indication or documentation that shows that the legislature has waived sovereign immunity. This Court, in accordance with South Dakota case law, declines to hold that purchase of insurance by SDRC constitutes waiver under the law.

B. Was the State engaged in a commercial enterprise, which would bar them from asserting sovereign immunity?

Defendants contend that the State is shielded by sovereign immunity, regardless of an issue of "commercial enterprise", because the "proprietary/commercial function is not applicable to the State of South Dakota." Motion to Dismiss at 4, n. 4 (citing *High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 738 (S.D. 1980). Their argument continues,

> ""The functions of a [non-state] public entity which are proprietary or commercial, as opposed to governmental, are not shielded by sovereign immunity.' *Aune v. B-Y Water Dist.*, 464 N.W.2d 1, 3 (S.D. 1990). As to the State itself, 'there is no distinction between governmental and proprietary functions.' *High-Grade Oil Co., Inc.*, [*supra*, at 738]. Therefore, the inquiry into whether a function is

> governmental or proprietary is only relevant in the case of non-state public entities like municipalities, which participate in the State's sovereign immunity only, 'to a lesser extent.' *Aune v. B-Y Water Dist.*, 464 N.W.2d at 5."

Id.

Plaintiffs, in their response, cite to *Aune v. B-Y Water Dist., supra*, "where a state creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily subject to suit, the same as any private corporation organized for the same purpose." *Aune* at 3. However, Defendants point out that *Aune*, is distinguishable from the current case. "In *Aune*, the S.D. Supreme Court held that SDCL 46A-9-3 provided the direct manner in which a water user district (i.e. B-Y Water District) could be sued. The Court determined that B-Y was a business enterprise with a commercial purpose, and that sovereign immunity does not extend to business enterprises with a commercial purpose." State's Response to Plaintiff's Opposition to Motion to Dismiss at 3-4. This Court agrees with the Defendant's position that a water district, such as that in *Aune*, is much more like a municipality, and far removed from the sovereign immunity that the State enjoys. Id. at 4. Also, in *Aune*, SDCL 46A-9-3 was a specific *legislative* enactment which would constitute a waiver of sovereign immunity. As discussed above, no such enactment exists in the current case.

Both parties also point this Court to two cases involving the South Dakota State Cement Plant: *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407, and *L.R. Foy Const. Co., Inc. v. South Dakota State Cement Plant Com'n*. The Supreme Court in both cases found that sovereign immunity had been waived, however, these cases are factually distinguishable from the current case. In *Arcon*, the South Dakota Supreme Court first found that the cement plant is an arm of the state under Article XIII, § 10 of the South Dakota Constitution, which declares that the manufacture, distribution, and sale of cement and cement products is a function of state government, thus it retains sovereign status. *Arcon* at 410. However, the Court goes on to hold that "when the legislature enacted the UCC it expressly waived sovereign immunity for the cement plant whenever the cement plant enters into contracts for the sale of goods." *Id.* In the current case there is no UCC claim which can apply, thus making the *Arcon* case unrelated to the facts before this Court.

Plaintiff also cited *L.R. Foy Const.*, stating that, "[w]here the State elects to operate a business enterprise solely for commercial purposes, it ought not be permitted to avoid its legal responsibility by invoking the doctrine of governmental immunity. [It] should be amenable to suit for mismanagement, bad faith actions and negligent conduct, just as the private sector is made responsible." *L.R. Foy Const.* at 346. Again, this Court finds that the *L.R. Foy Const.* case is not analogous to facts found in the case before it. In *L.R. Foy Const.*, the South Dakota

Supreme Court again held that the commercial tort claims involved were related to obligations and remedies within the intent and meaning of the UCC, which they previously found to be an express waiver of sovereign immunity by the Legislature.

There is no foundation by which the Plaintiffs have shown that the State was engaged in any sort of similar commercial activity as that contemplated by the State Supreme Court in the cement plant cases where the activity was an ongoing, contractual, obligation to sell cement. Certainly there are no activities that would fall under the purview of the UCC. Further, there have been no constitutional enactments regarding the EB5 Program as a commercial enterprise engaged in by the State.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss is GRANTED.

John L Brown

Honorable John Brown
Presiding Sixth Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.:	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

LP6 CLAIMANTS LLC,	)	
	)	
Plaintiff,	)	
	)	CIV. NO. 15-312
v.	)	
	)	
SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, THE STATE OF SOUTH DAKOTA, SDRC INC., SD Investment Fund LLC 6, and JOOP BOLLEN,	)	AMENDED COMPLAINT
	)	
Defendants.	)	

COMES NOW Plaintiff, LP6 Claimants LLC ("Plaintiff or Claimants LLC"), by and through its undersigned counsel and for its cause of action against Defendants states and alleges as follows.

NATURE OF THIS ACTION

1. Plaintiff brings this action to redress the fraud committed by Defendants by which Plaintiff's members were unlawfully solicited to invest in and provide financing for a project undertaken by Northern Beef Packers Limited Partnership ("NBP") to build, develop and operate a beef processing plant in South Dakota (the "Project"). Defendants induced the members of Plaintiff to pay $530,000 dollars each to invest and become limited partners in SDIF Limited Partnership 6 ("LP 6"), a South Dakota limited partnership, which Defendants created and

promoted as an investment vehicle for the Project, and to take advantage of a federal program known as the immigrant investment program pursuant to 8 U.S.C. § 1155(b)(5) (the "EB-5 Program") which facilitates foreign investment in certain communities in the United States for projects that will significantly benefit those communities by creating needed jobs. Under the program, in exchange for making approved investments, the foreign investors and their immediate families are granted conditional lawful permanent resident status, which can become unconditional after two years.

2. Defendants solicited the investment in the Project through written materials, including Confidential Offering Memoranda (the "Offering Memo" [Exhibit 1 hereto]) which resulted in investments in LP6. The Offering Memo contained material misrepresentations and omissions upon which the investors relied, which resulted in the aggregate loss of more than $18 million in investments.

PARTIES

3. Claimants LLC is a New York limited liability company created and organized to pursue claims of its members against Defendants. Each member of Claimants LLC, identified on Exhibit 2 hereto, is a Chinese national [residing in China], each made an investment in LP6, and each has assigned his/her claim(s) against Defendants to Claimants LLC.

4. Defendant South Dakota Department of Tourism and State Development (the "Department") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. The Department was at all relevant times responsible to oversee EB 5 Program investments in the "regional center" that was designated by the U.S. Customs and Immigration Service for purposes of the EB 5 Program in

South Dakota.

5. Defendant South Dakota Governor's Office of Economic Development ("GOED") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. GOED is the successor of the Department, and succeeds and assumes the rights and obligations of the Department in any contract or other transaction.

6. Defendant South Dakota Department of Tourism ("DOT") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. DOT is the successor of the Department, and succeeds and assumes the rights and obligations of the Department in any contract or other transaction.

7. Defendant State of South Dakota controls and administers the Department, GOED, and DOT, and is responsible for their actions. The State of South Dakota, the Department, GOED, and DOT are hereinafter collectively referred to as "South Dakota."

8. Defendant SDRC Inc. ("SDRC") was engaged by South Dakota in 2009 to run and promote South Dakota's EB 5 Program pursuant to a Consulting Contract dated December 22, 2009 (the "Consulting Contract").

9. Defendant Joop Bollen ("Bollen") was the sole owner of SDRC and was a former employee of the State of South Dakota.

10. Defendant SD Investment Fund LLC 6 ("GP 6") is a South Dakota limited liability company organized by Bollen, and is the sole General Partner of LP6. Bollen is the sole member of GP 6.

11. At all relevant times, South Dakota and Bollen used SDRC and GP 6 as mere

instrumentalities to further the conduct alleged herein.

FACTS

The EB-5 Program.

12. Defendants are involved in the business of soliciting and securing investments in EB5 projects in South Dakota. The EB5 program is the result of a federal law that allows foreign investors to obtain lawful permanent resident status for themselves and their families by making qualifying investments in the United States. Under this program, an employment-based preference immigrant visa category was created for immigrants seeking to enter the United States to engage or invest in a commercial enterprise that will benefit the U.S. economy and create jobs per the requirements of the EB-5 Program.

13. The requirements for the program include a minimum $1 million investment, which is reduced to $500,000 if it is made for a project within a designated regional center. The South Dakota International Business Institute Dairy Economic Development Region ("SD Regional Center") is an approved regional center.

14. Upon the making of a qualified investment, lawful permanent resident status may be granted to the investor, his spouse and children less than 21 years of age. The lawful permanent resident status is initially provided on a conditional basis; the investor and his family can file an I-829 petition to have the conditional status removed after two years by showing that the investor and the commercial enterprise have complied with the requirements of the EB-5 Program.

The Solicitation

15. South Dakota is empowered and directed to administer the EB5 Program in South Dakota and enter into ventures for that purpose. It acts and acted at all relevant times in a

commercial capacity to increase investment in South Dakota.

16. Pursuant to the Consulting Contract, South Dakota was responsible (a) for approving all EB 5 Program projects; (b) for rejecting projects for lack of feasibility or financial soundness, and (c) to ensure that the Project was not marketed if not financially sound.

17. South Dakota acted in concert with the other Defendants at all relevant times to secure investments in EB 5 Program entities, including NBP.

18. SDRC held itself out to the public, and more particularly to potential EB 5 Program investors, as a promoter and manager of the SD Regional Center for and on behalf of South Dakota, and as the general partner of the investment vehicles for EB5 programs (such as LP6) so that it could protect the interests of investors, that is, creation of jobs sufficient to secure permanent residency and repayment of the investment.

19. With the knowledge and approval of South Dakota, SDRC and Bollen solicited investments into LP6 through the Offering Memo.

20. Each investor paid $530,000 ($30,000 of which was for fees and expenses) to acquire a Unit Certificate representing a limited partnership interest in LP6. Plaintiff's members made such investments commencing in May 2010.

21. LP6 loaned the invested money to NBP for completion and operation of the Project.

Defendants' Misrepresentations and Failure To Disclose Material Risks And Facts.

22. Defendants defrauded the investors in LP6 through material misrepresentations and omissions of material facts in the Offering Memorandum which Defendants knew were false or were made recklessly, including that:

- the NBP facility was substantially complete and that the funding to be provided by LP6 would allow for the completion of remaining construction and the operation of the facility;

- the Project was competitive and had a sustainable business model;

- the Project was sufficiently capitalized to generate revenue from operations commencing upon the investment(s) being made;

- the Project would meet or exceed the minimum number of jobs required under the EB5 Program;

- Defendants had carefully reviewed the financial information of the Project and recommended it as sufficiently sound to generate jobs and repay the loan from the investors;

- the Project had a competitive advantage over other major competitors in the beef packing industry;

- the investors were protected because the loan being made to the Project would be secured by security interests on equipment, a corporate guarantee, and a mortgage on the property;

- NBP will be locally owned and led by recognized beef industry experts.

23. Each of the representations set forth above was materially false in that:

- the Project did not have adequate financing to achieve sufficient revenue to create the required jobs or repay loans or support any refinancing;

- given the poor financial condition of the Project the investors could not be adequately secured;

- the Project did not have any favorable or competitive position and did not have

sufficient capital to commence operations and generate revenue;

- the Project was owned by foreign investors and not run by beef industry experts; and

- that the project was already plagued by years of delays and was already in need of additional financing.

24. In addition, the Offering Memo contained material omissions, including that:

- NBP had been unable to sell tax increment financing bonds to finance the Project;

- the Project had experienced financial difficulties and the initial foreign EB 5 investors had ousted NBP's management and had become the managers and owners of NBP;

- additional investments or loans of at least $30 million would be required for the Project to begin operations;

- NBP had itself acknowledged that loans to the Project were extraordinarily high-risk because the Project was undercapitalized and its assets were not sufficient to repay or secure any loan;

- substantial liens had been filed against the Project;

- NBP was unable to pay, or was delinquent on, property taxes due and owing;

- other EB-5 investors had lost their money in a similar project promoted and administered by Defendants relating to the Veblen East Dairy in South Dakota;

- the Project's business was subject to legally imposed restrictions and obligations that placed it at a disadvantage.

25. The members of Plaintiff relied on the misrepresentations and omissions set forth

above, and purchased limited partnership interests in LP6.

26. As a result of Defendants' fraud set forth above the entire investment was lost.

The Colossal Failure of NBP

27. Even with the infusion of as much as $35,000,000 of EB 5 loans, including the investment made by Plaintiff's members, the Project was not financially sound, construction was not completed in 2010, and the plant was not operational that year as represented.

28. NBP did not begin operations until October 2012.

29. The delay was the result of the Project's need of additional financing, beyond LP6's loan, requiring subordination of LP6's loan, which vitiated the secured position that Defendants had represented would protect the investors.

30. NBP was never profitable.

31. Within eight months of commencement of operations, in April 2013, NBP laid off 108 of its employees because of inadequate financing.

32. In or about July 2013, NBP filed for bankruptcy protection.

33. In the bankruptcy proceeding, NBP disclosed that its failure was the result of insufficient capital and financing, and that the Project was not financially sound, as Defendants had represented.

34. The bankruptcy concluded with the sale of the NBP plant to one of its priority creditors, and the plant has yet to re-open.

35. Plaintiff's members lost their entire $18,550,000 investment.

COUNT I

(FRAUD)

36. Plaintiff repeats and realleges each and every allegation in paragraphs 1-35 above as if repeated at length herein.

37. Defendants made the above representations of fact and omissions knowing them to be false at the time, or else were reckless in making them.

38. Defendants made those representations and material omissions with the intent to deceive and for the purpose of inducing Plaintiff's members to act upon them.

39. Plaintiff's members relied on the representations and omissions.

40. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000, together with interest thereon.

41. Plaintiff is entitled to recover the losses its members suffered due to Defendants' fraud.

COUNT II

(BREACH OF FIDUCIARY DUTY)

42. Plaintiff repeats and realleges each and every allegation in paragraphs 1-41 above as if repeated at length herein.

43. GP6, as the general partner of LP6, and Bollen, who directly and solely controlled GP6, owed a fiduciary duty of utmost loyalty to the limited partners, including the members of Plaintiff.

44. GP 6 and Bollen breached their fiduciary duty to Plaintiff by (i) failing to disclose the numerous problems with the Project; (ii) failing to properly manage LP6 and the Plaintiffs' members' status as limited partners therein; (iii) placing its interests and the interest of SDRC and Bollen above the interests of the Investors (iv) making the misrepresentations and omissions

set forth above.

45. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000, together with interest thereon.

46. Plaintiff is entitled to recover the losses its members suffered due to these Defendants' breaches of fiduciary duty.

COUNT III

AIDING AND ABETTING BREACH

47. Plaintiff repeats and realleges each and every allegation in paragraphs 1-46 above as if repeated at length herein.

48. GP6 and Bollen breached their fiduciary duties to Plaintiff's members, as set forth above.

49. South Dakota aided and abetted GP6 and Bollen in such breach by, *inter alia*, permitting them to administer EB5 projects, and the LP6-NBP venture in particular, without proper supervision and approval.

50. South Dakota knew that GP6's and Bollen's conduct *vis-a-vis* the limited partners of LP6 constituted a breach of their fiduciary duties.

51. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000.

COUNT IV

PIERCE THE CORPORATE VEIL

52. Plaintiff repeats and realleges each and every allegation in paragraphs 1-51 above as if repeated at length herein.

53. At all relevant times, Bollen exerted complete dominion and control over the corporate Defendants, and used those entities as mere instrumentalities to further their improper conduct alleged herein.

54. Upon information and belief, Bollen controls all outstanding shares of stock in SDRC, and he is the sole member of GP 6, Bollen is the sole officer and director of SDRC, and he is the sole member manager of GP 6. Thus, there is a unanimity of control between the two entities and Bollen.

55. Continued recognition of the Defendant entities as separate legal entities would produce injustice and inequitable consequences by allowing Bollen to attempt to avoid personal liability for his wrongful conduct and the wrongful conduct committed by SDRC or GP 6 as mere instrumentalities of Bollen and South Dakota. Making Bollen and South Dakota personally liable for any damages or liability created by SDRC or GP 6 would prevent this injustice and inequitable consequences.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant judgment in favor of Plaintiff as follows:

A. For Plaintiff and against each Defendant, jointly and severally, in the amount of $18,550,000 together with prejudgment interest thereon;

B. For costs and attorneys' fees incurred by Plaintiff in this action; and

C. For such other and further relief as the Court may deem appropriate.

Dated: December 8, 2015

STEVEN D. SANDVEN LAW OFFICE PC

/s/ Steven D. Sandven
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EXHIBIT 1

SDRC Inc. www.sdeb5.com

SOUTH DAKOTA REGIONAL CENTER EB-5 IMMIGRANT INVESTMENT PROGRAM

CONFIDENTIAL OFFERING MEMORANDUM

SDIF LIMITED PARTNERSHIP 6

SDRC Inc. www.sdeb5.com

Date: November 15, 2009

SOUTH DAKOTA IMMIGRANT INVESTMENT FUND

SDIF LIMITED PARTNERSHIP 6

US$530,000 per Limited Partnership Unit
(being $500,000 plus $30,000 issue expenses per Unit)

CONFIDENTIAL OFFERING MEMORANDUM

This Confidential Offering Memorandum (the "Offering") is being provided to prospective investors on a confidential basis so that they can consider an investment in the limited partnership called SDIF Limited Partnership 6 (the "Limited Partnership") formed pursuant to the laws of South Dakota and subject to the partnership agreement (the "Limited Partnership Agreement") in connection with the investments to be made by the Limited Partnership, as specified pursuant to the immigrant investment program (the "Program"), which grants lawful permanent resident status in the United States to those who make qualifying investments under the provisions of the relevant immigration law, being 8 U.S.C. §1153 (b)(5)(A)(i)-(iii), (C) (the "Act"). In order to take advantage of the Program, qualified investors must invest in the Limited Partnership (see "Subscription Procedure") and complete the required immigration procedures (see "Immigration Procedures"). All the investments invested in the Limited Partnership will be first used to fund Northern Beef Packers Limited Partnership (the "Funded Business") to construct its facilities and purchase machinery and equipment capable of processing 7,500 head a week or 396,000 annually on a single shift. This project (the "Project") is located at 1.5 miles east of Highway 281 on 135th Street in Aberdeen, South Dakota and is expected to create the required number of jobs, all as set out under the Program and within the boundaries of the South Dakota International Business Institute (SDIBI), Dairy Economic Development Region (DEDR) (collectively "SDIBI/DEDR") Regional Center. The sole general partner of the Limited Partnership, SD Investment Fund LLC 6 (the "General Partner"), is an affiliate of SDRC, Inc. (the "Promoter"). **All dollar amounts expressed herein are in currency of the United States.**

The advantage of the "regional center" designation is that jobs may be direct or indirect (as opposed to only direct) to qualify for the purpose of the Program. The approval of the SDIBI/DEDR Regional Center and the subsequent amendments thereof under the Program is attached as Appendix I.

The number of requisite job creation for the program under SDIBI/DEDR Regional Center is specified in the said regional center approval and amendments from USCIS utilizing the

Regional Input-Output Modeling System (RIMS) II, a statistical modeling system employed to forecast the relationship between economic development and job creation using regional multiplier tables. The U.S. Citizenship and Immigration Services ("USCIS"), through its predecessors, the Bureau of Citizenship and Immigration Services and the Immigration and Naturalization Service, has already deemed RIMS II an acceptable modeling system for the purposes of the regional center program. The Project, as specified in the **Business Plan** of the Offering, will, at a minimum, meet the stated job requirements of the Program by calculating the total number of direct and indirect jobs resulting from the investment based on the RIMS II multiplier tables.

After identifying the Project, the General Partner has formed the Limited Partnership for the purpose of making the qualifying investments to the Project. After reviewing the Offering with the details of the proposed business plan of the Project, investors may elect to purchase the Limited Partnership unit (each a "Unit" and, collectively, the "Units") by completing the subscription procedure pursuant to the subscription agreement (the "Subscription Agreement") attached to the Offering as Appendix III, including depositing the investment funds (the "Subscription Proceeds") with the designated banks for the Project as the escrow agent (the "Escrow Agent"), pursuant to the Escrow Agreement attached to this Offering as Appendix IV (see "Subscription Procedure"). The release by the Escrow Agent of an investor's Subscription Proceeds to the Limited Partnership is conditional upon approval of the investor's I-526 petition (immigrant petition by alien entrepreneur) (an "I-526 Petition"). Upon satisfaction of the foregoing conditions, the investor will be issued a Unit and the investor's investment will be final and irrevocable, subject only, in the event the investor fails the Visa Process (as defined under "Immigration Procedures") to the purchase of the investor's Unit by the Partnership for cancellation (see "Subscription Procedure").

Each Unit is offered at a price of $530,000.00, being the minimum $500,000 capital investment required pursuant to the Program, plus issue expenses of $30,000.00. In the event that such issue expenses, including legal, accounting, printing and escrow expenses and third part commissions, exceed $30,000 per Unit, the excess will be borne by the General Partner and in the event that such issue expenses are less than such amount, the difference will be paid to the General Partner. In the event that an investor thereafter fails the Visa Process, the investor's Unit will be repurchased by the Limited Partnership for cancellation 90 days after the Limited Partnership receives notice of such failure. The Offering Amendment will set out provisions dealing with the repurchase of the Units of investors who fail the Visa Process. In such event, the Unit will be repurchased for $500,000 and the investor will be entitled to receive a repayment (less a reasonable amount for administration and other costs, not to exceed $3,500 per Unit) of that portion of the issue expenses paid to the General Partner and that portion paid to a selling representative from such persons.

The Units are only being offered pursuant to exemptions from registration requirements pursuant to applicable securities laws.

The approval of the SDIBI/DEDR Regional Center under the Program was made pursuant to the application of SDIBI/DEDR and such approval was granted upon the assurance of SDIBI/DEDR's ongoing involvement in recommending and monitoring the Project. Accordingly, the General Partner has entered into an arrangement with SDRC, Inc., a corporation affiliated with SDIBI/DEDR to provide certain consulting and administrative services pursuant to the consulting agreement (the "Consulting Agreement") attached as Appendix II, to be entered into with each Limited Partnership (see "Management of Limited Partnerships"). The fees payable to SDRC, Inc. by a Limited Partnership are specified in the Consulting Agreement.

A prospective investor, by accepting receipt of this Offering agrees not to duplicate or to furnish copies of this Offering to persons other than such investor's investment and tax advisors, accountants and legal counsel. Prospective investors are not to construe the contents of this Offering as legal or tax advice and the Fund has not engaged any legal or other advisors to represent prospective investors. Each prospective investor should consult such investor's own advisors as to legal, tax and related matters concerning their immigration application and an investment in the Fund, the costs of which shall be borne by such investor.

An investment in the Limited Partnership involves certain risks (see "Risk Factors"). In making an investment decision, investors must rely on such investor's own examination of the terms of the offering, including the merits and risks involved. Each prospective investor is invited to ask questions of, and upon request may obtain additional information from representatives of the Limited Partnership concerning the Fund, its contemplated business, the terms and conditions of such offering and any other relevant matters to the extent the Limited Partnership or the Promoter possess such information or can acquire it without unreasonable effort or expense.

In addition, there can be no assurance that investors will obtain final immigration status under the Act or that the jobs required to be created and maintained under the Program will be achieved. However, the advantage of the "regional center" designation is that indirect as well as direct jobs qualify under the Program. Moreover, the Promoter has recommended the Limited Partnership after a careful review of the business plan (see "Business Plan") and the financial information (see "Financial Information") of the Project included in the Offering for the full period of the Limited Partnership's investment, indicating the Project will have sufficient revenue to create and maintain the requisite number of jobs under the Program.

THE UNITS ARE SUITABLE ONLY FOR INVESTORS WHO DO NOT REQUIRE LIQUIDITY IN THEIR INVESTMENTS AND WHO CAN AFFORD THE LOSS OF THEIR ENTIRE INVESTMENT. THE UNITS HAVE NOT BEEN REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933 (the "Securities Act") OR THE SECURITES LAWS OF ANY STATE (the "State Securities Acts") AND HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE U.S. SECURITIES AND

EXCHANGE COMMISSION (the "SEC") OR THE SECURITIES COMMISSION OF ANY STATE, NOR HAS THE SEC OR THE SECURITIES COMMISSION OF ANY STATE PASSED UPON THE ACCURACY OR ADEQUACY OF THESE MATERIALS OR ANY OTHER INFORMATION THAT MAY BE FURNISHED TO PROSPECTIVE INVESTORS; ANY REPRESENTATION TO THE CONTRARY SHALL BE A CRIMINAL OFFENCE.

Units will be offered without registration under the Securities Act of the State Securities Acts only as follows:

- Outside the United States, in reliance upon Regulations promulgated by the S EC only to persons who are not "U.S. Persons" within the meaning of such Regulations; and
- Within the United States, in reliance upon Rule 506 promulgated by the SEC, only to persons who are "Accredited Investors" within the meaning of Rule 501 promulgated by the SEC.

Units will not be offered to any person in any place except as set forth above. Any person wishing to buy a Unit will be required to demonstrate that he or she is an Eligible Investor in accordance with the foregoing. This Offering does not constitute an offer to sell to, or a solicitation of an offer to buy from, any person in any jurisdiction to whom such an offer or solicitation would be unlawful.

For the purpose of this Offering, "Accredited Investor" means any person who comes within any of the following categories, or whom the issuer reasonably believes comes within any of the following categories, at the time of the sale of a Unit to that person:

- Any natural person whose individual net worth, or joint net worth with that p erson's spouse, at the time of his purchase exceeds $1,000,000;

- Any natural person who had an annual individual income in excess of $200,0 00 in each of the two most recent years or joint income with that person's sp ouse in excess of $300,000 in each of those years and has a reasonable expe ctation of reaching the same income level in the current year.

For the purpose of this Offering, "U.S. Person" means any natural person residing in the United States.

No person is authorized to give any information or to make any representation not contained in this Offering.

THE PROGRAM

The Act provides for an employment based preference immigrant visa category for immigrants seeking to enter the United States to engage or invest in a commercial enterprise that will benefit the U.S. economy and create at least ten full-time jobs. Pursuant to the Act, a qualified immigrant investor must invest at least $1 million, provided that such investment may be $500,000 in the event that the invested funds will be utilized within a designated regional center. SDBI/DEDR Regional Center, comprised of the 63 contiguous counties of eastern South Dakota, has been designated as a "regional center", pursuant to Section 610 of the U.S. Appropriations Act of 1993. The advantage of the "regional center" designation is that jobs may be direct or indirect (as opposed to only direct) to qualify for the purposes of the Program. Therefore, a $530,000 investment (being $500,000 plus $30,000 issue expenses per Unit) in the Limited Partnership that makes an investment in the Project located therein will qualify under the Act. Lawful permanent resident status may be granted to the investor, his or her spouse and children less than 21 years of age. Such status is granted under the Act on a conditional basis, which condition may be removed after 2 years upon the filing if an I-829 petition within 90 days prior to the second anniversary of conditional permanent residence being granted, upon a showing that the investor and the commercial enterprise have complied with the requirements under the Program.

Under the Program, the investor is required to be an "active participant" in the management of the commercial enterprise, but such participation in connection with the activities of a limited partnership is subject to limitations set out in the relevant legislation. Notwithstanding such limitations, limited partnerships have been recognized as appropriate investment vehicles under the Program. (See "Summary of Partnership Agreement – Limited Partner Decisions") The funds invested by a Limited Partner must have been lawfully obtained.

Legislation enacted on December 3, 2003 extends the regional center pilot program through September 30, 2008 and provided the USCIS with the discretion to prioritize the processing of I-526 petitions filed in connection with a proposed Qualifying Investment in a Target Business located in a designated regional center.

IMMIGRATION PROCEDURES

To qualify for residency, investors must file an I-526 Petition at the designated USCIS Service Center. Tax returns and substantial documentation evidencing that an investor's funds intended for investment in a Limited Partnership were derived from lawful sources must be submitted along with the I-526 Petition. Such evidence may include information concerning real estate transactions, business income, proceeds from the sale of a business, employment income, investments, bank accounts and dealings, licenses or similar evidence. If investment funds are from a gift or inheritance, an appropriate affidavit and/or other

evidence will be required to be filed.

Persons applying for United States residency must demonstrate that they are admissible to the United States in accordance with Section 212 of the Immigration and Nationality Act. Section 212 sets forth various grounds of inadmissibility, which may prevent an otherwise eligible applicant from receiving an immigrant visa or entering the United States. Aliens precluded from entering the United States include: (a) persons who are determined to have a communicable disease of public health significance; (b) persons who are found to have, or have had, a physical or mental disorder, and behavior associated with the disorder which poses, or may pose, a threat to the property, safety, or welfare of the alien or of others, or have had a physical or mental disorder and history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the immigrant alien or others, and which behavior is likely to recur or to lead to other harmful behavior; (c) persons who have been convicted of a crime involving moral turpitude (other than a purely political offense), or persons who admit to having committed the essential elements of such a crime; (d) persons who have been convicted of any law or regulation relating to a controlled substance, admitted to having committed or admits to committing acts which constitute the essential elements of same; (e) persons who are convicted of multiple crimes (other than purely political offenses) regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether such offenses involved moral turpitude, persons who are known, or for whom there is reason to believe, are, or have been, traffickers in controlled substances; (f) persons engaged in prostitution or commercialized vice; (g) persons who have committed in the United States certain serious criminal offenses, regardless of whether such offense was not prosecuted s a result of diplomatic immunity; (h) persons excludable on grounds related to national security, related grounds, or terrorist activities; (i) persons determined to be excludable by the Secretary of State of the United States on grounds related to foreign policy; (j) persons who are or have been a member of a totalitarian party, or persons who have participated in Nazi persecutions or genocide; (k) persons who are likely to become a public charge at any time after entry; (l) persons who were previously deported or excluded and deported from the United States; (m) persons who by fraud or willfully misrepresenting a material fact, seek to procure (or have procured) a visa, other documentation or entry into the United States or other benefit under the Immigration Act; (n) persons who have at any time assisted or aided any other alien to enter or try to enter the United States in violation of law; (o) certain aliens who have departed the United States to avoid or evade U.S. military service or training; (p) persons who are practicing polygamists; and (q) persons who were unlawfully present in the United States for periods in excess of 180 days.

Following approval of an investor's I-526 Petition, the investor must apply for an immigrant visa or permanent resident status. If the investor will be outside of the United States, the application is filed at the appropriate U.S. Consulate. If the investor will be in the United States, the application is filed at the appropriate office of the USCIS. The Consular Interview Process, or the USCIS adjustment of status process, as applicable, (the "Visa

Process"), is designed to enable the U.S. Government to determine whether the investor is inadmissible to the United States as explained in the previous paragraph. As part of this process, the investor is subjected to medical, police, security and immigration history checks. Upon approval, the investor (and spouse and children) are granted conditional permanent residency status.

Each prospective investor should review these substantive inadmissibility grounds with competent counsel to determine whether there may be a basis for denying admission of the prospective investor notwithstanding eligibility for immigration based on an investment in a Limited Partnership.

Investors who have been granted conditional permanent residency status must file a petition to remove the condition (From I-829) between 21 and 24 months after the date on which they received their conditional permanent resident status upon arriving in the United States. The primary purpose of the application is to ensure that investors submit evidence establishing that they have successfully met the requirements of the Program, including the creation and maintenance of the requisite number of direct and indirect jobs. Except in rare cased, Investors who fail to file this petition in a timely manner will automatically lose their permanent residency status.

Investors and their immigration attorneys are responsible for ensuring that their applications are timely and properly filed. However, the General Partner and SDIBI will facilitate the preparation of all requisite evidence regarding the limited partnership and its investment in the Project Company.

There can be no assurance that an I-526 Petition will be approved, that an investor will successfully complete the Visa Process, or that upon the approval thereof that the conditions attaching thereto will be removed.

FORMATION OF LIMITED PARTNERSHIP

The Limited Partnership has been formed as a commercial for profit entity governed by the provisions of the Limited Partnership Agreement attached to the Offering and will engage solely in the business of making an investment or series of investments in the Project under the Program in the form of loans or equity investments. Each investor who subscribes for a Limited Partnership Unit pursuant to the Offering will, subject to approval of the investor's I-526 Petition, become a Limited Partner of the Limited Partnership. Other than in the event that the Limited Partner fails the Visa Process, a Unit issued to the Limited Partner is non-transferable and the Limited Partnership is prohibited from redeeming or repurchasing any Units. All Units will be of the same class unless issued in series and no Unit will have any priority over any other Unit of the same series. The Limited Partnership will have one or more Limited Partners, provided that for each Limited Partner admitted to the Limited Partnership the job creation requirement under the Program must be met and identified with

respect to such Limited Partner.

USE OF PROCEEDS

This Offering contains the plan for the use of the proceeds from the offering of Units and the financial projections for the Project (see "Business Plan"). The Promoter has recommended the Project to the Limited Partnership because the projections indicate that, for the full period of the Limited Partnership's investment, the Project will have sufficient revenues to:

- create the requisite number of jobs under the Program
- make all required payments to the Limited Partnership during the term of the investment
- support the refinancing thereof at the expiry of the term of the loan.

MANAGEMENT OF LIMITED PARTNERSHIP

The day-to-day management of the Limited Partnership will be conducted by the General Partner. Under the laws of South Dakota, in order to maintain their limited liability, limited partners of the limited partnership may not take part in the management or control of the limited partnership. The approval of limited partners is required in connection with certain matters (see "summary of Partnership Agreement – Limited Partner Decisions"). The duties of the General Partner, which are set out more fully in the Partnership Agreement, include:

- recommending the Project to the Limited Partners;
- determining that the Project meets the minimum requirement for investment;
- determining that the Project is projected to meet the criteria for job creation under the Program;
- monitoring the Project with respect to continuing qualification under the Program;
- monitoring the investments and the financial performance of the Project;
- supervising SDRC, Inc.'s performance of its obligations under the Consulting Agreement;
- reporting to the Limited Partners;
- calling meetings of the Limited Partners, as necessary;
- maintaining Limited Partnership books and records; and,
- retaining lawyers, auditors and other professionals as may be required on behalf of the Limited Partnership

In addition to monitoring the Limited Partnership's investments, the General Partner will, subject to the approval of the Limited Partners in connection with any realization plan (see "Summary of Partnership Agreement - Limited Partner Decisions") take such steps as may be required to protect the interests of the Limited Partnership and the Limited Partners, including,

if necessary, realizing upon any security granted to the Limited Partnership in connection with its investments.

The Limited Partnership has entered into a Consulting Agreement, attached to this Offering as Appendix II, with SDRC, Inc., to provide certain advisory and administrative services to the Limited Partnership.

SOUTH DAKOTA

History

South Dakota occupies an area of 77,047 square miles, enjoys a continental climate and is bordered by Minnesota and Iowa (E), Nebraska (S), North Dakota (N), and Wyoming and Montana (W). The United States acquired South Dakota as part of the Louisiana Land Purchase in 1803 from France. The land was then occupied by Sioux Indians who had driven the agricultural Arikara Indians from the region. The first settlement was established in 1817 by fur traders in Fort Pierre, South Dakota. In 1850 settlements began to develop more rapidly as land speculators and farmers from Iowa and Minnesota moved west. Emigration from European countries (Germany, Scandinavia, Holland, Russia, and the United Kingdom) soon followed. The Gold Rush in 1874, when gold was discovered on Indian land (Treaty 1868), led to the development of towns in western South Dakota and South Dakota's rich western history with now famous personalities such as General Custer, Wild Bill Hickok and Calamity Jane unfolded. In 1889 South Dakota became the 40th state with Pierre as its capital. The development of the railroads in the late 1800s caused the population to increase threefold with agriculture following suit. Postwar South Dakota, with improved farming techniques, witnessed a steady increase in agricultural and livestock operations with larger farms replacing smaller family farms. The late 1990s, with a major New York bank moving its credit card operation to Sioux Falls, marked the beginning of a swift shift towards service, finance and trade investments that resulted in significant economic growth.

Today almost one-third of the region west of the Missouri River belongs to Indians on reservation with most of the remaining land being occupied by cattle and sheep ranchers. In the more productive region east of the Missouri River, livestock and cash cropping (corn, soybeans, wheat) are major sources of income,. The economy is more diversified including manufacturing, electronics, and service industry. South Dakota currently has a population of 755,010 with Sioux Falls (140,000), Rapid City (65,000), Aberdeen (30,000) and Watertown (25,000) being the largest population centers.

The Business-Friendly Climate

Business environment of South Dakota is being rated as the optimum condition as its state laws and regulations provide excellent tax benefits such as no state corporate tax, no state

income tax, or the sales tax and its mobility in business operation. The South Dakota of today is characterized by its excellent infrastructure system such as fiber optics, airport, railroads and highways and the nation's lowest energy prices. Additionally, South Dakota is famous for its 2nd lowest crime rates, 6th best average verbal and math SAT scores and the nation's best high school graduation rate.

South Dakota's main business is the agricultural industry with the dairy/cattle industry being one of the most important businesses. Most of agricultural appliance producers and dairy product processors have its principal business offices in South Dakota. According to Fortune Magazine (Nov. 2006), South Dakota was ranked 1st for having favorable business environment among the entire 50 states in the U.S.

INVESTMENT STRATEGY

Pursuant to the Consulting Agreement, SDRC, Inc. has introduced the Project to the General Partner for its consideration, including detailed financial information and due diligence reviews. Based upon its review, the General Partner has recommended the Project for approval by prospective investors in the Limited Partnership and in connection therewith has delivered this Offering describing the Project in detail.

The investment in the Project will:

- Be structured as funding for the Project;
- Be a minimum of US $530,000 and will qualify under the Program to permit investors to make the minimum US $530,000 investment (the "Minimum Inv estment");
- Result in meeting the minimum job creation requirements of the Program; an d,
- Be subject to an undertaking from the Project to make reasonable best efforts to hire individuals who reside in the regional center.

SUBSCRIPTION PROCEDURE

Investors wishing to subscribe for a Unit in the Limited Partnership are required to deliver:

- $530,000.00 to the General Partner by certified check made payable to the Es crow Agent or to the Escrow Agent by wire transfer of funds, representing th e subscription price (the "Subscription Proceeds") for the Unit;

- to the General Partner an executed subscription agreement (attached as Append ix III), the definitive form of which is included as part of the Offering, whic h includes an undertaking by the investor to (i) diligently prepare and file I-5

26 Petition and complete the Visa Process; (ii) provide to the General Partner such information as the General Partner may require confirming that the fund s to be invested by the investor were lawfully obtained, together with such ot her documents as the General Partner may reasonably require (which requirem ent may be met by providing a letter addressed to it from a recognized and q ualified firm of accountants licensed to practice in the jurisdiction in which th e investor resides, in form, substance and from a firm of accountants or other professionals acceptable to the General Partner); (iii) provide the Escrow Age nt with copies of the investor's I-526 Petition, passport and such other docum entation that the Escrow Agent deems appropriate in order for the Escrow Ag ent to satisfy its "Know Your Customer" requirements; and (iv) diligently file and prosecute an I-829 Petition within 21 to 24 months after the date that c onditional permanent residency status is obtained.

The Escrow Agreement provides for the release of an investor's Subscription Proceeds upon the earliest to occur of:

- the Promoter delivering notice to the Escrow Agent that the I-526 Petition of such investor and the Project have been approved under the Program, to the Limited Partnership;

- the Promoter delivering notice to the Escrow Agent that an investor's I-526 p etition has been refused (notice which the Promoter shall deliver within 7 day s of it becoming aware of such refusal), to the investor; or

- 12 months from the date the investor completed the subscription procedure for a partnership unit.

An investor's full Subscription Proceeds will be returned to the investor unless the conditions for the release thereof from the Escrow to the Limited Partnership have been met.

The Offering in connection with the offering of Units provides as a condition of closing that a minimum of One (1) or a maximum of One Hundred (100) with fifty (50) to seventy (70) being the target number of investors, have had their Subscription Proceeds transferred to the Escrow Agent.

- It will also be a condition of the release of Subscription Proceeds to the Limi ted Partnership that at least One (1) investor has had his/her I-526 application approved.

- No Units will be offered for sale after the earlier of (i) the maximum number of Units (100) being subscribed for and (ii) twelve (12) months from the firs t subscription for a Unit.

The Partnership Agreement provides for distributions to the Limited Partners pro rata irrespective of the date of subscription by a Limited Partner.

In the event that subscriptions are received for Units representing more subscription proceeds than required for the Project, priority will be given to qualifying investors as determined by the General Partner in its sole discretion. The General Partner will deliver notice to the Escrow Agent in the event of over-subscription and, pursuant to the Escrow Agreement, the Escrow Agent will deliver notice to such effect to the investors where subscriptions cannot be accepted. No subscription shall be complete until the General Partner has accepted such subscription and the General Partner reserves the right to reject a subscription for any reason.

SUMMARY OF PARTNERSHIP AGREEMENT

The Limited Partnership is formed solely for the purpose of funding the Project described in the Offering and will be governed by the terms of the Partnership Agreement attached to the Offering.

The following information is presented as a summary of principal terms only and is qualified in its entirety by reference to the Partnership Agreement attached to the Offering.

The Partnership

The Limited Partnership is formed pursuant to the laws of South Dakota. The registered office of the Limited Partnership and the General Partner are in the state of South Dakota.

Investment Objective

The Limited Partnership's investment objective is to invest in the Project in order to permit investors to qualify for immigration to the United States pursuant to the Act and to permit Limited Partners to participate in a commercial for profit enterprise.

Classes of Units

All Units are of the same class unless issued in series and no Unit will have any priority over any other Unit of the same series. Units issued in series will be tied to the Project to the effect that all income or losses derived therefrom allocated to the Limited Partners will be allocated to the Limited Partners subscribing for such series, any security granted to the Limited Partnership in connection with the Project will be held for the benefit of the series Units to which it relates and all matters requiring the approval of Limited Partners which relate to the Project will be voted upon separately by the holders of the series Units released thereto as a class.

Project

The Project must be reviewed and approved by the investors prior to completing the subscription procedures below. In order to evaluate the Project, each investor is advised to review the detailed investment description, including the form and structure of the investment, characteristics of securities and anticipated returns. The Project may earn returns below market for similar investments.

Allocations and Distributions

Net proceeds realized from the sale, repayment or distribution of realized from the Limited Partnership's investments (including any interest) will be allocated and distributed 99% to the Limited Partners and 1% to the General Partner.

Net proceeds realized from the sale or repayment (other than scheduled payments of principal) of all or any portion of the Limited Partnership's investments will be distributed at the end of the term or at the sole discretion of General Partner prior to the end of the term. When distributed prior to the end of term, the General Partner will be entitled to withhold from any distributions (including disposition proceeds) amounts as are necessary to create, in its discretion, appropriate reserves for expenses and liabilities of the Limited Partnership as well as any tax withholdings as necessary.

Compensation of General Partner

The General Partner is entitled to receive fees and expenses as described in the Offering.

Limited Partner Decisions

Approval of Limited Partners is required by ordinary resolution (an "Ordinary Resolution") (51% of Limited Partners voting) with respect to the following matters:

- approving the conditions for the staged funding of the Project
- materially changing the terms of the Funding Agreement (see Funding Agreem ent) with the Project
- advising the General Partner in connection with the monitoring of the Project
- advising the General Partner in connection with its relationship with SDRC, In c. pursuant to the Consulting Agreement
- approving the realization with any security given or rights granted to the Limi ted Partnership in connection with the Project
- changing the auditors of the Limited Partnership

Approval of the General Partner and Limited Partners is required by unanimous resolution (100% of Limited Partners Voting) to make investments other than the Project.

Term

The Limited Partnership will continue until January 1 of the year following the year in which all of the Limited Partnership's assets have been realized upon distribution.

Limited Partnership Expenses

The Limited Partnership will pay all expenses of the Limited Partnership, including fees payable to SDRC, Inc. pursuant to the Consulting Agreement and any expenses of the General Partner, all expenses incurred in connection with the making, holding, sale or proposed sale of investments, the cost of the preparation of the annual accounting, financial and tax reports to Limited Partners, litigation or other extraordinary expenses, insurance and indemnity expenses and expenses of liquidating the Limited Partnership.

Indemnification

The Limited Partnership will indemnify and hold harmless the General Partner and SDRC, Inc. and their respective directions, officers, members, partners and employees, from and against liabilities arising in connection with the Limited Partnership. The Limited Partners will be obligated to return any amounts distributed to them to fund indemnity obligations of the Limited Partnership, but will not be required to put in additional capital for such purpose.

Transferability of Interests and Withdrawal

Except as expressly provided for in the Partnership Agreement, no Limited Partner will be permitted to withdraw from the Limited Partnership or to withdraw any portion of his or her capital account. Other than in the event the Limited Partner fails the Visa Process, a Unit issued to the Limited Partner is non-transferable and the Limited Partnership is prohibited from redeeming or repurchasing any Units.

Reports

The Limited Partnership will send to each Limited Partner generally within 90 days after the end of each fiscal year of the Limited Partnership an audit report including a balance sheet and statements of income, changes in Partner's equity and cash flows, prepared in accordance with generally accepted accounting principles, plus a schedule and summary description of the investments owned by the Limited Partnership at year-end a statement for each Limited Partner of its capital account and tax information necessary for completion of its tax returns. The Limited Partnership will also send its Limited Partners status reports on a minimum of semi-annual basis.

Amendments

The Partnership Agreement may be amended from time to time with the consent of the General Partner and by Ordinary Resolution of the Limited Partners, unless the proposed amendment will, or is likely to, cause a Limited Partner to suffer an adverse economic effect, in which case the written consent of such Limited Partner is required. The Partnership Agreement may also be amended by the General Partner to correct ambiguities or inconsistencies provided the proposed amendment dose not adversely affect the interest of any Limited Partner of to incorporate provisions, which in the written opinion of counsel to the Limited Partnership are for the protection of Limited Partners.

INCOME TAX CONSIDERATIONS

An Investor is responsible for obtaining his or her own tax advice with respect to the federal, state and local income and other possible tax consequences of his or her investment in the Project, and no tax advice will be provided hereunder or at any time in the future. However, as a general rule, a resident alien of the United States will be taxed on all of his or her worldwide income and will be required to file a United States income tax return. In addition, if an alien is not a resident of the United States but has United States source income he or she generally will be subject to taxation in the United States on such income, and such may be subject to withholding and /or reporting on a United States income tax return.

THE FUNDED BUSINESS

The Funded Business, Northern Beef Packers Limited Partnership ("NBP LP"), is a South Dakota Limited Partnership formed in April, 2007. It was established in order to build a state-of-the-art beef processing facility in South Dakota through investment of local managing partners and 70 (Seventy) EB-5 investors seeking immigration to the U.S. This facility is designed to process over 7,500 head a week or 396,000 annually on a single shift, and other associated facilities are to be managed and operated by NBP LP. The construction of this beef processing plant is crucial to the newly implemented South Dakota Certified Beef Program that, for the first time ever, is trying to certify beef products based on age and source verification administered under the State law of any kind in the United States of America. With this SDCB program, the State of South Dakota, under law, will be guaranteeing the source and age verification as well as the quality of the meat produced under the program. This plant, once completed, will be the back bone of the South Dakota's ambitious SDCB program as its sole mass beef packing plant for the program. With the plant in operation, the potential for huge boost in beef exports to Asian market where the verifiable age and source requirements of beef is a critical element of beef export/import.

In the process of construction, the project scope was enlarged to include Hide & Rendering

Plant and waste water treatment plant to further capitalize on the by-products from the beef processing plant. The construction and initial operating of the plant is scheduled for Spring of 2010. The total plant budget including the first year operating loss and working capital is for approximately $94 million with all of the financing in place in anticipation of EB-5 funding. Of the $94 million budget, more than 50% of it is attributable to equity with State of South Dakota administered loan and financing from Asian bank of high repute consisting the remainder. The two strong facets of this project for the investors are: (1) State of South Dakota and local municipalities are contributing more than $20 million in loans, grants and in tax financing to build this critically important beef plant for the State; (2) a major Asian bank's capital arm subsidiary is providing up to USD $30 million in financing for the construction and operation of the plant; and (3) various strategic distribution partners from both US and Asia are involved in the plant. The EB-5 funds from SDIF Limited Partnership 6, will be loaned to the Funded Business to complete out the construction, equipment purchase and to facilitate start-up and operations.

STRENGTH OF THE PROJECT

The strengths of the Project are as follows:

- The abundance of cattle within a 150-mile radius of Aberdeen, South Dakota, coupled with a negative corn basis, will assure competitive production costs. A new beef plant will encourage the growth of cattle infrastructure and slow the sale of quality South Dakota cattle and corn to the commercial cattle-feeding areas.

- The NBP LP plant will enjoy a favorable competitive advantage over other major players in the packing industry.

- As a new facility, NBP LP will utilize state-of-the-art identification / traceability technology that will meet all qualification standards for South Dakota Certified™ beef. The South Dakota Certified™ beef label will be an invaluable domestic marketing tool. The animal traceability records will also help qualify NBP LP product to lead the resurgence of the beef export market.

- NBP LP freight costs for inbound cattle are substantially lower than those of the mega-plants for two main reasons: 1) the fed cattle supply for NBP LP's planned slaughter of 1500 head / day will be garnered from the tri-state area within a 150-mile radius of the plant; 2) the mega-plants in this comparison draw cattle from an area in excess of 600 miles from the plant on average.

- NBP LP is correctly positioned in production capability size (1500 head / day) to capitalize on South Dakota's corn and quality fed beef supply. NBP LP has a competitive advantage; the business model is sustainable--$32.87 better than the INDUSTRY average!

- NBP LP will proactively manage the pathogens and chemical residues associated with fed beef production through utilization of state-of-the-art, multiple-hurdle HACCP interventions in the slaughter / fabrication process. The residue monitoring program will begin on the ranch and follow the raw material—cattle, corn, or soybeans—through the feedlot and packing plant to meat and offal product customers.

- NBP LP will also manage the environment proactively to control dust, odor, and insects. Wastewater will be cleaned, chlorinated, and recycled for use in cleaning and flushing cattle handling facilities and trucks.

PLANT OPERATIONS

A brief explanation of the NBP LP plant operation is provided in the following:

- The plant will be situated on 105 acres located 1.5 miles east of Highway 281 on 135th Street in Aberdeen, South Dakota. Legal description is Lots 2 and 3 of the South Side Industrial Subdivision in N1/2 and SE1/4, Section 36-T123N-R64W, Brown County, South Dakota.

- An existing all-weather gravel road currently provides access the 1.5 miles down 135th Street from Highway 281. NBP LP has requested that local and State governments combine resources to provide paved access.

- The NBP LP plant has adopted several "clean room" features, which will improve operational sanitation and cleaning. Unique design features include stainless steel trench and floor drains, separate lunch and locker facilities (shown below) for clean to dirty air, people, and water flow through operations, and a ceiling utility interstitial chase to isolate plumbing and electrical maintenance from the meat processing area.

- Northwest Public Service Company will provide electrical service. Utility requirements are based on a total horse-power load of 4,500 KW, 440 volts transformed to low voltage controls. Refrigeration compressors will utilize 4,160 KW.

- Major motors and compressors will be equipped with PLC controls with VDF drives to monitor and control the peak electrical loads to manage excess / peak demand billing charges from the utility company.

- Water is supplied from the City of Aberdeen, South Dakota.

FINANCIAL PROJECTION AND EMPLOYMENT CREATION

Attached as Appendix VI is the Business Plan including financial projections and job creation estimated from the development of the Project. Briefly summarizing the financial projections, total expense estimated for the completion of the Project including the start up cost and first year operating capital is $94,000,000. In addition, through the operation stage of the Project, a total number of 563 jobs will be created. More detailed information of the total projected cost and job creation are provided as below.

PLANT CONSTRUCTION CAPITAL COSTS / SOURCES AND USES OF FUNDS
NORTHERN BEEF PACKERS LP

SDRC Inc. www.sdeb5.com

Uses of Funds	
Land	$604,039
Site Development	$11,364,491
Building	$42,907,081
Equipment	$21,181,340
Engineering/Prof. Fees	$2,827,156
Contingency	$2,000,000
Sales/Use Tax Recapture	-$2,800,000
Sub-Total	$78,084,107
Non Construction Engineering/Prof	$2,200,000
Loan Fees	$2,653,812
Legal/Accounting	$406,564
Start-Up Losses	$3,000,000
Working Capital	$7,655,517
Total Uses	$94,000,000
Sources of Funds	
Owner Equity	$37,000,000
Tax Increment Financing (TIF)	$9,800,000
Sub-total (Equity)	$46,800,000
State of South Dakota (incl. Municipalities) Loans and Bonds	$12,200,000
REDI Loan ($3,000,000)	
EDFI Bonds ($5,000,000)	
SDDC ($1,000,000)	
ADDC ($2,200,000)	
REED ($1,000,000)	
USDA Guaranteed Loan ($10,000,000)	$10,000,000
Sub-total (Loans)	$22,200,000
Asian Bank (Hong Kong)	$30,000,000
Total Sources	$99,000,000

Employee/ Work Location/ Year

EMPLOYEE WORK LOCATION	TOTAL
Management	69
Slaughter Division	153
Fabrication Division	316
Plant maintenance	25

TOTAL PLANT 563

* NBP will provide 563 jobs by 2010.

FUNDING AGREEMENT

Purpose of Funds

Prior to the closing of the first Unit offered hereunder, the Limited Partnership will enter into a Funding Agreement (the "Funding Agreement") with the Funded Business. The proceeds of the funding will be mainly used for completing Project construction and other operation expenses. The plant being constructed has been designed with the most technologically advanced programs, practices and processes in the beef processing and packing industry, and this will make the plant one of the most efficient in the industry.

Amount of Funding

The funding is a maximum of $50 million with targeted amount of $25 ~ $35 million, based upon the number of Units sold pursuant to this Offering. In the event that the maximum funding amount is not advanced, the Funded Business will continue to operate profitably in the future.

Terms of Funding

The funding requires quarterly payments of simple interest only at a set rate to be determined later, payable based upon the amounts advanced from time during the previous quarterly period. The total investment funds (the Subscription Proceeds) shall be payable in five (5) years from the date of the first disbursement of the funds. It is the Funded Business's intention to repay the total funds in five (5) years with the proceeds from long term financing and profits which it will be generating during the five-year period.

Disbursement of Funds

The funds will be disbursed by the General Partner to the Funded Business as requested by the Funded Business and needed for the Project.

Security

The Subscription Proceeds will be secured by a first mortgage on the building and a first security interest in the equipments.

RISK FACTORS

An investment in the Limited Partnership is subject to a number of risks that could affect the repayment of the Loan in accordance with its terms including those that affect the uniform rental and sales industry generally and industries in which the Funded Business's clients operate in particular, including competition for the Funded Business's clients, risks associated with the suppliers from whom the Funded Business's products are soured, an inability to open, new, cost effective Operating facilities, unionization campaigns, compliance with environmental Laws and regulations, risks associated with the Funded Business's acquisition policy, attracting and retaining competent personnel in key positions, failure to achieve and maintain effective internal controls, increased operating costs and other factors. An investment is also subject to risks related to general economic conditions, that investment returns may be below market for similar investment, that the jobs required to be created under the Program may not be created for the entire period required thereunder, that final immigration status under the Act may not be granted to a Limited Partner, that some or all of a Limited Partner's capital may not be returned and the Units represent an illiquid investment which cannot be assigned or transferred. In addition, there can be no assurance that investors obtain final immigration status under the Act of that the jobs required to be created and maintained under the Program will be achieved. However, the advantage of the "regional center" designation is that indirect as well as direct jobs qualify under the Program.

SOUTH DAKOTA REGIONAL CENTER EB-5 IMMIGRANT INVESTMENT PROGRAM

CONFIDENTIAL OFFERING MEMORANDUM

SDIF LIMITED PARTNERSHIP 6

EXHIBIT 1

SDRC Inc.

www.sdeb5.com

Date: January 10, 2010

SOUTH DAKOTA IMMIGRANT INVESTMENT FUND

SDIF LIMITED PARTNERSHIP 6

US$530,000 per Limited Partnership Unit
(being $500,000 plus $30,000 issue expenses per Unit)

CONFIDENTIAL OFFERING MEMORANDUM

This Confidential Offering Memorandum (the "Offering") is being provided to prospective investors on a confidential basis so that they can consider an investment in the limited partnership called SDIF Limited Partnership 6 (the "Limited Partnership") formed pursuant to the laws of South Dakota and subject to the partnership agreement (the "Limited Partnership Agreement") in connection with the investments to be made by the Limited Partnership, as specified pursuant to the immigrant investment program (the "Program"), which grants lawful permanent resident status in the United States to those who make qualifying investments under the provisions of the relevant immigration law, being 8 U.S.C. §1153 (b)(5)(A)(i)-(iii), (C) (the "Act"). In order to take advantage of the Program, qualified investors must invest in the Limited Partnership (see "Subscription Procedure") and complete the required immigration procedures (see "Immigration Procedures"). All the investments invested in the Limited Partnership will be first used to fund Northern Beef Packers Limited Partnership (the "Funded Business") to construct its facilities and purchase machinery and equipment capable of processing 7,500 head a week or 396,000 annually on a single shift. As demand grows, it is expected that a second or third shifts will be required, and the expanded facility will be able to process up to 4,000 head a day or 20,000 head a week. This project (the "Project") is located at 1.5 miles east of Highway 281 on 135th Street in Aberdeen, South Dakota and is expected to create the required number of jobs, all as set out under the Program and within the boundaries of the South Dakota International Business Institute (SDIBI), Dairy Economic Development Region (DEDR) (collectively "SDIBI/DEDR") Regional Center. The sole general partner of the Limited Partnership, SD Investment Fund LLC 6 (the "General Partner"), is an affiliate of SDRC, Inc. (the "Promoter"). All dollar amounts expressed herein are in currency of the United States.

The advantage of the "regional center" designation is that jobs may be direct or indirect (as opposed to only direct) to qualify for the purpose of the Program. The approval of the SDIBI/DEDR Regional Center and the subsequent amendments thereof under the Program is attached as Appendix I.

The number of requisite job creation for the program under SDIBI/DEDR Regional Center is specified in the said regional center approval and amendments from USCIS utilizing the Regional Input-Output Modeling System (RIMS) II, a statistical modeling system employed to forecast the relationship between economic development and job creation using regional multiplier tables. The U.S. Citizenship and Immigration Services ("USCIS"), through its predecessors, the Bureau of Citizenship and Immigration Services and the Immigration and Naturalization Service, has already deemed RIMS II an acceptable modeling system for the purposes of the regional center program. The Project, as specified in the Business Plan of the Offering, will, at a minimum, meet the stated job requirements of the Program by calculating the total number of direct and indirect jobs resulting from the investment based on the RIMS II multiplier tables.

After identifying the Project, the General Partner has formed the Limited Partnership for the purpose of making the qualifying investments to the Project. After reviewing the Offering with the details of the proposed business plan of the Project, investors may elect to purchase the Limited Partnership unit (each a "Unit" and, collectively, the "Units") by completing the subscription procedure pursuant to the subscription agreement (the "Subscription Agreement") attached to the Offering as Appendix III, including depositing the investment funds (the "Subscription Proceeds") with the designated banks for the Project as the escrow agent (the "Escrow Agent"), pursuant to the Escrow Agreement attached to this Offering as Appendix IV (see "Subscription Procedure"). The release by the Escrow Agent of an investor's Subscription Proceeds to the Limited Partnership is conditional upon approval of the investor's I-526 petition (immigrant petition by alien entrepreneur) (an "I-526 Petition"). Upon satisfaction of the foregoing conditions, the investor will be issued a Unit and the investor's investment will be final and irrevocable, subject only, in the event the investor fails the Visa Process (as defined under "Immigration Procedures") to the purchase of the investor's Unit by the Partnership for cancellation (see "Subscription Procedure").

Each Unit is offered at a price of $530,000.00, being the minimum $500,000 capital investment required pursuant to the Program, plus issue expenses of $30,000.00. In the event that such issue expenses, including legal, accounting, printing and escrow expenses and third part commissions, exceed $30,000 per Unit, the excess will be borne by the General Partner and in the event that such issue expenses are less than such amount, the difference will be paid to the General Partner. In the event that an investor thereafter fails the Visa Process, the investor's Unit will be repurchased by the Limited Partnership for cancellation 90 days after the Limited Partnership receives notice of such failure. The Offering Amendment will set out provisions dealing with the repurchase of the Units of investors who fail the Visa Process. In such event, the Unit will be repurchased for $500,000 and the investor will be entitled to receive a repayment (less a reasonable amount for administration and other costs, not to exceed $3,500 per Unit) of that portion of the issue expenses paid to the General Partner and that portion paid to a selling representative from such persons.

The Units are only being offered pursuant to exemptions from registration requirements pursuant to applicable securities laws.

The approval of the SDIBI/DEDR Regional Center under the Program was made pursuant to the application of SDIBI/DEDR and such approval was granted upon the assurance of SDIBI/DEDR's ongoing involvement in recommending and monitoring the Project. Accordingly, the General Partner has entered into an arrangement with SDRC, Inc., a corporation affiliated with SDIBI/DEDR to provide certain consulting and administrative services pursuant to the consulting agreement (the "Consulting Agreement") attached as Appendix II, to be entered into with each Limited Partnership (see "Management of Limited Partnerships"). The fees payable to SDRC, Inc. by a Limited Partnership are specified in the Consulting Agreement.

A prospective investor, by accepting receipt of this Offering agrees not to duplicate or to furnish copies of this Offering to persons other than such investor's investment and tax advisors, accountants and legal counsel. Prospective investors are not to construe the contents of this Offering as legal or tax advice and the Fund has not engaged any legal or other advisors to represent prospective investors. Each prospective investor should consult such investor's own advisors as to legal, tax and related matters concerning their immigration application and an investment in the Fund, the costs of which shall be borne by such investor.

An investment in the Limited Partnership involves certain risks (see "Risk Factors"). In making an investment decision, investors must rely on such investor's own examination of the terms of the offering, including the merits and risks involved. Each prospective investor is invited to ask questions of, and upon request may obtain additional information from representatives of the Limited Partnership concerning the Fund, its contemplated business, the terms and conditions of such offering and any other relevant matters to the extent the Limited Partnership or the Promoter possess such information or can acquire it without unreasonable effort or expense.

In addition, there can be no assurance that investors will obtain final immigration status under the Act or that the jobs required to be created and maintained under the Program will be achieved. However, the advantage of the "regional center" designation is that indirect as well as direct jobs qualify under the Program. Moreover, the Promoter has recommended the Limited Partnership after a careful review of the business plan (see "Business Plan") and the financial information (see "Financial Information") of the Project included in the Offering for the full period of the Limited Partnership's investment, indicating the Project will have sufficient revenue to create and maintain the requisite number of jobs under the Program.

THE UNITS ARE SUITABLE ONLY FOR INVESTORS WHO DO NOT REQUIRE LIQUIDITY IN THEIR INVESTMENTS AND WHO CAN AFFORD THE LOSS OF THEIR ENTIRE INVESTMENT. THE UNITS HAVE NOT BEEN REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933 (the "Securities Act") OR THE

SECURITES LAWS OF ANY STATE (the "State Securities Acts") AND HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE U.S. SECURITIES AND

EXCHANGE COMMISSION (the "SEC") OR THE SECURITIES COMMISSION OF ANY STATE, NOR HAS THE SEC OR THE SECURITIES COMMISSION OF ANY STATE PASSED UPON THE ACCURACY OR ADEQUACY OF THESE MATERIALS OR ANY OTHER INFORMATION THAT MAY BE FURNISHED TO PROSPECTIVE INVESTORS; ANY REPRESENTATION TO THE CONTRARY SHALL BE A CRIMINAL OFFENCE.

Units will be offered without registration under the Securities Act of the State Securities Acts only as follows:

- Outside the United States, in reliance upon Regulations promulgated by the S EC only to persons who are not "U.S. Persons" within the meaning of such Regulations; and
- Within the United States, in reliance upon Rule 506 promulgated by the SEC, only to persons who are "Accredited Investors" within the meaning of Rule 501 promulgated by the SEC.

Units will not be offered to any person in any place except as set forth above. Any person wishing to buy a Unit will be required to demonstrate that he or she is an Eligible Investor in accordance with the foregoing. This Offering does not constitute an offer to sell to, or a solicitation of an offer to buy from, any person in any jurisdiction to whom such an offer or solicitation would be unlawful.

For the purpose of this Offering, "Accredited Investor" means any person who comes within any of the following categories, or whom the issuer reasonably believes comes within any of the following categories, at the time of the sale of a Unit to that person:

- Any natural person whose individual net worth, or joint net worth with that p erson's spouse, at the time of his purchase exceeds $1,000,000;

- Any natural person who had an annual individual income in excess of $200,0 00 in each of the two most recent years or joint income with that person's sp ouse in excess of $300,000 in each of those years and has a reasonable expe ctation of reaching the same income level in the current year.

For the purpose of this Offering, "U.S. Person" means any natural person residing in the United States.

No person is authorized to give any information or to make any representation not contained in this Offering.

THE PROGRAM

The Act provides for an employment based preference immigrant visa category for immigrants seeking to enter the United States to engage or invest in a commercial enterprise that will benefit the U.S. economy and create at least ten full-time jobs. Pursuant to the Act, a qualified immigrant investor must invest at least $1 million, provided that such investment may be $500,000 in the event that the invested funds will be utilized within a designated regional center. SDBI/DEDR Regional Center, comprised of the 63 contiguous counties of eastern South Dakota, has been designated as a "regional center", pursuant to Section 610 of the U.S. Appropriations Act of 1993. The advantage of the "regional center" designation is that jobs may be direct or indirect (as opposed to only direct) to qualify for the purposes of the Program. Therefore, a $530,000 investment (being $500,000 plus $30,000 issue expenses per Unit) in the Limited Partnership that makes an investment in the Project located therein will qualify under the Act. Lawful permanent resident status may be granted to the investor, his or her spouse and children less than 21 years of age. Such status is granted under the Act on a conditional basis, which condition may be removed after 2 years upon the filing if an I-829 petition within 90 days prior to the second anniversary of conditional permanent residence being granted, upon a showing that the investor and the commercial enterprise have complied with the requirements under the Program.

Under the Program, the investor is required to be an "active participant" in the management of the commercial enterprise, but such participation in connection with the activities of a limited partnership is subject to limitations set out in the relevant legislation. Notwithstanding such limitations, limited partnerships have been recognized as appropriate investment vehicles under the Program. (See "Summary of Partnership Agreement – Limited Partner Decisions") The funds invested by a Limited Partner must have been lawfully obtained.

Legislation enacted on December 3, 2003 extends the regional center pilot program through September 30, 2008 and provided the USCIS with the discretion to prioritize the processing of I-526 petitions filed in connection with a proposed Qualifying Investment in a Target Business located in a designated regional center.

IMMIGRATION PROCEDURES

To qualify for residency, investors must file an I-526 Petition at the designated USCIS Service Center. Tax returns and substantial documentation evidencing that an investor's funds intended for investment in a Limited Partnership were derived from lawful sources must be submitted along with the I-526 Petition. Such evidence may include information concerning real estate transactions, business income, proceeds from the sale of a business, employment income, investments, bank accounts and dealings, licenses or similar evidence.

If investment funds are from a gift or inheritance, an appropriate affidavit and/or other evidence will be required to be filed.

Persons applying for United States residency must demonstrate that they are admissible to the United States in accordance with Section 212 of the Immigration and Nationality Act. Section 212 sets forth various grounds of inadmissibility, which may prevent an otherwise eligible applicant from receiving an immigrant visa or entering the United States. Aliens precluded from entering the United States include: (a) persons who are determined to have a communicable disease of public health significance; (b) persons who are found to have, or have had, a physical or mental disorder, and behavior associated with the disorder which poses, or may pose, a threat to the property, safety, or welfare of the alien or of others, or have had a physical or mental disorder and history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the immigrant alien or others, and which behavior is likely to recur or to lead to other harmful behavior; (c) persons who have been convicted of a crime involving moral turpitude (other than a purely political offense), or persons who admit to having committed the essential elements of such a crime; (d) persons who have been convicted of any law or regulation relating to a controlled substance, admitted to having committed or admits to committing acts which constitute the essential elements of same; (e) persons who are convicted of multiple crimes (other than purely political offenses) regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether such offenses involved moral turpitude, persons who are known, or for whom there is reason to believe, are, or have been, traffickers in controlled substances; (f) persons engaged in prostitution or commercialized vice; (g) persons who have committed in the United States certain serious criminal offenses, regardless of whether such offense was not prosecuted s a result of diplomatic immunity; (h) persons excludable on grounds related to national security, related grounds, or terrorist activities; (i) persons determined to be excludable by the Secretary of State of the United States on grounds related to foreign policy; (j) persons who are or have been a member of a totalitarian party, or persons who have participated in Nazi persecutions or genocide; (k) persons who are likely to become a public charge at any time after entry; (l) persons who were previously deported or excluded and deported from the United States; (m) persons who by fraud or willfully misrepresenting a material fact, seek to procure (or have procured) a visa, other documentation or entry into the United States or other benefit under the Immigration Act; (n) persons who have at any time assisted or aided any other alien to enter or try to enter the United States in violation of law; (o) certain aliens who have departed the United States to avoid or evade U.S. military service or training; (p) persons who are practicing polygamists; and (q) persons who were unlawfully present in the United States for periods in excess of 180 days.

Following approval of an investor's I-526 Petition, the investor must apply for an immigrant visa or permanent resident status. If the investor will be outside of the United States, the application is filed at the appropriate U.S. Consulate. If the investor will be in the United States, the application is filed at the appropriate office of the USCIS. The Consular

Interview Process, or the USCIS adjustment of status process, as applicable, (the "Visa Process"), is designed to enable the U.S. Government to determine whether the investor is inadmissible to the United States as explained in the previous paragraph. As part of this process, the investor is subjected to medical, police, security and immigration history checks. Upon approval, the investor (and spouse and children) are granted conditional permanent residency status.

Each prospective investor should review these substantive inadmissibility grounds with competent counsel to determine whether there may be a basis for denying admission of the prospective investor notwithstanding eligibility for immigration based on an investment in a Limited Partnership.

Investors who have been granted conditional permanent residency status must file a petition to remove the condition (From I-829) between 21 and 24 months after the date on which they received their conditional permanent resident status upon arriving in the United States. The primary purpose of the application is to ensure that investors submit evidence establishing that they have successfully met the requirements of the Program, including the creation and maintenance of the requisite number of direct and indirect jobs. Except in rare cased, Investors who fail to file this petition in a timely manner will automatically lose their permanent residency status.

Investors and their immigration attorneys are responsible for ensuring that their applications are timely and properly filed. However, the General Partner and SDIBI will facilitate the preparation of all requisite evidence regarding the limited partnership and its investment in the Project Company.

There can be no assurance that an I-526 Petition will be approved, that an investor will successfully complete the Visa Process, or that upon the approval thereof that the conditions attaching thereto will be removed.

FORMATION OF LIMITED PARTNERSHIP

The Limited Partnership has been formed as a commercial for profit entity governed by the provisions of the Limited Partnership Agreement attached to the Offering and will engage solely in the business of making an investment or series of investments in the Project under the Program in the form of loans or equity investments. Each investor who subscribes for a Limited Partnership Unit pursuant to the Offering will, subject to approval of the investor's I-526 Petition, become a Limited Partner of the Limited Partnership. Other than in the event that the Limited Partner fails the Visa Process, a Unit issued to the Limited Partner is non-transferable and the Limited Partnership is prohibited from redeeming or repurchasing any Units. All Units will be of the same class unless issued in series and no Unit will have any priority over any other Unit of the same series. The Limited Partnership will have one

or more Limited Partners, provided that for each Limited Partner admitted to the Limited Partnership the job creation requirement under the Program must be met and identified with respect to such Limited Partner.

USE OF PROCEEDS

This Offering contains the plan for the use of the proceeds from the offering of Units and the financial projections for the Project (see "Business Plan"). The Promoter has recommended the Project to the Limited Partnership because the projections indicate that, for the full period of the Limited Partnership's investment, the Project will have sufficient revenues to:

- create the requisite number of jobs under the Program
- make all required payments to the Limited Partnership during the term of the investment
- support the refinancing thereof at the expiry of the term of the loan.

MANAGEMENT OF LIMITED PARTNERSHIP

The day-to-day management of the Limited Partnership will be conducted by the General Partner. Under the laws of South Dakota, in order to maintain their limited liability, limited partners of the limited partnership may not take part in the management or control of the limited partnership. The approval of limited partners is required in connection with certain matters (see "summary of Partnership Agreement – Limited Partner Decisions"). The duties of the General Partner, which are set out more fully in the Partnership Agreement, include:

- recommending the Project to the Limited Partners;
- determining that the Project meets the minimum requirement for investment;
- determining that the Project is projected to meet the criteria for job creation under the Program;
- monitoring the Project with respect to continuing qualification under the Program;
- monitoring the investments and the financial performance of the Project;
- supervising SDRC, Inc.'s performance of its obligations under the Consulting Agreement;
- reporting to the Limited Partners;
- calling meetings of the Limited Partners, as necessary;
- maintaining Limited Partnership books and records; and,
- retaining lawyers, auditors and other professionals as may be required on behalf of the Limited Partnership

In addition to monitoring the Limited Partnership's investments, the General Partner will,

subject to the approval of the Limited Partners in connection with any realization plan (see "Summary of Partnership Agreement - Limited Partner Decisions") take such steps as may be required to protect the interests of the Limited Partnership and the Limited Partners, including, if necessary, realizing upon any security granted to the Limited Partnership in connection with its investments.

The Limited Partnership has entered into a Consulting Agreement, attached to this Offering as Appendix II, with SDRC, Inc., to provide certain advisory and administrative services to the Limited Partnership.

SOUTH DAKOTA

History

South Dakota occupies an area of 77,047 square miles, enjoys a continental climate and is bordered by Minnesota and Iowa (E), Nebraska (S), North Dakota (N), and Wyoming and Montana (W). The United States acquired South Dakota as part of the Louisiana Land Purchase in 1803 from France. The land was then occupied by Sioux Indians who had driven the agricultural Arikara Indians from the region. The first settlement was established in 1817 by fur traders in Fort Pierre, South Dakota. In 1850 settlements began to develop more rapidly as land speculators and farmers from Iowa and Minnesota moved west. Emigration from European countries (Germany, Scandinavia, Holland, Russia, and the United Kingdom) soon followed. The Gold Rush in 1874, when gold was discovered on Indian land (Treaty 1868), led to the development of towns in western South Dakota and South Dakota's rich western history with now famous personalities such as General Custer, Wild Bill Hickok and Calamity Jane unfolded. In 1889 South Dakota became the 40th state with Pierre as its capital. The development of the railroads in the late 1800s caused the population to increase threefold with agriculture following suit. Postwar South Dakota, with improved farming techniques, witnessed a steady increase in agricultural and livestock operations with larger farms replacing smaller family farms. The late 1990s, with a major New York bank moving its credit card operation to Sioux Falls, marked the beginning of a swift shift towards service, finance and trade investments that resulted in significant economic growth.

Today almost one-third of the region west of the Missouri River belongs to Indians on reservation with most of the remaining land being occupied by cattle and sheep ranchers. In the more productive region east of the Missouri River, livestock and cash cropping (corn, soybeans, wheat) are major sources of income,. The economy is more diversified including manufacturing, electronics, and service industry. South Dakota currently has a population of 755,010 with Sioux Falls (140,000), Rapid City (65,000), Aberdeen (30,000) and Watertown (25,000) being the largest population centers.

Business environment of South Dakota is being rated as the optimum condition as its state laws and regulations provide excellent tax benefits such as no state corporate tax, no state income tax, or the sales tax and its mobility in business operation. The South Dakota of today is characterized by its excellent infrastructure system such as fiber optics, airport, railroads and highways and the nation's lowest energy prices. Additionally, South Dakota is famous for its 2nd lowest crime rates, 6th best average verbal and math SAT scores and the nation's best high school graduation rate.

South Dakota's main business is the agricultural industry with the dairy/cattle industry being one of the most important businesses. Most of agricultural appliance producers and dairy product processors have its principal business offices in South Dakota. According to Fortune Magazine (Nov. 2006), South Dakota was ranked 1st for having favorable business environment among the entire 50 states in the U.S.

INVESTMENT STRATEGY

Pursuant to the Consulting Agreement, SDRC, Inc. has introduced the Project to the General Partner for its consideration, including detailed financial information and due diligence reviews. Based upon its review, the General Partner has recommended the Project for approval by prospective investors in the Limited Partnership and in connection therewith has delivered this Offering describing the Project in detail.

The investment in the Project will:

- Be structured as funding for the Project;
- Be a minimum of US $530,000 and will qualify under the Program to permit investors to make the minimum US $530,000 investment (the "Minimum Investment");
- Result in meeting the minimum job creation requirements of the Program; and,
- Be subject to an undertaking from the Project to make reasonable best efforts to hire individuals who reside in the regional center.

SUBSCRIPTION PROCEDURE

Investors wishing to subscribe for a Unit in the Limited Partnership are required to deliver:

- $530,000.00 to the General Partner by certified check made payable to the Escrow Agent or to the Escrow Agent by wire transfer of funds, representing th

e subscription price (the "Subscription Proceeds") for the Unit;

- to the General Partner an executed subscription agreement (attached as Append ix III), the definitive form of which is included as part of the Offering, whic h includes an undertaking by the investor to (i) diligently prepare and file I-5 26 Petition and complete the Visa Process; (ii) provide to the General Partner such information as the General Partner may require confirming that the fund s to be invested by the investor were lawfully obtained, together with such ot her documents as the General Partner may reasonably require (which requirem ent may be met by providing a letter addressed to it from a recognized and q ualified firm of accountants licensed to practice in the jurisdiction in which th e investor resides, in form, substance and from a firm of accountants or other professionals acceptable to the General Partner); (iii) provide the Escrow Age nt with copies of the investor's I-526 Petition, passport and such other docum entation that the Escrow Agent deems appropriate in order for the Escrow Ag ent to satisfy its "Know Your Customer" requirements; and (iv) diligently file and prosecute an I-829 Petition within 21 to 24 months after the date that c onditional permanent residency status is obtained.

The Escrow Agreement provides for the release of an investor's Subscription Proceeds upon the earliest to occur of:

- the Promoter delivering notice to the Escrow Agent that the I-526 Petition of such investor and the Project have been approved under the Program, to the Limited Partnership;

- the Promoter delivering notice to the Escrow Agent that an investor's I-526 p etition has been refused (notice which the Promoter shall deliver within 7 day s of it becoming aware of such refusal), to the investor; or

- 12 months from the date the investor completed the subscription procedure for a partnership unit.

An investor's full Subscription Proceeds will be returned to the investor unless the conditions for the release thereof from the Escrow to the Limited Partnership have been met.

The Offering in connection with the offering of Units provides as a condition of closing that a minimum of Twenty (20) or a maximum of seventy (70) investors have had their Subscription Proceeds transferred to the Escrow Agent.

- It will also be a condition of the release of Subscription Proceeds to the Limi ted Partnership that at least One (1) investor has had his/her I-526 application approved.

- No Units will be offered for sale after the earlier of (i) the maximum number of Units (70) being subscribed for and (ii) twelve (12) months from the first subscription for a Unit.

The Partnership Agreement provides for distributions to the Limited Partners pro rata irrespective of the date of subscription by a Limited Partner.

In the event that subscriptions are received for Units representing more subscription proceeds than required for the Project, priority will be given to qualifying investors as determined by the General Partner in its sole discretion. The General Partner will deliver notice to the Escrow Agent in the event of over-subscription and, pursuant to the Escrow Agreement, the Escrow Agent will deliver notice to such effect to the investors where subscriptions cannot be accepted. No subscription shall be complete until the General Partner has accepted such subscription and the General Partner reserves the right to reject a subscription for any reason.

SUMMARY OF PARTNERSHIP AGREEMENT

The Limited Partnership is formed solely for the purpose of funding the Project described in the Offering and will be governed by the terms of the Partnership Agreement attached to the Offering.

The following information is presented as a summary of principal terms only and is qualified in its entirety by reference to the Partnership Agreement attached to the Offering.

The Partnership

The Limited Partnership is formed pursuant to the laws of South Dakota. The registered office of the Limited Partnership and the General Partner are in the state of South Dakota.

Investment Objective

The Limited Partnership's investment objective is to invest in the Project in order to permit investors to qualify for immigration to the United States pursuant to the Act and to permit Limited Partners to participate in a commercial for profit enterprise.

Classes of Units

All Units are of the same class unless issued in series and no Unit will have any priority over any other Unit of the same series. Units issued in series will be tied to the Project to the effect that all income or losses derived therefrom allocated to the Limited Partners will be allocated to the Limited Partners subscribing for such series, any security granted to the

Limited Partnership in connection with the Project will be held for the benefit of the series Units to which it relates and all matters requiring the approval of Limited Partners which relate to the Project will be voted upon separately by the holders of the series Units released thereto as a class.

Project

The Project must be reviewed and approved by the investors prior to completing the subscription procedures below. In order to evaluate the Project, each investor is advised to review the detailed investment description, including the form and structure of the investment, characteristics of securities and anticipated returns. The Project may earn returns below market for similar investments.

Allocations and Distributions

Net proceeds realized from the sale, repayment or distribution of realized from the Limited Partnership's investments (including any interest) will be allocated and distributed 99% to the Limited Partners and 1% to the General Partner.

Net proceeds realized from the sale or repayment (other than scheduled payments of principal) of all or any portion of the Limited Partnership's investments will be distributed at the end of the term or at the sole discretion of General Partner prior to the end of the term. When distributed prior to the end of term, the General Partner will be entitled to withhold from any distributions (including disposition proceeds) amounts as are necessary to create, in its discretion, appropriate reserves for expenses and liabilities of the Limited Partnership as well as any tax withholdings as necessary.

Compensation of General Partner

The General Partner is entitled to receive fees and expenses as described in the Offering.

Limited Partner Decisions

Approval of Limited Partners is required by ordinary resolution (an "Ordinary Resolution") (51% of Limited Partners voting) with respect to the following matters:

- approving the conditions for the staged funding of the Project
- materially changing the terms of the Funding Agreement (see Funding Agreem ent) with the Project
- advising the General Partner in connection with the monitoring of the Project
- advising the General Partner in connection with its relationship with SDRC, In c. pursuant to the Consulting Agreement
- approving the realization with any security given or rights granted to the Limi

ted Partnership in connection with the Project
- changing the auditors of the Limited Partnership

Approval of the General Partner and Limited Partners is required by unanimous resolution (100% of Limited Partners Voting) to make investments other than the Project.

Term

The Limited Partnership will continue until January 1 of the year following the year in which all of the Limited Partnership's assets have been realized upon distribution.

Limited Partnership Expenses

The Limited Partnership will pay all expenses of the Limited Partnership, including fees payable to SDRC, Inc. pursuant to the Consulting Agreement and any expenses of the General Partner, all expenses incurred in connection with the making, holding, sale or proposed sale of investments, the cost of the preparation of the annual accounting, financial and tax reports to Limited Partners, litigation or other extraordinary expenses, insurance and indemnity expenses and expenses of liquidating the Limited Partnership.

Indemnification

The Limited Partnership will indemnify and hold harmless the General Partner and SDRC, Inc. and their respective directions, officers, members, partners and employees, from and against liabilities arising in connection with the Limited Partnership. The Limited Partners will be obligated to return any amounts distributed to them to fund indemnity obligations of the Limited Partnership, but will not be required to put in additional capital for such purpose.

Transferability of Interests and Withdrawal

Except as expressly provided for in the Partnership Agreement, no Limited Partner will be permitted to withdraw from the Limited Partnership or to withdraw any portion of his or her capital account. Other than in the event the Limited Partner fails the Visa Process, a Unit issued to the Limited Partner is non-transferable and the Limited Partnership is prohibited from redeeming or repurchasing any Units.

Reports

The Limited Partnership will send to each Limited Partner generally within 90 days after the end of each fiscal year of the Limited Partnership an audit report including a balance sheet and statements of income, changes in Partner's equity and cash flows, prepared in accordance with generally accepted accounting principles, plus a schedule and summary description of the investments owned by the Limited Partnership at year-end a statement for each Limited

Partner of its capital account and tax information necessary for completion of its tax returns. The Limited Partnership will also send its Limited Partners status reports on a minimum of semi-annual basis.

Amendments

The Partnership Agreement may be amended from time to time with the consent of the General Partner and by Ordinary Resolution of the Limited Partners, unless the proposed amendment will, or is likely to, cause a Limited Partner to suffer an adverse economic effect, in which case the written consent of such Limited Partner is required. The Partnership Agreement may also be amended by the General Partner to correct ambiguities or inconsistencies provided the proposed amendment dose not adversely affect the interest of any Limited Partner of to incorporate provisions, which in the written opinion of counsel to the Limited Partnership are for the protection of Limited Partners.

INCOME TAX CONSIDERATIONS

An Investor is responsible for obtaining his or her own tax advice with respect to the federal, state and local income and other possible tax consequences of his or her investment in the Project, and no tax advice will be provided hereunder or at any time in the future. However, as a general rule, a resident alien of the United States will be taxed on all of his or her worldwide income and will be required to file a United States income tax return. In addition, if an alien is not a resident of the United States but has United States source income he or she generally will be subject to taxation in the United States on such income, and such may be subject to withholding and /or reporting on a United States income tax return.

THE FUNDED BUSINESS

The Funded Business, Northern Beef Packers Limited Partnership ("NBP LP"), is a South Dakota Limited Partnership formed in April, 2007. It was established in order to build a state-of-the-art beef processing facility in South Dakota through investment of local managing partners and seventy (70) EB-5 investors seeking immigration to the U.S. This facility is designed to process over 7,500 head a week on a single shift and up to 20,000 head a week on a double or triple shifts, and other associated facilities are to be managed and operated by NBP LP. According to original plan, the construction was planned for completion in 2009. However, in the course of development, the completion date was postponed due to expansion of the business which additionally included construction of rendering plant and waste facilities. In order to facilitate new construction and operating cost, the Funded Business plans to receive additional financing from the Limited Partnership. Thus far, a total fund of $45 million has been invested to the Project and 95% of constructions are being completed, and additional fund of maximum $35 million dollars,

which will be financed by SDIF Limited Partnership 6, will be loaned to the Funded Business to complete of remaining construction and to facilitate further operation cost and purchase of equipments.

STRENGTH OF THE PROJECT

The strengths of the Project are as follows:

- The abundance of cattle within a 150-mile radius of Aberdeen, South Dakota, coupled with a negative corn basis, will assure competitive production costs. A new beef plant will encourage the growth of cattle infrastructure and slow the sale of quality South Dakota cattle and corn to the commercial cattle-feeding areas.

- The NBP LP plant will enjoy a favorable competitive advantage over other major players in the packing industry. Only the new Kansas plant will be as low cost with sustainable profitability. The difference will grow as NBP LP matures and is able to adopt a more aggressive value-added position.

- As a new facility, NBP LP will utilize state-of-the-art identification / traceability technology that will meet all qualification standards for South Dakota Certified™ beef. The South Dakota Certified™ beef label will be an invaluable domestic marketing tool. The animal traceability records will also help qualify NBP LP product to lead the resurgence of the beef export market.

- NBP LP freight costs for inbound cattle are substantially lower than those of the mega-plants for two main reasons: 1) the fed cattle supply for NBP LP's planned slaughter of 1,500 to 4,000 head / day will be will be garnered from the tri-state area within a 150-mile radius of the plant; 2) the mega-plants in this comparison draw cattle from an area in excess of 600 miles from the plant on average.

- NBP LP is correctly positioned in production capability size (1,500 head / day on single shift and up to 4,000 head / day on double or triple shifts) to capitalize on South Dakota's corn and quality fed beef supply. NBP LP has a competitive advantage; the business model is sustainable--$32.87 better than the INDUSTRY average!

- NBP LP will proactively manage the pathogens and chemical residues associated with fed beef production through utilization of state of-the-art, multiple-hurdle HACCP interventions in the slaughter / fabrication process. The residue monitoring program will begin on the ranch and follow the raw material—cattle, corn, or soybeans—through the feedlot and packing plant to meat and offal product customers.

- NBP LP will also manage the environment proactively to control dust, odor, and insects. Wastewater will be cleaned, chlorinated, and recycled for use in cleaning and flushing cattle handling facilities and trucks.

PLANT OPERATIONS

A brief explanation of the NBP LP plant operation is provided in the following:

- The plant will be situated on 39 acres located 1.5 miles east of Highway 281 on 135th Street in Aberdeen, South Dakota. Legal description is Lots 2 and 3 of the South Side Industrial Subdivision in N1/2 and SE1/4, Section 36-T123N-R64W, Brown County, South Dakota.

- An existing all-weather gravel road currently provides access the 1.5 miles down 135th Street from Highway 281. NBP LP has requested that local and State governments combine resources to provide paved access.

- The NBP LP plant has adopted several "clean room" features, which will improve operational sanitation and cleaning. Unique design features include stainless steel trench and floor drains, separate lunch and locker facilities (shown below) for clean to dirty air, people, and water flow through operations, and a ceiling utility interstitial chase to isolate plumbing and electrical maintenance from the meat processing area.

- Northwest Public Service Company will provide electrical service. Utility requirements are based on a total horse-power load of 4,500 KW, 440 volts transformed to low voltage controls. Refrigeration compressors will utilize 4,160 KW.

- Major motors and compressors will be equipped with PLC controls with VDF drives to monitor and control the peak electrical loads to manage excess / peak demand billing charges from the utility company.

- Water is supplied from the City of Aberdeen, South Dakota.

FINANCIAL PROJECTION AND EMPLOYMENT CREATION

Attached as Appendix VI is the Business Plan including financial projections and job creation estimated from the development of the Project. Briefly summarizing the financial projections, a total expense estimated for the completion of the Project is $95,583,691. In addition, through the operation stage of the Project, a total number of 563 jobs will be created. More detailed information of the total projected cost and job creation are provided as below.

USES OF FUNDS

LAND	$	908,696
SITE DEVELOPMENT	$	12,599,727
BUILDING	$	35,530,422
EQUIPMENT	$	6,855,974
SALES/USE TAX RECAPTURE	$	(2,800,000)

SUB-TOTAL	$	53,094,719
ENGINEERING/PROFESSIONAL FEES	$	3,663,552
SD FINANCING LOAN FEES-OTHER	$	468,000
NON GOED ELIGIBLE PROFESSIONAL FEE	$	2,259,498
FINANCING FEES-TIF	$	2,719,597
START-UP LOSSES	$	1,474,517
SUB-TOTAL	$	10,585,164
EQUIPMENT LEASE DOWN PAYMENT	$	4,396,397
WORKING CAPITAL	$	17,000,000
INTEREST/LEASE PAYMENT RESERVE	$	8,947,496
TOTAL USES	$	94,023,776

SOURCES OF FUNDS

Initial Funding

EB-5 INVESTMENT	$	35,000,000
GENERAL PARTNER INVESTMENT	$	2,000,000
ADDITIONAL PAID IN CAPITAL	$	2,020,000
SUB-TOTAL (EQUITY)	$	39,020,000

Interim Funding

QUINTUS CAPITAL/CDIB: Interim Financing	Paid off via SD Financing ($30 million)

Final Funding

TAX INCREMENT FINANCING - EQUITY (TIF)	$	10,100,000
KOREAN INVESTMENT - LOAN	$	23,703,776
EDFA BONDS - LOAN	$	5,000,000
REDI - LOAN	$	3,000,000
BANK LOAN (80% USDA GUARANTEED)	$	10,000,000
ABERDEEN DEVELOPMENT CORP. LOAN	$	2,200,000
RURAL ELECTRIC ECONOMIC DEVELOPMENT (REED) LOAN	$	1,000,000
SUB-TOTAL (LOANS)	$	55,003,776
TOTAL SOURCES	$	94,023,776

Employee/ Work Location/ Year

[illegible] WORK[illegible]CATION	TOTAL
MANAGEMENT	69
SLAUGHTER DIVISION	153
FABRIC[illegible] DIVISION	316
PLANT MAINTENANCE	25
TOTAL PLANT	563

* NBP will [illegible] 563 jobs by 2010.

FUNDING AGREEMENT

Purpose of Funds

Prior to the closing of the first Unit offered hereunder, the Limited Partnership will enter into a Funding Agreement (the "Funding Agreement") with the Funded Business. The proceeds of the funding will be mainly used for completing Project construction and other operation expenses. The plant being constructed has been designed with the most technologically advanced programs, practices and processes in the beef processing and packing industry, and this will make the plant one of the most efficient in the industry.

Amount of Funding

The funding is a maximum of $[illegible] million based upon the number of Units sold pursuant to this Offering. In the event that the maximum funding amount is not advanced, the Funded Business will continue to operate profitably in the future.

Disbursement of Funds

The funds will be disbursed by the Financial Partner to the Funded Business as requested by the Funded Business and needed [illegible] Project.

Terms of Funding

The funding requires quarterly payments of interest only at a rate of 3% per annum, simple

interest, payable based upon the [illegible] ...nced from time during the previous quarterly period. The total investment fu[illegible] ...e Subscription Proceeds) shall be payable in five (5) years from the date of the first [illegible] ...sen nt of the funds. It is the Funded Business's intention to repay the total funds [illegible] ...(5) years with the proceeds from long term financing and profits which it will be gener[illegible] ...rior to the five-year period.

Security

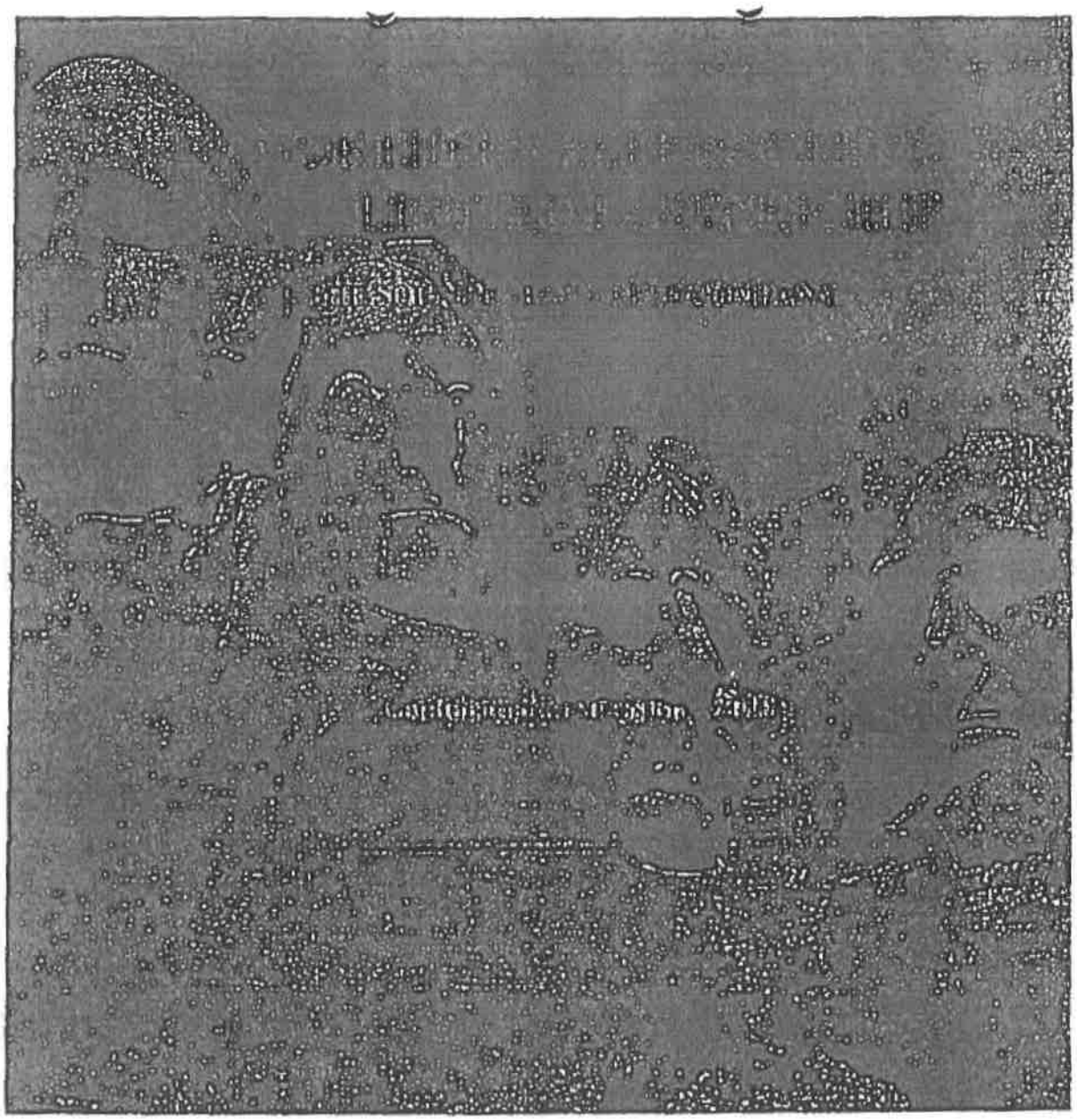
The Subscription Proceeds will b[illegible] ...d by the following:

- On the initial $11.5 mi[illegible] ...he Subscription Proceeds will be secured by a se curity interest in the equip[illegible] ...nt purchased, as well as a corporate guarantee of the Funded Business.

- The remaining Subscri[illegible] ...ds will be secured by a first mortgage on t he building and a first [illegible] ...ity interest in the equipment.

SK[illegible]CTORS

An investment in the Limited P[illegible] ...bject to a number of risks that could affect the repayment of the Loan in accor[illegible] ...terms including those that affect the uniform rental and sales industry gener[illegible] ...ries in which the Funded Business's clients operate in particular, including c[illegible] ...the Funded Business's clients, risks associated with the suppliers from whom th[illegible] ...ess's products are soured, an inability to open, new, cost effective Operating [illegible] ...ties, unionization campaigns, compliance with environmental Laws and regulat[illegible] ...ciated with the Funded Business's acquisition policy, attracting and retaining c[illegible] ...nt personnel in key positions, failure to achieve and maintain effective internal cor[illegible] ...ed operating costs and other factors. An investment is also subject to ri[illegible] ...general economic conditions, that investment returns may be below market for[illegible] ...ent, that the jobs required to be created under the Program may not be crea[illegible] ...entire period required thereunder, that final immigration status under the Ac[illegible] ...nted to a Limited Partner, that some or all of a Limited Partner's capital may [illegible] ...nd the Units represent an illiquid investment which cannot be assigned or tra[illegible] ...addition, there can be no assurance that investors obtain final immigration s[illegible] ...the Act of that the jobs required to be created and maintained under the Progran[illegible] ...chieved. However, the advantage of the "regional center" designation is that [illegible] ...ell as direct jobs qualify under the Program.



This business plan has been submitted on a confidential basis solely for the benefit of selected, highly qualified investors and is not for use by any other persons. By accepting delivery of the plan, the recipient agrees to return this copy to the corporation if the recipient does not undertake to subscribe to the offering. Do not copy, fax, reproduce, or distribute without written permission of Northern Beef Packers, Limited Partnership.

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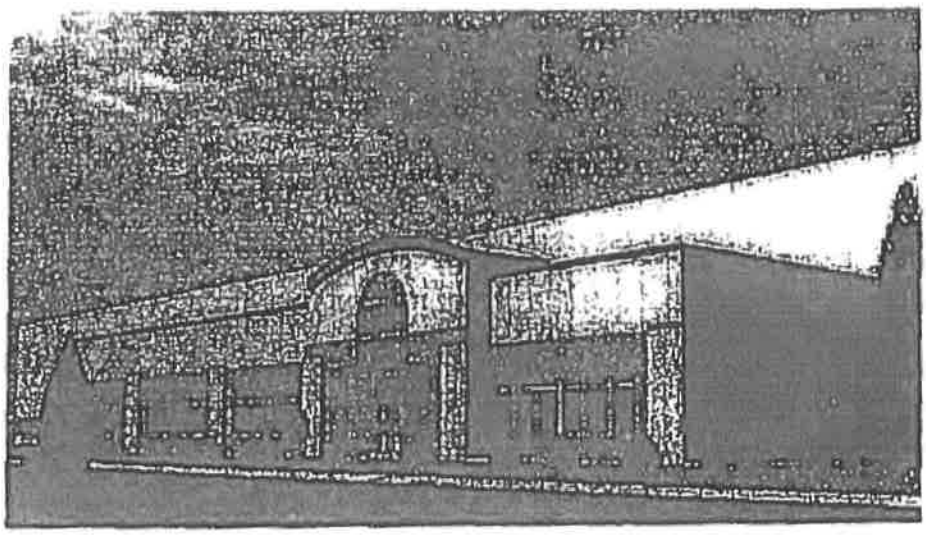


INTRODUCTION

- The current beef industry paradigm actually began with the widespread use of tractors in farming after World War II. Farmers were suddenly able to produce great quantities of corn that had no obvious market.

- When cattle feeders began to utilize the corn surplus to supplement cattle feed, the die was cast. U.S. consumers no longer had only a seasonal supply of beef in late fall to early winter. Consumption of fed beef grew, and fed beef eventually became THE MEAT of the U.S. consumer.

- Packers moved their facilities from major population centers to corn-growing areas. Companies other than Armour, Swift, Wilson, and Cudahy began to build larger plants, which several years later were double shifted. The concentration of these mega-plants depleted local labor and cattle.

- Further merger / purchase concentration among the large, even foreign, packing companies led to a proliferation of technologically outdated, oversized plants which were financed at new construction cost to pay for the merger interest, good will, and acquisition cost.

- The paradigm began its shift in 2002 with construction of the first technologically advanced, mid-sized, regional packing plant in Kansas. The time is right for the Northern Beef Packers, Limited Partnership (NBP) plant to be constructed in South Dakota to take advantage of abundant corn and ethanol by-products in South Dakota and abundant cattle from the tri-state area.

- The NBP plant will enjoy a favorable competitive advantage over other major players in the packing industry. Only the new Kansas plant will be as low cost with sustainable profitability. The difference will grow as NBP matures and is able to adopt a more aggressive value-added position.

- The abundance of cattle within a 150-mile radius of Aberdeen, South Dakota, coupled with a negative corn basis, will assure competitive production costs. A new beef plant will encourage the growth of cattle infrastructure and slow the sale of quality South Dakota cattle and corn to the commercial cattle-feeding areas.

- As a new facility, NBP will utilize state-of-the-art identification / traceability technology that will meet all qualification standards for South Dakota Certified™ beef. The South Dakota Certified™ beef label will be an invaluable domestic marketing tool. The animal traceability records will also help qualify NBP product to lead the resurgence of the beef export market.

- NBP will proactively manage the pathogens and chemical residues associated with fed beef production through utilization of state-of-the-art, multiple-hurdle HACCP interventions in the slaughter / fabrication process. The residue monitoring program will begin on the ranch and follow the raw material—cattle, corn, or soybeans—through the feedlot and packing plant to meat and offal product customers.

- NBP will also manage the environment proactively to control dust, odor, and insects. Wastewater will be cleaned, chlorinated, and recycled for use in cleaning and flushing cattle handling facilities and trucks.

- NBP will be locally owned and led by a Board of Directors comprised of recognized beef industry experts. Substantial investment dollars will come through the EB-5 visa program and Brown County TIF grants. The NBP plant will bring 563 labor and management jobs (494 hourly) to Aberdeen by 2010. The multiple of supporting infrastructure jobs, estimated at 7X, brings 3,941 additional paychecks to Aberdeen and the surrounding South Dakota region in 2010.

- Utilizing industry data and other associated information provided by experts in the respective fields, management has attempted to estimate the future performance of NBP operations over a five-year period. While significant risk can be associated with any capital-intensive project, management feels that operations will come on line quickly with highly profitable margins, thereby providing significant cash flow to service and repay debt. Significant leverage is expected during the course of the first eighteen months of operations. Please note the Summary of Financial Information for the periods 2010 through 2014, included in the following table:

NBP LP INCOME STATEMENT

REVENUE	2010	2011	2012	2013	2014
HIDE SALES	$17,792,875	$20,520,000	$20,325,000	$20,130,000	$25,935,000
PROTEIN MEAL SALES	$4,337,699	$8,622,200	$8,489,600	$8,360,900	$8,232,200
BLOOD @ BLOOD MEAL PRICES	$2,242,688	$3,424,200	$3,354,000	$3,286,920	$3,221,910
TALLOW SALES	$11,884,244	$16,146,780	$17,796,600	$17,429,100	$17,078,160
SUB-TOTAL RENDERING SALES	$36,257,506	$50,713,180	$50,952,600	$50,206,920	$52,468,310
TOLL KILL	$19,948,225	$32,175,000	$31,200,000	$30,225,000	$29,250,000
OFFAL -BUY BACK	$2,768,038	$5,065,700	$4,954,200	$4,855,500	$4,758,000
CUTOUT/PREMIUM-BUY BACK	$94,492,945	$122,946,266	$122,946,266	$122,946,266	$122,946,266
SUB-TOTAL TOLL KILL	$117,209,208	$160,178,966	$159,100,566	$158,026,766	$156,954,266
BRANDED-OFFAL	$6,619,874	$7,583,550	$7,431,450	$7,283,250	$7,137,000
-CUTOUT	$184,734,669	$250,229,850	$250,229,850	$250,229,850	$250,229,850
-PREMIUM	$7,953,459	$10,672,350	$10,459,800	$10,251,150	$10,044,450
SUB-TOTAL BRANDED	$201,308,002	$268,485,750	$268,121,100	$267,764,250	$267,411,300
OTHER INCOME(IKOR LEASE)	$70,125	$81,000	$85,500	$90,000	$94,500
TOTAL REVENUE	$354,844,841	$483,458,816	$481,259,766	$476,087,936	$476,926,378
NUMBER OF HEAD	259,750	390,000	390,000	390,000	390,000
SLAUGHTER/FAB COST/HEAD	$146	$135	$137	$138	$141
CATTLE COST	$180,395,258	$241,817,550	$241,817,550	$241,817,550	$241,817,550
PRODUCT PURCH. OF TOLL KILLS	$97,280,983	$128,001,960	$127,008,566	$127,891,766	$127,704,266
DIRECT LABOR	$10,587,280	$12,959,440	$13,348,223	$13,748,670	$14,161,130
DIRECT LABOR BENEFITS	$2,865,208	$4,808,829	$4,953,094	$5,101,687	$5,254,737
OTHER COSTS	$24,412,682	$34,814,336	$35,259,795	$34,953,497	$35,737,960
CHANGE IN INVENTORY	(35,606,166)	$236,213	$59,570	(51,582)	(513,764)
TOTAL COST OF GOODS	$309,875,245	$472,638,334	$473,338,799	$473,421,588	$424,661,900
GROSS MARGIN	$44,969,596	$80,818,482	$57,920,968	$55,666,348	$52,264,476
SALARIED EMPLOYEE WAGES	$1,490,174	$1,534,880	$1,580,926	$1,628,354	$1,677,205
SALARIED EMPLOYEE BENEFITS	$1,053,864	$1,092,781	$1,125,565	$1,159,332	$1,194,112
OTHER COSTS	$1,872,888	$1,904,720	$1,937,558	$1,971,382	$2,006,220
TOTAL SG&A EXPENSE	$4,416,726	$4,532,381	$4,644,049	$4,759,867	$4,877,536
TOTAL OPERATING INCOME	$40,552,870	$56,286,101	$53,276,919	$50,907,291	$47,386,940
TOTAL PROFIT B4 DEPR (EBITDA)	$45,936,038	$62,117,033	$59,197,851	$56,738,213	$53,217,872
INTEREST EXPENSE					
SHORT TERM LINE OF CREDIT	$27,706	$0	$0	$0	$0
LONG TERM LINE OF CREDIT	$467,891	$0	$0	$0	$0
REDI LOAN	$91,223	$85,384	$81,909	$78,328	$74,637
EDR BOND	$226,348	$219,620	$231,621	$223,212	$214,373
OTHER STATE BONDS	$185,602	$196,484	$189,825	$183,030	$175,781
ABERDEEN DEVELOPMENT CORP	$189,410	$199,536	$189,497	$179,904	$169,410
REED ELECTRIC FUND	$63,068	$65,108	$63,098	$59,871	$56,409
AVERA HOSPITAL	$25,172	$26,448	$25,244	$23,953	$22,349
USDA GUARANTEED LOAN	$1,707,599	$1,536,112	$1,360,458	$1,477,262	$1,389,123
BEND EQUIP CAPITAL LEASE	$651,080	$586,618	$659,688	$630,232	$598,013
SUB-TOTAL INTEREST	$3,625,100	$2,125,310	$3,000,440	$2,855,692	$2,700,094
PROFIT B4 TAX	$36,927,770	$53,159,791	$50,276,479	$48,051,599	$44,686,845
BONUS/INT HOLDER TAX DIST.	$15,364,949	$21,791,824	$20,613,356	$19,701,151	$18,321,607
NET INCOME	$21,562,821	$31,358,967	$29,663,122	$28,350,437	$26,365,239
NET PROFIT MARGIN	6.1%	6.5%	6.2%	5.9%	5.5%

HDP I,P BALANCE SHEET

	2010	2011	2012	2013	2014
	DEC	DEC	DEC	DEC	DEC
CURRENT ASSETS					
CASH ON HAND	$1,068,701	$38,936,698	$72,185,030	$104,026,286	$133,745,522
ACCOUNTS RECEIVABLE	$28,034,799	$17,353,978	$17,306,703	$17,260,498	$17,214,868
INVENTORY(WORK IN PROGRESS)	$5,298,761	$4,849,782	$4,651,430	$4,653,020	$4,656,766
PREPAID EXPENSES(KOR INVESTMENT	$3,000,000	$3,000,000	$3,000,000	$3,000,000	$3,000,000
OTHER RECEIVABLES	$0	$0	$0	$0	$0
TOTAL CURRENT ASSETS	$29,402,261	$63,932,368	$97,153,153	$128,939,804	$158,626,976
FIXED ASSETS-PLANT	$95,930,571	$95,930,571	$95,930,571	$95,930,571	$95,930,571
ACCUMULATED DEPRECIATION	($5,373,172)	($11,203,104)	($17,033,036)	($22,865,968)	($28,696,900)
NET FIXED ASSETS-PLANT	$90,557,399	$84,726,467	$78,895,535	$73,064,603	$67,233,671
FIXED ASSETS-OTHER	$0	$0	$0	$0	$0
TOTAL ASSETS	$119,959,660	$148,658,835	$176,048,688	$202,004,407	$225,860,647
CURRENT LIABILITIES					
ACCOUNTS PAYABLE	$3,991,023	$3,481,350	$3,488,573	$3,489,751	$3,500,074
ACCRUED INTEREST	$267,011	$261,935	$251,338	$240,216	$228,616
ACCRUED PAYROLL TAXES	$412,345	$441,680	$454,944	$468,592	$482,650
ACCRUED SD UNEMPLOYMENT TAX	$21,094	$22,595	$23,273	$23,971	$24,690
SHORT TERM LINE OF CREDIT	$0	$0	$0	$0	$0
LONG TERM LINE OF CREDIT	$0	$0	$0	$0	$0
CURRENT MATURITIES L/T DEBT	$133,177	$160,143	$170,740	$181,882	$193,462
TOTAL CURRENT LIABILITIES	$4,824,650	$4,367,702	$4,388,868	$4,404,392	$4,429,492
REDI LOAN	$2,888,823	$2,774,551	$2,656,804	$2,535,476	$2,410,457
BDFI BOND	$4,850,635	$4,694,279	$4,529,924	$4,357,160	$4,175,557
OTHER STATE BOND FUNDING	$3,877,520	$3,849,348	$3,714,547	$3,572,891	$3,423,969
ABERDEEN DEVELOPMENT CORP	$2,892,705	$2,767,661	$2,633,578	$2,478,802	$2,325,832
REED ELECTRIC FUND	$960,937	$919,297	$874,647	$826,770	$775,431
AVERA HOSPITAL	$364,328	$347,669	$349,869	$330,698	$309,902
USDA GUARANTEED LOAN	$23,852,907	$22,792,535	$21,655,509	$20,436,287	$19,128,926
RENDERING EQUIPMENT CAPITAL LEASE	$7,507,690	$6,974,354	$6,441,018	$5,907,682	$5,374,346
KOR INVESTMENT	$3,000,000	$3,000,000	$3,000,000	$3,000,000	$3,000,000
CURRENT MATURITIES OF L/T DEBT	($133,177)	($160,143)	($170,740)	($181,882)	($193,462)
TOTAL L/T LIABILITIES	$50,172,425	$47,969,524	$45,677,698	$43,264,884	$40,730,759
EQUITY					
RETAINED EARNINGS	$18,162,636	$48,521,692	$78,184,724	$107,536,181	$133,900,400
DENNIS HELLING INVESTMENT	$2,000,000	$2,000,000	$2,000,000	$2,000,000	$2,000,000
(TIF) TAX INCENTIVE FINANCING	$9,800,000	$9,800,000	$9,800,000	$9,800,000	$9,800,000
FBLS INVESTMENT	$35,000,000	$35,000,000	$35,000,000	$35,000,000	$35,000,000
TOTAL EQUITY	$64,962,636	$96,321,692	$125,284,724	$154,336,181	$180,700,400
TOTAL LIABILITIES & EQUITY	$119,959,660	$148,658,835	$176,048,688	$202,004,407	$225,860,647
Debt to Total Asset Ratio	45.8%	35.2%	28.4%	22.6%	20.0%

HDP I,P CASH FLOW STATEMENT

	2010	2011	2012	2013	2014
	DEC	DEC	DEC	DEC	DEC
OPERATING ACTIVITIES	$2,009	$2,010	$2,011	$2,012	$2,013
INCOME FROM OPERATIONS	$21,582,822	$31,358,967	$29,663,122	$28,330,437	$26,365,239
DEPRECIATION	$5,373,172	$5,830,932	$5,830,932	$5,830,932	$5,830,932
CASH FLOW FROM OPER B4 CHANGES IN WC	$26,956,994	$37,189,899	$35,494,054	$34,161,369	$32,196,171
WORKING CAPITAL ADJUSTMENTS					
CHANGES IN CURRENT ASSETS(EXCL. CASH)	($25,333,560)	$3,337,500	$37,537	$44,605	$32,094
COLLECTED NOTES/OTHER ASSETS	$9,369,503	$0	$0	$0	$0
CHANGES IN CURR. LIAB (EXCL LOC & CPLTD)	($4,154,880)	($483,814)	$10,550	$1,402	$10,500
TOTAL CHANGES IN WORKING CAPITAL	($20,118,937)	$2,853,686	$48,188	$45,907	$42,594
NET TOTAL CASH FROM OPERATIONS	$6,837,057	$40,043,585	$35,542,190	$34,208,276	$32,241,725
INVESTING ACTIVITIES					
INVESTMENT IN FIXED ASSETS	($8,504,503)	$0	$0	$0	$0
OTHER INVESTMENT/INVESTMENT	$210,000	$0	$0	$0	$0
NET CASH FROM INVESTING ACTIVITIES	($8,294,503)	$0	$0	$0	$0
FINANCING ACTIVITIES					
LINE OF CREDIT CHANGE	($20,100,000)	$0	$0	$0	$0
REDI LOAN CHANGE	$2,888,823	($114,272)	($117,747)	($121,328)	($125,019)
BDFI BOND CHANGE	$4,850,635	($156,356)	($164,355)	($172,764)	($181,603)
OTHER STATE BOND FUNDING CHANGE	$3,877,520	($128,172)	($134,771)	($141,656)	($148,918)
ABERDEEN DEVELOPMENT CORP CHANGE	$2,892,705	($125,044)	($134,083)	($143,776)	($154,970)
REED ELECTRIC FUND CHANGE	$960,937	($41,640)	($44,650)	($47,877)	($51,339)
AVERA HOSPITAL CHANGE	$364,328	($16,659)	($17,800)	($19,151)	($20,756)
KOR LOAN CHANGE	$0	$0	$0	$0	$0
USDA GUARANTEED LOAN CHANGE	($1,060,685)	($1,060,372)	($1,137,026)	($1,219,222)	($1,307,361)
RENDERING EQUIP CAPITAL LEASE CHANGE	$7,507,690	($533,336)	($533,336)	($533,336)	($533,336)
NET CASH FROM FINANCING ACTIVITIES	$7,383,799	($2,375,850)	($2,483,870)	($2,399,120)	($2,573,922)
NET CHANGE IN CASH	$916,514	$37,667,697	$33,268,320	$31,831,256	$29,719,216
STARTING CASH BALANCE	$152,307	$1,068,701	$38,936,698	$72,185,030	$104,026,286
ENDING CASH BALANCE	$1,068,701	$38,936,698	$72,185,030	$104,026,286	$133,745,522
BALANCE SHEET CASH	$1,068,701	$38,936,698	$72,185,030	$104,026,286	$133,745,522

BEEF MARKETING / BUSINESS TRANSACTION SUMMARY

TRANSACTION Based on 2007 Actual Data:	2007 Market Price	WEIGHT LB / HD	$ / Head
FEEDLOT STEER WITH SHRINK	4.0%	1312	
2007 SLAUGHTER STEER Weight		1262	
2007 AVG. LIVE STEER COST	$ / HD	$92.73	$ 1,170.25
CARCASS DRESSING PERCENTAGE	63.5%	805	
2007 AVG LIVE DROP CREDIT / CWT.	$ 9.94	1262	$ (125.43)
EDIBLE OFFAL/ CWT.	$44.17	60	$ 26.50
HIDE / Head	$71.21/hide	60	$ 71.21
TALLOW / CWT	$27.77	113	$ 31.65
MEAT & BONE MEAL/Ton	$225.73/ton	.045	$ 16.89
BLOOD / Head -Valued at Meal Mkt. / Ton	$562.84/ton	.034	$ 2.49
BY-PRODUCT VALUE / HEAD	$ / HD		$ 146.62
NBP Rendering PREMIUM TO DROP CREDIT	$ / HD		$ 23.19
2007 AVG. CARCASS CUT-OUT VALUE / CWT	$ 145.46		$ 1,171.76
NBP Quality Grade Premium			$ 27.93
RED MEAT YIELD PERCENTAGE	76.2%	630	
BOXED BEEF PRIMALS	$ 2.10	480	$ 1,008.17
BEEF TRIMMINGS	$ 1.09	150	$ 163.59
2007 INDUSTRY GROSS PROFIT PER HEAD			$ 128.94

The table above illustrates the business transactions of buying cattle, slaughter / fabrication costs, live drop credit, premium sales of by-products, and sale values for the red meat products, resulting in an EBIDTA and Net Profit $ / head. Economic values in these calculations are based on average $ / head for 2007, USDA-ERS data.

- The analysis in this table and in this Feasibility Study indicates that NBP will be a strong, viable meat slaughter / fabrication company for the following reasons:

    1. **Efficient, low cost / high quality operations / sustainable profitability;**
    2. **Lower in- and outbound freight cost in an escalating energy market;**
    3. **High quality cattle supply / few inferior breeds and Mexican imports;**
    4. **High quality / low cost corn supply / abundant low cost by-products;**
    5. **New plant design / state-of-the-art Food Safety program.**

SUMMARY SWOT ANALYSIS

INTERNAL	**HELPFUL STRENGTHS** GREAT PEOPLE TO BUILD FAITH AND TRUST FOR CUSTOMERS BECOME THE INDUSTRY LEADER IN FOOD SAFETY BECOME LEADER IN EXPORT MARKET / TRADE NEW AND TALENTED MANAGEMENT TEAM LOW COST EQUITY AND LOW INTEREST CAPITAL COST	**HARMFUL WEAKNESSES** FEW ESTABLISHED SALES AND MARKETING RELATIONSHIPS ABILITY TO RECRUIT TOP QUALITY MANAGEMENT TO ABERDEEN, SD NOT ENOUGH LOCAL / TALENTED PEOPLE--MUST RECRUIT
EXTERNAL	**OPPORTUNITIES** HIGH QUALITY CATTLE / SOUTH DAKOTA CERTIFIED™ ABUNDANT QUALITY CORN SUPPLY / BIG BASIS ADVANTAGE TALENTED VALUE-ADDED CATTLE FEEDERS STATE & LOCAL LEADERSHIP COMMITTED TO ECONOMIC GROWTH	**THREATS** BIG PACKER MARGIN FOR FED CATTLE OVER-PENETRATION OF ETHANOL INTO THE CORN SUPPLY DROUGHT AS RELATED TO CORN AND FEEDER CATTLE SUPPLY NON-TARIFF TRADE BARRIERS--RESTRICTED EXPORT MARKETS

- **CLEARLY, NORTHERN BEEF PACKERS IS POISED FOR SUCCESS!**

MARKETING PLAN

BIRTH OF THE BEEF PARADIGM AND WHY IT HAS CHANGED!

- In the first half of the last century, cattle were grown on the range and slaughtered during the fall and early winter. Beef supply was limited and seasonal, at best.

- After WWII, tractors replaced horses and mules, and farm production grew rapidly.

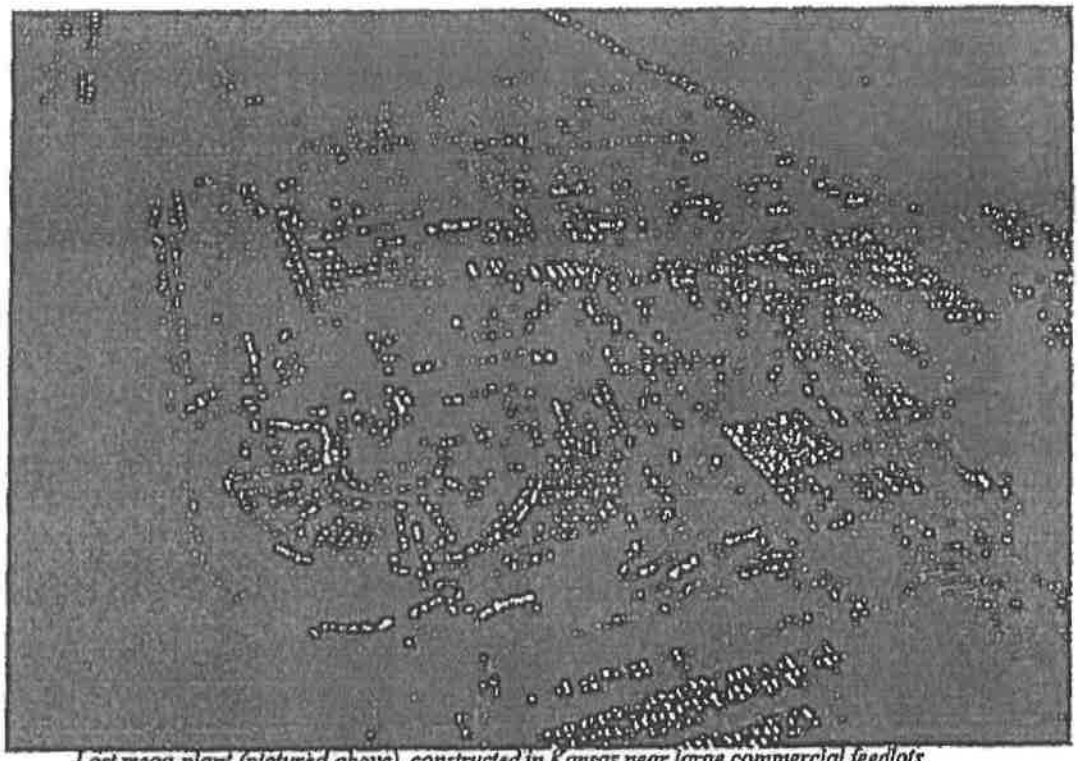
- Cattle feeding was created of economic necessity—"feeding worthless cattle worthless corn" (Warren Monfort, 1979) to extend the market window for both overly abundant commodities from a one-season supply to a year-round supply. Thus, cattle feeding was born. In the late 1950s and the 1960s, the beef packing industry moved from the terminal markets in hub cities to take advantage of the new cattle-feeding concept, close to corn production.

- Mild weather and abundant irrigation water for grain production encouraged the development of large commercial feedlots in the High Plains that were not feasible in the northern Corn Belt because of environmental limitations.

- New super-plants entered the beef slaughter business near the feedlots and corn. New technology and innovation were spawned to create vacuum packaging and fabrication of the carcass, which now happened in the same large plants in the central Corn Belt, several days' transportation away from where the meat would ultimately be consumed.

- The super-plants gave way to mega-plants. As competition grew, so did their appetite for fed cattle. Then mega-plants were double shifted, slashing fixed costs again.

- The super-plants, already in human resource trouble, then found themselves in a real crisis, attempting to compete with plants twice the size. Turnover and training became monumental problems that "more money" would not eliminate. These companies had created beef-eating machines that could never be staffed from the small agricultural communities from which they grew.



Last mega-plant (pictured above), constructed in Kansas near large commercial feedlots.

First mid-sized, regional plant, constructed in 2002 in Kansas. Note that this entire plant is smaller than the single plant building to the right side of the mega-plant pictured above.

- Fewer plants, located further from the population centers, created the demand for much longer and more viable shelf life from vacuum-packaged beef products. Sanitary beef production eliminated spoilage bacteria, and in their absence a minutely small number of truly mean pathogens crept onto the scene—*E. coli* and *Listeria monocytogenes* became familiar names in the industry! Large, high volume plants struggled to innovate and incorporate new technology rapidly enough to defeat the pathogen problem. Food Safety was then added to the growing list of mega-packer concerns!

- Ground water has been significantly depleted in Texas, Oklahoma, and Kansas, and corn is supplied increasingly by truck and rail. Feedlots daily consume the competitive advantage of most beef companies as local, cheap corn succumbs to the high cost of transporting the amount of corn essential to finish steers.

- Terrorism has created a border security crisis, and the already troublesome personnel crisis has widened with little or no end in sight. Once the least-cost producer, the mega-plant cost structure has increased dramatically.

- At best, the mega-plants are well suited for high volume generic / commodity beef production. In order to fight the rising cost battle, successive rounds of concentration have resulted in fewer companies' owning / operating this same small group of plants (26 total mega-plants now slaughter 85% - 90% of the fed beef supply); however, the interest and good will cost involved in these acquisitions has left the emerging companies to compete utilizing 50-year-old plants financed at new construction costs! As long as NO new concept plants are built to conquer these problems, the old beef paradigm camp is safe!

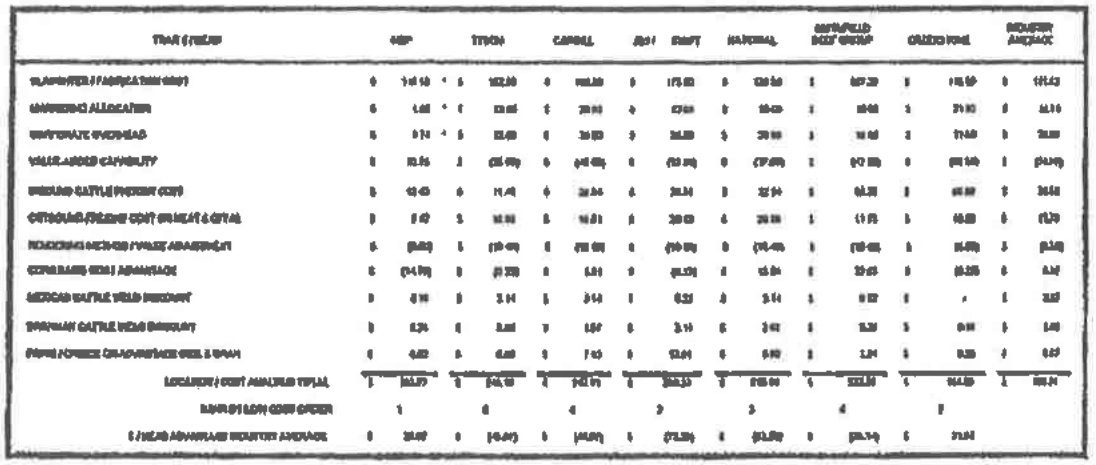
- Unfortunately, the water, corn, people, and process innovations that created these High Plains giants are the same factors that over-reaching concentration has now turned against in a series of irreversible, game-ending scenarios. The CHANGE that made the mega-plants industry stalwarts now consumes them!

- **Enter the new BREED: the mid-sized, premium branded, regional slaughter / fabrication / value-added companies.**

- The beef industry in the United States is a mature, commodity-based business. Many new beef initiatives attempt to market their way to a competitive advantage and profitability; however, the stark reality is that a new beef company such as NBP must, this day, compete on a cost of production basis with the commodity industry to survive long enough to build a true BEEF BRAND. A new entrant into the beef business, no matter how well intentioned, cannot market its way to sustainable profitability; accordingly, NBP must prove viability on a cost basis with existing U.S. commodity-driven beef companies.

NBP COMPETITIVE ADVANTAGE

Why will the mid-sized, regional slaughter / fabrication plant succeed when others have failed?



- Although numerous factors determine the competitive viability of a company within the beef industry, the primary factor each company must address is this question: "Is our slaughter / fabrication cost structure low enough to buy and process cattle and sell the meat and offal profitably?" The key question then becomes, "Do we have sufficient competitive advantage to produce a return on capital that will attract investors?"

- The beef industry paradigm has for many years assumed that "small, regional plants cannot compete with the huge mega-plants of the central Corn Belt." However, these huge monoliths were constructed 35 to 55 years ago, and the economic conditions which prevailed at their inception are no longer the dominant factors governing profitability and, thus, sustainable viability in today's meat packing industry.

- The factors included in the competitive analysis presented in the table above encompass the company structure, sales maturity (value-added capability), inbound and outbound freight costs, rendering method for by-product sales, and yield and quality differences for regional cattle types (Mexican and Brahman *vs.* traditional European and Continental breeds).

- Clearly, the two mid-sized slaughter / fabrication plants have a primary cost advantage in comparison to the large mega-plants, in direct contradiction to the paradigm. The two mid-sized plants are new design and construction and have incorporated many years of learned improvements and numerous equipment innovations. Even though the mega-plants have begun to age substantially and their

amortization should be nearly eliminated from their cost structure, these companies have actually been purchased in an industry-wide "big fish eats little fish" maneuver which has kept their amortization costs near new plant levels. As a result, the packing industry has concentrated, and non-competitive plants have surrendered to the scrap heap! In fact, all five of the large, multi-plant companies have had significant addition of plants or change of ownership structure in the recent past: JBS, a large Brazilian company, purchased Swift; Tyson purchased IBP; Smithfield Foods purchased Packerland Packing Company; and National and Cargill have purchased struggling plants in the last year. Each of these large acquisitions has added substantial interest and good will payments to each parent company's cost structure; getting bigger does not always mean more efficient / lower cost operationally!

- Labor cost and employee turnover are major contributing factors in cost escalation. As the industry concentrated, each of the mega-plants was double shifted to increase volume and dilute fixed costs. These efficiency efforts have been marginalized in most instances because the increased throughput has both over-penetrated the labor pool and forced cattle to be hauled from increasingly greater distances. These scenarios are currently further exacerbated as immigration laws become tighter and the cost of oil magnifies transportation costs. Past concentration that served to fuel lower cost and efficiency of the mega-plants has now, in a self-fulfilling fashion, become the formula for uncontrollable cost overruns in many companies.

- NBP will begin at a substantial value-added and sales discount (simple set offal production and limited fabrication styles of finished product mix) during the initial phase of operation; however, this disadvantage of ($32.75) is easily offset against the average advantage of $34 / head (net $66.75) in value-added capability from existing plants. As the NBP plant matures, this disadvantage will disappear. The plan to emphasize toll slaughter / fabrication will also help negate this start-up cost.

- NBP freight costs for inbound cattle are substantially lower than those of the mega-plants for two main reasons: 1) the fed cattle supply for NBP's planned slaughter of 1,500 to 4,000 head / day will be garnered from the tri-state area within a 150-mile radius of the plant; 2) the mega-plants in this comparison draw cattle from an area in excess of 600 miles from the plant on average.

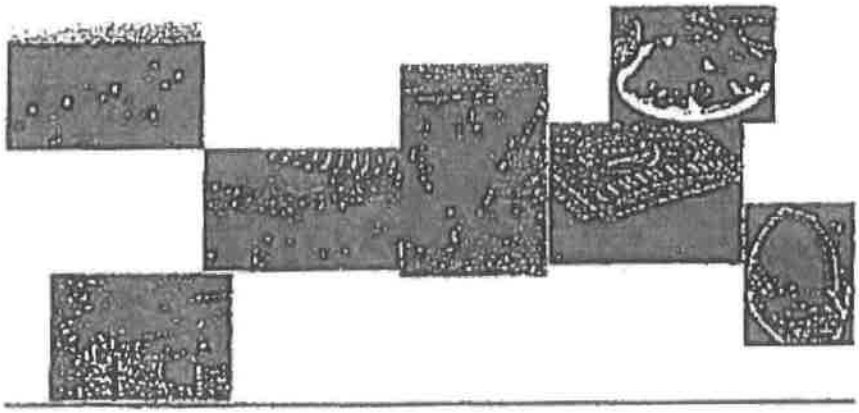
- Outbound freight is calculated as the area of population density required to consume 75% of the meat produced within the target plant. NBP has many fewer miles to travel to sell the volume of meat that they produce, compared to the four major packers located in the central corn belt, whose major customer bases are located on the four corners of the country.

- South Dakota has the largest negative corn basis of any state, -$0.21 / bu. additionally, the basis price for corn reaches a maximum in California of $0.65 / bu. Corn basis is simply the difference between the hedge market quote and the local cash price. Corn basis is fundamentally created by the balance of corn usage and production in the area. If corn is transported, stored, and dried before consumption in another state, the basis is negative, and the farmer or producer absorbs this cost; however, when a state or area has a positive corn basis, more corn is consumed than is locally produced, and the end user pays the basis cost. Why have we elected to include "corn basis" economics in the competitive advantage model? While not a direct economic factor, corn basis does represent the likelihood of adequate corn supply to feed cattle without excess cattle or corn transportation cost into the region. In such a comparison, South Dakota / NBP would enjoy abundant corn supply in excess of cattle and ethanol plant consumption, calculated as a negative corn basis / head of -$14.70 (-$0.21 corn basis / bu. X 70 bu. / head = -$14.70 / head). In the case of a company that has plants on both coasts and primarily in positive corn basis areas, such as Smithfield Beef Group, the positive corn basis is $22.63 / head, which simply means the cattle feeder would realize much less profit in the same finished cattle market. As the cattle market swings from undersupply to oversupply in a particular region, corn basis is a large determinant of regional cattle supply. **Because NBP is located in an abundant corn production region, corn basis as related to cattle supply will always be a positive growth factor for this plant.**

- The next three competitive advantages listed on the table are a reflection of quality and yield in the cattle available to NBP *vs.* cattle available in the southern Corn Belt (Mexican, Brahman *vs.* European cattle types). The northern tier of beef plants has long enjoyed the absence of Mexican and Brahman cattle in their slaughter mix. Mexican and Brahman cattle generally have a 2% and 1% deficit red meat yield, respectively; additionally, these cattle suffer with no Prime and one-third less Choice quality grading. Packers that suffer heavy value loss from these cattle are located in the southern plains and struggle to produce enough Prime and Choice beef to meet their customer demand. Creekstone and Smithfield Beef Group are exceptions to the southern cattle influence because they slaughter primarily Angus and Holstein cattle but pay the inbound freight consequence.

- In summary of this analysis, the mid-sized, regional packers have a lower competitive cost due to lower corporate overhead, less in- and outbound freight costs, and less southern cattle influence on Quality grades and red meat Yield. In this category **Creekstone has superior value-added capability in comparison to NBP, but NBP is, nonetheless, the lowest cost plant in the industry.** These NBP value-added numbers reflect a conservative start-up position with regard to value-added, which can be overcome as the plant and work force mature. When the low cost paradigm of the mega-plants is compared to the cost of the regional, mid-sized plant, clearly, plant / company purchases and the resulting recapitalization of interest costs and good will have driven corporate overhead out of the low cost category. As energy costs multiply, in- and outbound freight costs become a burden, when they were inconsequential on a cheap energy diet. The mega-plants have also encountered substantial labor increases as double shifting forced overpenetration of existing work forces in small rural communities, a labor problem that has been magnified many folds with increased crackdowns on illegal immigrants in the work force.

- NBP is correctly positioned in production capability size (1500 head / day for single shift and up to 4,000 head / day for double or triple shifts) to capitalize on South Dakota's corn and quality fed beef supply. NBP has a competitive advantage; the business model is sustainable--$32.87 better than the INDUSTRY average!



BEEF MARKETING DESCRIPTIONS

How will NBP merchandise more than commodity beef to assure greatest market penetration and profitability?

MARKETING PROGRAM	GREAT TASTE ⟶			LESS FILLING
USDA BEEF GRADING	PRIME	CHOICE	SELECT	STANDARD
CERTIFIED LOCATION		SOUTH DAKOTA		
CERTIFIED BREED	WAGYU	ANGUS	HOLSTEIN	HEREFORD
PRIVATE LABEL	Pr. GOLD ANGUS	MEYER	COLEMAN NATURAL	MAVERICK
PRODUCTION STANDARDS	NATURAL	ORGANIC	GREEN	GRASS FED
RELIGIOUS REQUIREMENTS	KOSHER			HALAL
POINT OF SALE BRANDING	MORTON'S	OMAHA STEAKS	HY-VEE RETAIL	RALPH'S
EXPORT PROGRAMS	JAPAN	KOREA	CHINA	MIDDLE EAST

- For the purpose of this marketing analysis, beef merchandising attributes have been arranged along the traditional USDA Beef Grading continuum from Prime to Standard. To organize and discuss the remaining marketing attributes, the general outline progresses from left as "Great Taste" to right as lean, or "Less Filling."

- Economics dictate that beef be USDA Graded if the carcass qualifies for Prime or Choice, even if the intention is to brand. (USDA Grading is a voluntary function; USDA Meat Inspection is mandatory.)

- **NBP will have access to the only State identity program developed thus far. Because NBP will be the largest Federally Inspected beef plant in South Dakota, the South Dakota Certified™ label will provide NBP great State recognition and branded marketing opportunities.**

- **As many large Angus ranches reside in the region, NBP will have great access to produce "Certified Angus Beef®" as well as "Certified Hereford Beef®," which are grade designations within a USDA grade. These "Breed" brands provide a premium to the live cattle and to the Certified meat when merchandised in premium programs, adding significant value to the entire production chain—ranch to meat counter.**

- NBP will begin operations as a "toll slaughter / fabrication" plant. As a result, NBP will not face the immediate economic challenge of sales and marketing of their beef. Toll contract arrangements with producers such as Yeon Fresh & Safe, Partlow & Co.,

and Meyer Angus are currently under negotiation, and letters of intent are included in Appendix D.

- NBP will encourage the production of Natural beef in the South Dakota Certified™ beef program. Natural beef has become a favorite with heavy beef consumers because of its consistent tenderness, not because consumers fear the chemicals used in beef production. Natural beef and, to a lesser extent, organic beef have an opportunity to become branded sales leaders for NBP. The possibility also exists to slaughter a limited number of certified grass-fed cattle, which would fit the green or environmental marketing requirements.

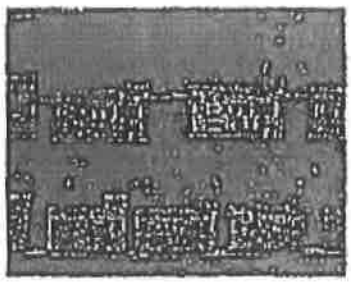
- Production Standards of this nature require close coordination with the production supply chain. Traceability and verification of specific management / feeding regimes require close attention to third-party documentation at the ranch and feedlot; the South Dakota Certified Enrolled Cattle™ program provides such a management process verification system. NBP infrastructure will complement the South Dakota Certified Enrolled Cattle™ system with a DNA-based cattle, carcass, meat traceability system which enables verification and identification to the primal meat package. NBP, with the cooperation of the South Dakota Certified Enrolled Cattle™ program, will be the first packer / production chain system to link traceable cattle from the ranch through the feedlot, through the packer, to the meat customer! USDA Production Standards require a transparent, third party verification system managed to create individual animal traceability records prior to label approval. Together, NBP and the South Dakota Certified Enrolled Cattle™ program will demonstrate strong compliance and receive label approval. Verified Production Standard Brands will become the cornerstone of the NBP marketing system, further differentiating NBP from the commodity mega-packer. South Dakota Certified™ beef is a duly recognized PVP (Product Verified Program) by USDA.

- Point-of-sale branding will follow as specific customers recognize the strength of the NBP production chain. Branding of this nature will create a dedicated supply for a name brand retail or Hotel, Restaurant, Institutional (HRI) customer and a link to sustainable profits for NBP and producers who are licensed to raise South Dakota Certified Enrolled Cattle™ cattle.

- When BSE was discovered in the U.S. cattle herd, the U.S. beef industry immediately lost ALL export markets—10% of our beef volume and 20% of beef value. Offal value decreased the most; for example, the price of a three-pound beef tongue fell from $8.75 / lb to $0.55 / lb, a loss of $24.60 / head on one offal item. The U.S. beef machine was not prepared. We still are not prepared! The source and age records available through the South Dakota Certified Enrolled Cattle™ program and NBP are essential for export verification to meet the requirements of our most demanding export customers!

WORLD BEEF CONSUMPTION OPPORTUNITIES

Who are the world's customers and competitors to NBP branded beef products?



COUNTRY	POPULATION (MILLIONS)	PER CAPITA GDP U.S. $	BEEF CONSUMPTION LB	BEEF CONSUMPTION KG
CHINA	1,314 MM	$ 7,204	11.9	5.4
UNITED STATES	301 MM	$ 43,740	78.9	35.6
JAPAN	127 MM	$ 30,615	20.3	9.2
SOUTH KOREA	49 MM	$ 20,690	19.0	8.6
PHILIPPINES	89 MM	$ 4,923	8.8	4.0
VIETNAM	84 MM	$ 3,025	<1	1.9
ARGENTINA	40 MM	$ 4,470	154.7	70.2
BRAZIL	176 MM	$ 3,460	71.2	32.3
EUROPE	487 MM	$ 31,914	39.7	18.0

- World beef consumption follows two macro economic trends: 1) countries that produce the most beef consume the most beef, *i.e.* Argentina and Brazil; 2) countries with the highest per capita gross domestic product consume the highest quality protein. The weak dollar will make beef exports more attractive to consuming countries. From these patterns the largest export customers and competitors become apparent.

- Prior to December 2003, Japan and South Korea had been our greatest export customers; however, with the discovery of BSE in the United States, their borders were closed. Cattle disease became an effective NON-TARIFF TRADE BARRIER when foreign governments learned we had no paper trail to individual animal source and age. While beef trade has resumed, market vitality has not. The U.S. beef industry must make serious infrastructure investment in traceability systems to fully recover world export market supremacy. The investment from U.S. commodity ranchers, feeders, and packers has not been forthcoming!

- **Australia and South America have filled the void in our absence and have been willing to build the traceability infrastructure to capture and hold the market. The contest for the world beef customer is now their technology against U.S. beef quality; candidly, this is an embarrassing competitive position for the only world super-power! The ability to compete for export markets will come from branded, not commodity, production systems; in this regard, the mid-sized, regional packers are the best opportunity the U.S. beef system has to capture lost market share. NBP will be in a position to earn its fair share of these value-added export markets and will be rewarded with long-term market share and profitability. The ego of importing countries will not allow the same old *status quo* system back in the door! Source and age identification are essential.**

- **JBS, a Brazilian company, has become the largest meat packer in the world, leap-frogging the top four American companies. The Brazilians already consume as much meat as Americans (per capita), with half the population and 8% of the GDP. The battle lines are clear; they want to be the dominant player in the world market! The inherent danger in this proposition for U.S. beef is that South America will promote and sell lean beef once they have conquered the Foot and Mouth Disease barrier, leaving the American beef system to fight alone in the "Great Taste / Less Filling" battle for consumers (mentioned in the previous table). The American beef system clearly needs a champion in this arena, and NBP is positioned to make that leap!**

- **China is the hidden elephant in the room! China has become the third largest world economy in the past six months and has a robust pork and poultry production system. However, it shows no sign of a beef infrastructure. A large percentage of the 12 pounds of beef per capita produced and consumed in contemporary China comes from the wet market slaughter of spent dairy cows! With a BILLION customers in the offering, surely China is a prized customer worth sincere attention from the best, not just the biggest commodity players!**

- **NBP must be designed to meet the plant standards of the European Union; however, this market may be well into the future, as their population and GDP are not keeping pace with Asian economies.**

- **The conclusion is obvious: companies like NBP will lead the American beef resurgence in the world beef market, or the U.S. beef machine will settle for a place in the niche market and suffer another blow to balance of trade! NBP is the best qualified to lead the charge; again, the mid-sized, regional packer defeats the paradigm and will enjoy sustainable profitability as payment for this leadership position!**

- **Although most American export companies have not come to this realization, the trade competition between the U.S. and China highlighted by the toy safety and quality problems and the melamine contamination of pet food will spark demand**

for all world export-minded companies to move to the next level with regard to SAFETY AND QUALITY systems; chief among them is FOOD SAFETY!

NBP LEADS THE WAY TO NEXT GENERATION FOOD SAFETY

NBP will have superior food safety management and will not produce recalled product when others have failed. Why?

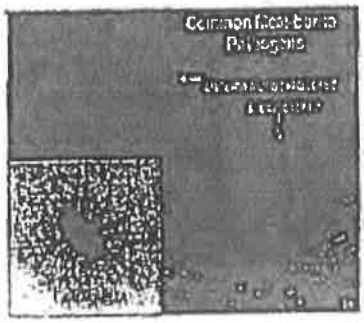
HAZARD ANALYSIS CRITICAL CONTROL POINT FOOD SAFETY INTERVENTION SYSTEM	MANAGEMENT SCHEME	HAZARD CONTROL KILL %	ACCUMULATIVE HAZARD REMAINING %
RESIDUE MONITORING PROGRAM–RAW MATERIAL	CCP-1	90%	10%
RESIDUE MONITORING PROGRAM–FINISHED PRODUCT	CCP-2	95%	0.5%
PATHOGEN INTERVENTION PROGRAM			
CLEAN TRUCKS	BMP	75%	25.00%
CLEAN SLAUGHTER PLANT PENS	BMP	75%	18.75%
SEPARATION OF CLEAN & DIRTY JOBS	BMP	50%	9.34%
ASEPTIC SLAUGHTER PROCESS	CCP-1	90%	0.94%
PRE-EVISCERATION WASH / LACTIC ACID RINSE	CCP-2	90%	0.09%
OFFAL PROCESSING DEPARTS FROM CARCASS PROCESS			
HEAD WASH & LACTIC ACID RINSE	CCP-3	90%	0.01%
LACTIC ACID RINSE OF OFFAL MEATS	CCP-3	90%	0.01%
OFFAL RAPID CHILL	CCP-4	90%	0.001%
APPLICATION OF COMPETITIVE EXCLUSION BACTERIA TO THE VARIETY MEATS	CCP-5	99%	0.00001%
CARCASS PROCESS CONTINUES AFTER EVISCERATION			
FINAL CARCASS WASH	BMP	20%	0.1%
HOT WATER PASTEURIZATION	CCP-6	99%	0.001%
APPLICATION OF COMPETITIVE EXCLUSION BACTERIA TO THE CARCASS	CCP-7	99%	0.00001%
36–48 HOUR CARCASS SPRAY CHILL	BMP	20%	0.00001%
APPLICATION OF COMPETITIVE EXCLUSION BACTERIA TO THE BEEF TRIM	CCP-8	90%	0.000001%
PATHOGEN MONITORING PROGRAM / VERIFICATION 125 SAMPLES OF COMBO TRIM & OFFAL / DAY	PATHOGEN TESTING 45 SAMPLES / DAY	CONFIDENCE INTERVAL 95%	ANY POSITIVE MEANS HACCP SYSTEM IS NOT PERFORMING AS PREDICTED!!!
PRODUCT TRACEABILITY SYSTEM / CALF TO CUSTOMER	PRODUCT CONTROL & TRACEABILITY	CONFIDENCE INTERVAL 99%	MarkSEW DNA TRACE BACK SYSTEM

BMP - "Best Manufacturing Practice" CCP - "Critical Control Point"
Number following CCP indicates sequential multiple hurdle

- A recognized brand NAME must FIRST be protected from known hazards; pathogens and residues are serious consumer concerns and will be further highlighted as world trade competition between nations comes to the forefront. The HAZARD ANALYSIS CRITICAL CONTROL POINT (HACCP) system is the current state-of-the-art management scenario accepted worldwide for food production. The NBP HACCP system for the control and management of chemical residues, biological pathogens, and disease is depicted in the table on the previous page and in the discussion below. We have included FOOD SAFETY in the marketing section because it will provide NBP a substantial margin of differentiation and a distinct competitive advantage over the mega-packer industry! Though it creates an inclsive marketing point, application of science and technology in a HACCP Food Safety System, not marketing, clearly creates this point of difference.

- NBP plans to start production in this plant with a "toll slaughter / fabrication" system for branded beef companies; nowhere does the demand for a preeminent FOOD SAFETY SYSTEM have greater meaning than in this scenario! The liability is not otherwise affordable!

- Of all the hazards, chemical residues are most easily controlled because they are easily found (even when a competing government looks) with scientific sampling and analysis. Credible validation of production systems for natural and organic marketing identities requires a residue monitoring system. Residue failures have been among the first shots fired back at American pork after the melamine / media melt-down. Failure in the export arena is not an option for NBP, as the commodity packers push for market share with other exporting countries and the importing countries' indigenous cattle supplies.



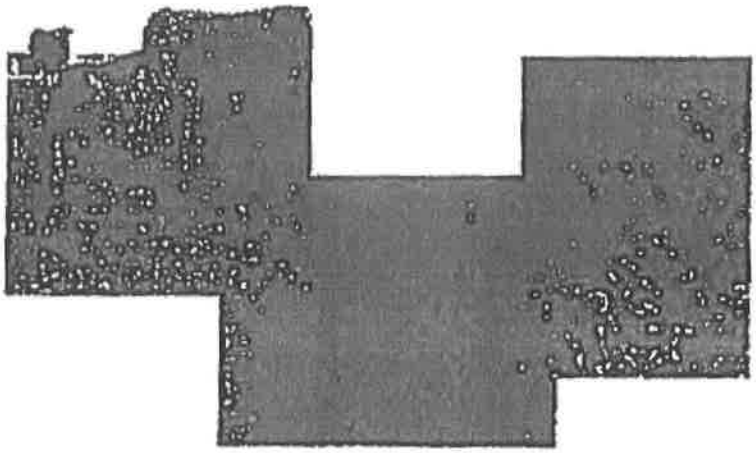
- *E. coli 0157:H7, Salmonella,* and *Listeria monocytogenes* are the most deadly food-borne pathogens we must control.

- Each of these pathogens survives, at times even thrives, in an animal / agricultural habitat. Scientists assume they are present 100% of the time on live cattle and in their environment. They are natural gastro-intestinal inhabitants of all creatures—man to fly!

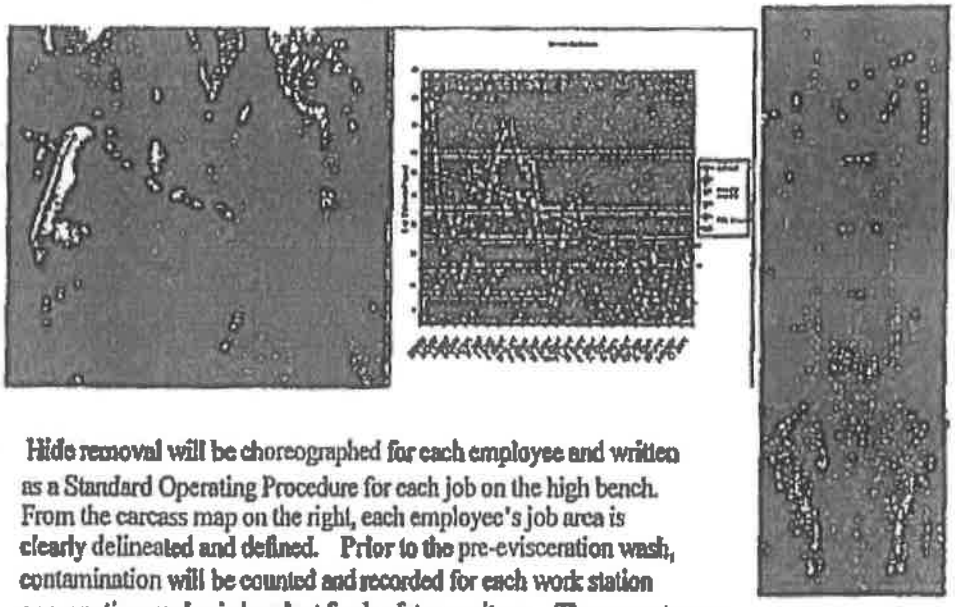
- In a very real sense, a wall or fence must be constructed between the world where cattle live and eat and the world where humans eat to live. With the exception of *Salmonella*, these pathogens are not of major health concern to the livestock and poultry in which they reside: they are ubiquitous in nature!

- *E. coli O157:H7, Listeria monocytogenes,* and certain serotypes of *Salmonella* can be lethal to a young child or older adult with the consumption of a single cell.

- *E. coli* and *Salmonella* survive up to 60 days in fresh manure on the feedlot floor; consequently, the hair and hide of cattle become the most prevalent pathogen reservoir. Best manufacturing practices must be followed to maintain feedlot bedding, truck floors, and packing plant pens to prevent cross-contamination from dirty to clean cattle.



- The single most critical pathogen intervention process begins with aseptic hide removal during the high bench operation.

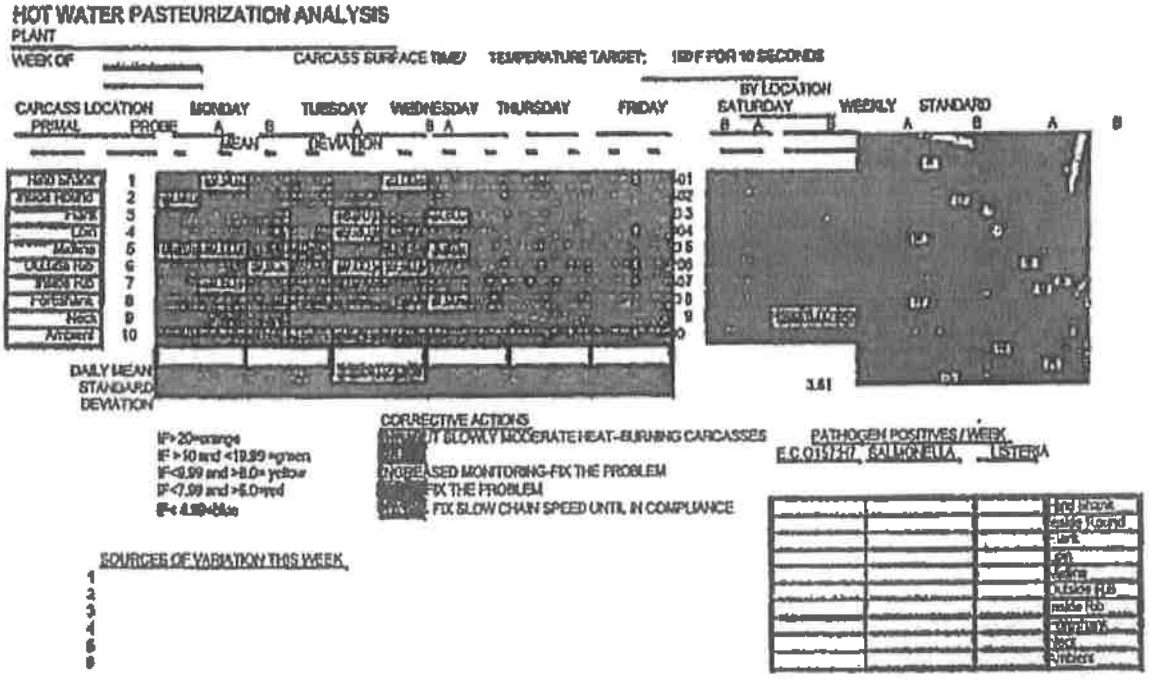


- Hide removal will be choreographed for each employee and written as a Standard Operating Procedure for each job on the high bench. From the carcass map on the right, each employee's job area is clearly delineated and defined. Prior to the pre-evisceration wash, contamination will be counted and recorded for each work station on a continuous basis by plant food safety monitors. The current score will be posted on the floor within view of the entire high bench team of workers. Scores for each work station will be statistically analyzed and trends recorded

(center graph). Contamination data and pathogen analysis data will then be used to generously incentivize the high bench team as a unit. They will be paid to eliminate contamination and prevent pathogens. When pathogen positives or contaminations are found, the incentives will be withheld. The aseptic dress procedure on the high bench is known as CCP-1 (Critical Control Point-1, or the first in a sequence of related events). The aseptic procedure will kill one log of bacteria (90%), but in a critical prevention mode at the beginning of the process.

- The pre-evisceration wash is designed to attack the 10% of the bacteria that remain after aseptic hide removal and before the fell membrane has had time to dry (two minutes). This procedure is accomplished with a soft, pulsating hot water (120°F) wash followed by a 5% lactic acid rinse. The wash and acid rinse remove or kill another 90%, or one log, of bacteria. A similar process is followed with the head and offal product with similar results.

- The final carcass wash and hot water pasteurization will be combined into the same cabinet to reduce air flow and allow the reuse of the initial carcass wash water in the pasteurization unit. Hot water pasteurization is CCP-6 and is a two-log kill, or 99%.

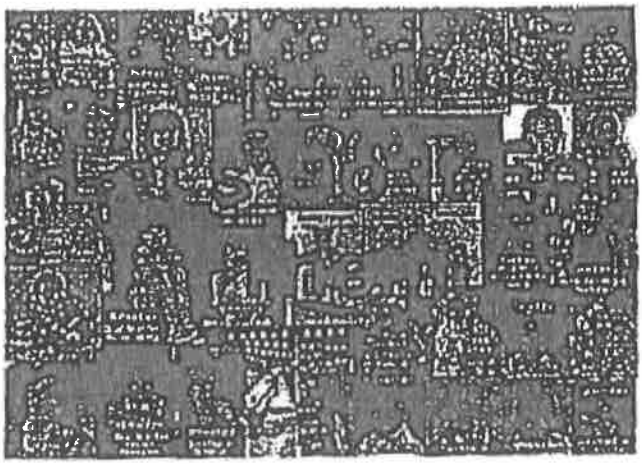


- The control chart above demonstrates that the carcass surface must reach 160°F for a duration of 10 seconds at each of the carcass surface monitoring points for true pasteurization to be accomplished. This CCP-6 will be validated on a carcass each hour, and corrective actions will be rigorously enforced.

- Application of competitive exclusion bacteria (recently approved by USDA-FSIS) to the carcass surface is the final intervention (CCP-7) before the carcass is chilled. These *lactobacillus* bacteria prevent incidental contamination after the carcass has been sanitized during the slaughter intervention process and provide a two-log protection, or another 99% kill. This process will be repeated again as beef trimmings are packaged prior to shipment for ground beef manufacture.

- Beef trimmings will be tested for *E. coli O157:H7* prior to release for use in ground beef products. Positive product will be removed and destroyed. The presence of positive pathogens indicates the HACCP process is not working as planned. Pathogen testing should be validation that the HACCP intervention is working.

- Potential investors are likely concerned about Food Safety management and control issues with all the media attention to recalls from China for melamine in pet food and lead paint on toys, and with numerous recalls of U.S. beef for *E. coli* contamination. To build and protect a beef brand, FOOD SAFETY cannot be done in half measure; almost is not good enough when the life of a child hangs in the balance. Investors and potential customers should demand to know that NBP has designed a truly state-of the-art food safety system. This section has been covered in great detail because diligent attention to food safety is one of the traits that separates NBP from the mega-plant culture. ONLY when food safety is achieved at the 100% level of commitment does it contribute to marketing or return customer patronage; with a commitment and execution short of 100%, NBP would become just another source of the problem! With planned education and training, each NBP employee will understand and share this trust! Employees will be asked to bring pictures of THEIR children and grandchildren, which will be made into a plant poster as a reminder that NBP takes maximum care never to harm ANY CHILD with products from this plant!



NBP VALUE-ADDED CAPABILITY

How will NBP leverage the new plant and facilities into greater profitability? How does NBP intend to squeeze the last bit of value into the economy from cattle fed in South Dakota?

VALUE-ADDED PROCESS	DESCRIPTION OF VALUE-ADDED	VALUE ADDED $ / HEAD	VALUE EARNED IN PHASE
TRACEABILITY OF INDIVIDUAL ANIMALS	ENABLES EXPORT MARKETS / STAT. PROCESS CONTROL	$ 6.80	I
COMPLETE OFFAL AND FABRICATION PRODUCT MIX	ADDITIONAL PEOPLE AND EQUIPMENT	$ (33.75)	II
PREVENTION OF FOOD SAFETY PROBLEMS	CONSUMER BRAND CONFIDENCE / REPEAT PURCHASE	$ 5.00	II
VITAMIN E / ELECTRICAL STIMULATION SYSTEM	ENHANCED RED MEAT COLOR / GREATER SHELF LIFE	$ 6.00	I
CASE READY OFFAL	RETAIL CONVENIENCE / GREATER SHELF LIFE	$ 24.25	II
PET TREATS	RENDERING TO PET CHEW UPGRADE	$ 6.25	II
NUTRICEUTICAL / PHARMACEUTICAL	GLUCOSAMINE / CHONDROITIN SULFATE / TENDONS	$ 6.50	III
GROUND BEEF PRODUCTION	UPGRADE TRAINING TO FINISHED GROUND BEEF	$ 5.00	III
	BRAND TOTAL VALUE-ADDED POSSIBILITIES	$ 24.25	

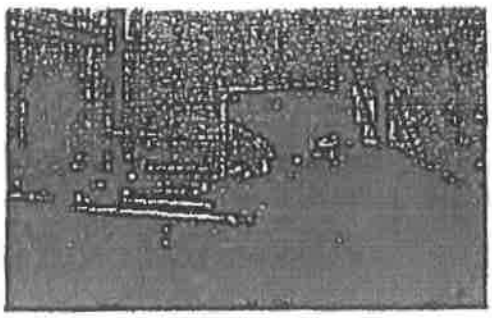
- The export markets found U.S. beef seriously deficient in the areas of identification and traceability. Using the IdentiGEN DNA-based traceability process, coupled with the South Dakota Certified Enrolled Cattle™ program, NBP will be capable of tracing meat products from the box back to the original source and age data. Meat and offal will be able to be qualified for export compliance to Japan and Korea, a requirement that has not been accomplished by the existing packers or processors.

- As the work force and customer base mature, a full complement of offal products and fabricated primals will be brought to the market, and the product mix deficit will disappear.

- NBP will pay cattle feeders ($1.50 / head) to feed cattle 1,000 I.U. of vitamin E for the last 100 days the cattle are fed. NBP will use electrical stimulation to improve tenderness and improve meat color. When these two factors are combined with a uniform carcass chill, the resulting meat color is spectacular! The bright red color is what draws consumers to beef as a perception of quality and safety. When the beef is consistently tender, the consumer will repeat the purchase pattern. Retail customers will follow with repeat purchases from the NBP Brand.

- For the past several years offal meats have been ignored in the domestic market; however, as ethnic cultures have grown in prominence, offal meats have seen increased domestic sales, possibly pushed by the inability to export offal during the BSE problem. NBP will create a "retail friendly" case-ready offal product line that will enable retailers to easily display offal products in attractive consumer packages.

- Pet treats can be manufactured from bone and damaged hides and sold to a dedicated pet food customer in later years.



- Cartilage and tendons will be harvested and sold as raw material to nutriceutical and pharmaceutical companies.

- These value-added activities leverage the traceability system and the residue and pathogen avoidance / food safety systems already in place.

- Trim will be further upgraded to ground beef products in Phase II of the proposed building plan. Consumer ground beef will leverage the lean trim upgrade to higher lean points than normally produced from fed commodity cattle. Hot-fat-trim (described in the "Carcass Evisceration and Offal Harvest" section) is the most efficient method of improving the lean point product mix for ground beef production.

THE NBP BRAND—COPYCAT BARRIERS TO ENTRY

What factors differentiate NBP beef from commodity beef? Why would customers and consumers seek out NBP beef over beef available in the counter today?

- Commodity beef companies have focused on high quality OR low cost not HIGH QUALITY AND LOW COST; obviously, the quality produced and sold to the customer hangs in the balance in such a buy low / sell high strategy. Frequently, the consumers are not satisfied. For example, NCBA–BQA reports, "fully 25% of beef steaks are considered exceptionally tough by consumers," and customers have no loyalty to the restaurants or retail outlets that sold the beef. The purchase cycle fails to repeat because the consumer has not received the expected VALUE. Buying and selling commodity beef has become a game of "high stakes poker" for customer and consumer with each purchase. Will it be tender? Is it safe from pathogens? The truth is, in a segmented commodity system, no one knows or is held accountable!

- NBP will integrate animal IDENTITY trace back from ranch to meat case.

- NBP will PREVENT pathogen and residue contamination!

- NBP will control bacterial spoilage to enable EXPORT OF FRESH MEAT PRODUCTS. Offal and primals will exhibit excellent shelf life!

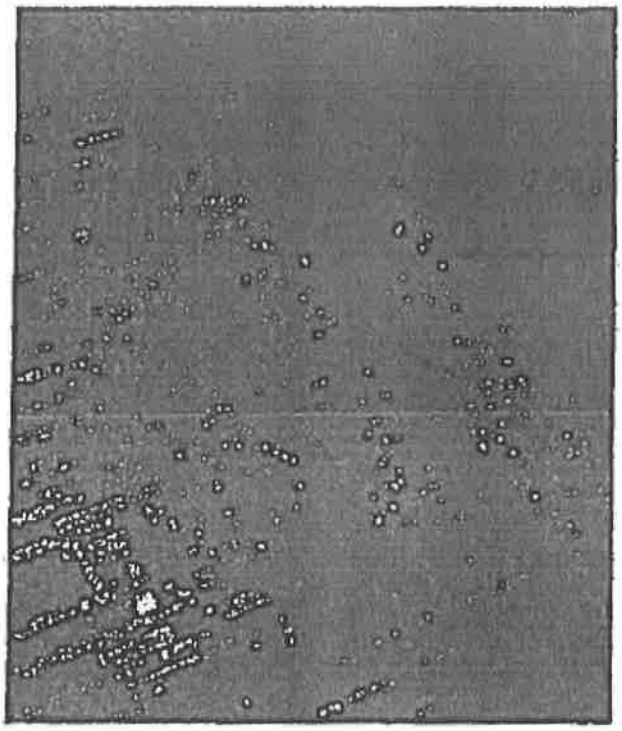
- NBP will pay for Vitamin E supplementation and use electrical stimulation to enhance red meat SPARKLE to compete for the first purchase every time!

- South Dakota Certified Enrolled Cattle™ corn-fed cattle, electrical stimulation, and uniform chill will produce the most consistently TENDER beef!

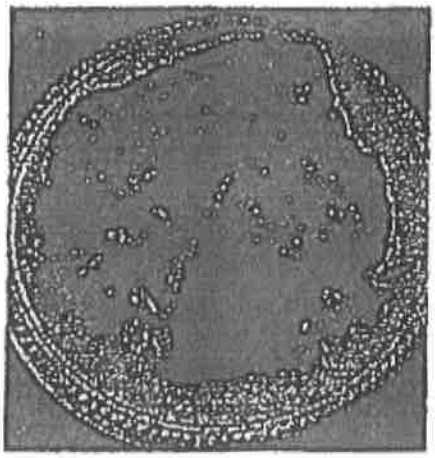
- NBP will focus on IN-PLANT value-added to eliminate excess handling and redundant packaging and enable realization of all raw material potential.

- The NBP BRAND will be based on INNOVATIVE DIFFERENTIATION to build and maintain consumer SAFETY and confidence!

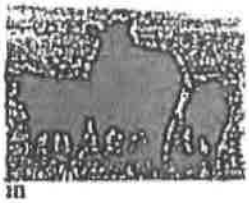
- The NBP BRAND will be built on TECHNOLOGY to sustain consumer QUALITY at a reasonable price!



• **HIGH QUALITY / LOW COST / SUSTAINABLE PROFITABILITY = NET CONSUMER VALUE** is the NBP strategy. As the table on page 30 indicates, NBP has a plan to produce **HIGH QUALITY** beef in each carcass. The **FOOD SAFETY** system is designed to prevent hazards. **LOW COST** is created by eliminating waste and improving efficiency, not by buying cheaper cattle. Increased and consistent **CONSUMER VALUE** will produce **NBP SUSTAINABLE GROWTH AND PROFITS!**



SUPPLY OF RESOURCES AND RAW MATERIAL



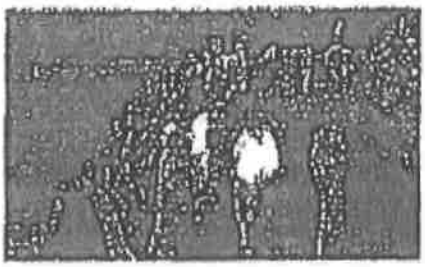
NBP / SOUTH DAKOTA INFRASTRUCTURE

Why would investors be attracted to a slaughter / fabrication company in South Dakota?

STATE	COWS MILLION HD	FED CATTLE MILLION HD	FEDERAL INSP. SLAUGHTER MILLION HD	CORN BILLION BU	ETHANOL PRODUCTION BILLION GAL
SOUTH DAKOTA	1.7	8.7	0.0	0.4	0.9
MINNESOTA	0.4	8.3	0.2	1.0	0.8
IOWA	1.1	1.3	0.9	2.0	2.0
NEBRASKA	1.9	4.9	7.8	1.1	1.5
OKLAHOMA	2.0	1.7	0.0	0.0	0.0
TEXAS	5.3	6.7	6.1	0.2	0.3
COLORADO	0.7	1.9	2.7	0.1	0.1
KANSAS	1.5	6.4	9.0	0.4	0.3

- The basic raw materials and infrastructure necessary for a viable beef production system include cows, feed grain, feedlots, and slaughter / fabrication capacity. The table above lists the assets available in each of the major beef producing states.

- The largest beef slaughter / fabrication states are Kansas, Nebraska, Texas, and Colorado. Each of these states are cattle deficit; they slaughter more cattle than they feed and produce fewer calves than are fed within the respective state. While Texas is most nearly balanced in cows, fed cattle, and slaughter, corn is in short supply for the Texas feedlots. Kansas and Nebraska capitalize on their slaughter capacity by importing calves to feedlots close to slaughter facilities.



- Texas, Kansas, and Colorado show deficit grain production compared to Nebraska and Iowa, which have surplus corn production.

- South Dakota produces 1,000,000 more calves than are fed within the state and 700,000 more cattle (total production) than are slaughtered in the state. South Dakota is a major exporter of cattle and corn to the states south and west, moving commodity cattle and corn to concentrated commodity slaughter / fabrication areas. Lost in this transaction, aside from the obvious transportation and corn basis costs, is the quality of the cattle. The South Dakota feeder cattle are used in the feedlot and packing plant to average-up the low-end Mexican and Brahman southern cattle, which feed well in the more moderate climate of the southern plains. The southern states have long resisted selling feeder or slaughter cattle on a value-based system. NBP will purchase cattle on a value-based grid, which encourages ranches and feedlots to add value to their cattle as proposed by the South Dakota Certified Enrolled Cattle[TM] program.

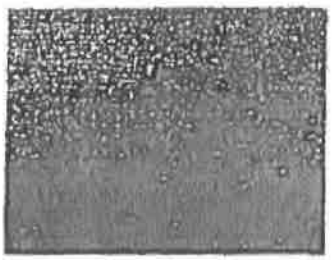
- The addition of the NBP plant to the South Dakota infrastructure will bring value, jobs, and revenue to the state in many multiples of the cost of starting this new business venture.

CORN AND SOYBEAN PRODUCTION—SOUTH DAKOTA, U.S., WORLD Why

are corn and soybeans a factor in the future profitability of NBP?

CROP PRODUCED 2006 / 2007	COUNTRY	AREA HARVESTED MILLION ACRES		YIELD M TONS / ACRE	PRODUCTION MILLION M TONS		PRODUCTION BASIS INDEX $/Bu	$/TON AS FED	ETHANOL USE MILLION TONS TONS	% CORN PR.	% WORLD
CORN	SOUTH DAKOTA	4.1	1.1%	3.2	10.4	1.5%	$ (0.21)	$ (14.70)	7.3	74%	1.8%
CORN	UNITED STATES	70.7	19.3%	3.9	282.3	42.0%	$ 0.00	$ 00.20	38.7	(3.0%	7.7%
CORN	WORLD	366.0		1.2	672.1		$ 1.60	$ 116.20	470.0	10.8%	
SOYBEAN	SOUTH DAKOTA	3.9	2%	3.2	3.2	1.2%	$/Bu $ (0.050)	$ (0.34)			
SOYBEAN	UNITED STATES	74.6	32%	3.5	86.7	36.8%	$ 0.20	$ 1.40			
SOYBEAN	WORLD	232.3		3.2	258.6		$ 1.56	$ 7.80			

Gerald A. Bange, Chair, World Outlook Board—The Situation and Outlook for World Corn, Soybean, and Cotton Markets



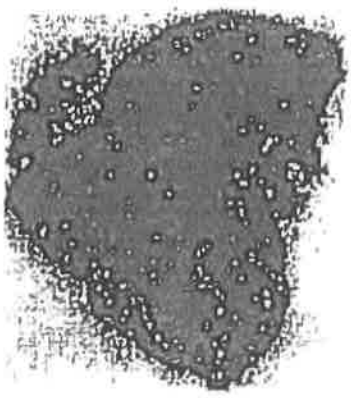
- South Dakota is a significant producer in the world corn and soybean arena with 1.5% and 1.2% of the world market, respectively.

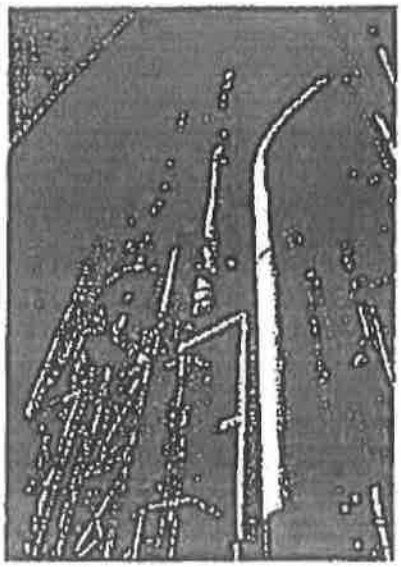
- Although South Dakota has several ethanol plants which consume 74% of the state's corn production, ethanol by-products will enhance cattle feeding within the state in areas adjacent to ethanol plants.

- Cattle fed within a 75-mile radius of these ethanol plants will receive cost benefit from the protein by-product from ethanol distillers.

- When the South Dakota infrastructure is more balanced with the addition of the NBP plant, cattle feeding will compete more favorably for corn than will ethanol production, since ethanol from corn only returns 95% of the fossil fuel required to grow and harvest the crop. Many new fermentation crops are in the wings of technology that will ultimately return 140% - 155% of the fossil fuel required to produce the biomass crop, displacing ethanol production's dependence on corn. Conversely, the new bio-fuel by-products will not likely be as valuable for finishing slaughter cattle.

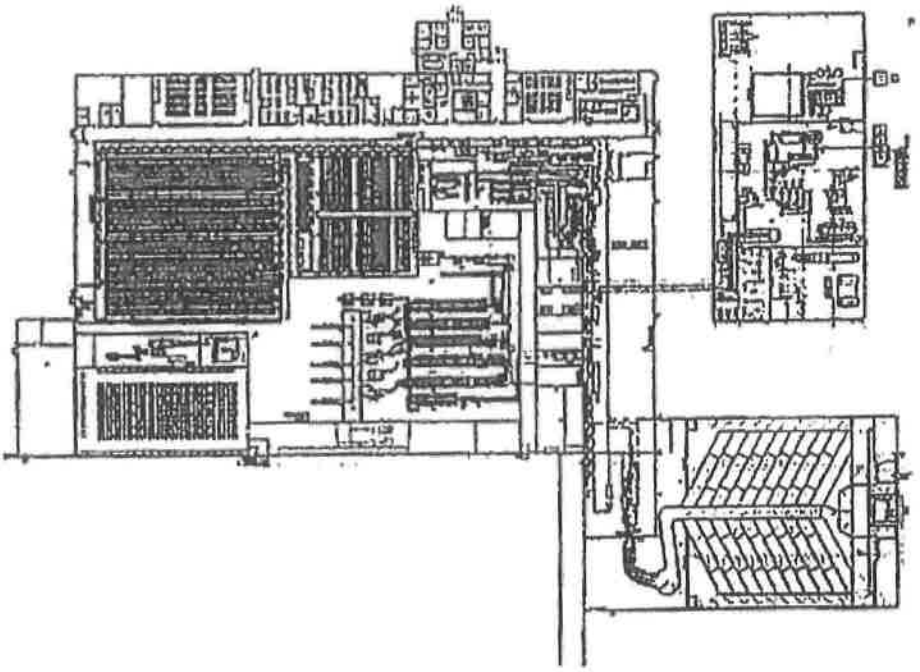
- The fact remains that South Dakota will need increased corn production to sustain future cattle feeding and ethanol production; however, the available supply in South Dakota and neighboring states can accommodate both needs when by-product production is considered. Soybean production will suffer the net loss in production acreage in areas that have enough rainfall or irrigation to support corn production. Cattle feeding will grow in the tri-state area; meat will compete well with ethanol production for corn.





PLANT OPERATIONS

NBP PLANT SCHEMATIC DIAGRAM



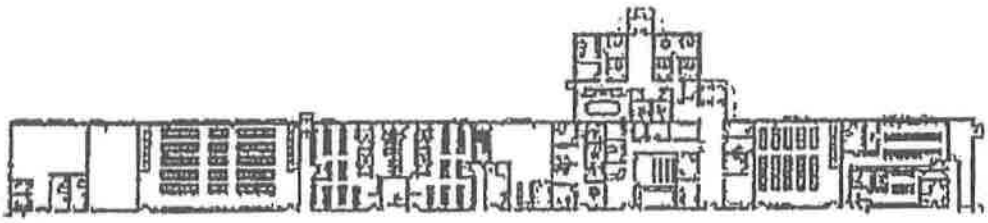
PLANT DESIGN FEATURES

- The plant will be situated on 39 acres located 1.5 miles east of Highway 281 on 135th Street in Aberdeen, South Dakota. Legal description is Lots 2 and 3 of the South Side Industrial Subdivision in N1/2 and SE1/4, Section 36-T123N-R64W, Brown County, South Dakota.

- An existing all-weather gravel road currently provides access the 1.5 miles down 135th Street from Highway 281. NBP has requested that local and State governments combine resources to provide paved access.

- Plant design leader will be Robert Breukelman, with Don Ulmer as on-site Construction Manager (resumes in Appendix A). Construction began in October 2006 with accumulation and compaction of fill dirt. Estimated completion date is 2010.

- The NBP plant has adopted several "clean room" features, which will improve operational sanitation and cleaning. Unique design features include stainless steel trench and floor drains, separate lunch and locker facilities (shown below) for clean to dirty air, people, and water flow through operations, and a ceiling utility interstitial chase to isolate plumbing and electrical maintenance from the meat processing area.



Clean Side Facilities **Slaughter Side Facilities**

- Northwest Public Service Company will provide electrical service. Utility requirements are based on a total horse-power load of 4,500 KW, 440 volts transformed to low voltage controls. Refrigeration compressors will utilize 4,160 KW.

- Major motors and compressors will be equipped with PLC controls with VDF drives to monitor and control the peak electrical loads to manage excess / peak demand billing charges from the utility company.

- Water is supplied from the City of Aberdeen, South Dakota.

- Plant construction cost is summarized in the table on the next page. Total cost of the project is $94 million, and operations will begin in the summer of 2010.

PLANT CONSTRUCTION CAPITAL COSTS / SOURCES AND USES OF FUNDS

STATMENT OF SOURCES AND USES

USES OF FUNDS

LAND	$	900,598
SITE DEVELOPMENT	$	12,599,727
BUILDING	$	35,530,422
EQUIPMENT	$	6,855,974
SALES/USE TAX RECAPTURE	$	(2,800,000)
SUB-TOTAL	$	53,094,719
ENGINEERING/PROFESSIONAL FEES	$	3,663,552
SD FINANCING LOAN FEES-OTHER	$	468,000
NON GOED ELIGIBLE PROFESSIONAL FEES	$	2,259,498
FINANCING FEES-TIF	$	2,719,597
START-UP LOSSES	$	1,474,517
SUB-TOTAL	$	10,585,164
EQUIPMENT LEASE DOWN PAYMENT	$	4,396,397
WORKING CAPITAL	$	17,000,000
INTEREST/LEASE PAYMENT RESERVES	$	8,947,496
TOTAL USES	$	94,023,776

SOURCES OF FUNDS

Initial Funding

EB-5 INVESTMENT	$	35,000,000
GENERAL PARTNER INVESTMENT	$	2,000,000
ADDITIONAL PAID IN CAPITAL	$	2,020,000
SUB-TOTAL (EQUITY)	$	39,020,000

Interim Funding

QUINTUS CAPITAL/CDIB: Interim Financing	Paid off via SD Financing ($30 million)

Final Funding

TAX INCREMENT FINANCING - EQUITY (TIF)	$	10,100,000
KOREAN INVESTMENT - LOAN	$	23,703,776
EDFA BONDS - LOAN	$	5,000,000
REDI - LOAN	$	3,000,000
BANK LOAN (80% USDA GUARANTEED)	$	10,000,000
ABERDEEN DEVELOPMENT CORP. LOAN	$	2,200,000
RURAL ELECTRIC ECONOMIC DEVELOPMENT (REED) LOAN	$	1,000,000
SUB-TOTAL (LOANS)	$	55,003,776
TOTAL SOURCES	$	94,023,776

DETAILED BREAK DOWN FOR USE OF FUNDS

VENDOR NAME	PROJECTED COST	USES CODING
CONCRETE CONTRACTORS INC - Foundation	$4,555,441	B
INDUSTRIAL BUILDERS - Erecting Metal Building	$2,500,000	B
BEHLEN MFG - Metal Structure	$4,450,943	B
CONCRETE CONTRACTORS INC -Flooring	$2,085,000	B
RED WILK - Stockyard Foundation	$200,000	B
CONCRETE INC- Plant - Pre-cast Floor	$2,794,364	B
CONCRETE BLOCK WALL/PROD	$62,000	B
COLUMN WRAPS	$87,000	B
CONDENSER ROOM /STEEL FRAME	$115,000	B
FARGO TANK & STEEL	$154,474	B
SPECIALTY MFG	$2,767	B
ARTIC INDUSTRIES	$3,070,000	B
THERMAL CONSTRUCTION	$980,000	B
MAIN/FRONT ARCH FINISH	$290,000	B
BUILDING SIGNAGE	$80,000	B
ROOFING SYSTEM	$460,000	B
EMPLOYEE LOCKERS/INSTALL	$125,000	B
CONCRETE TREATMENT	$69,090	B
STOCKYARDS/PENS/GATES	$260,000	B
FLOOR TOPPINGS	$800,000	B
OFFICE FINISHING/FURNITURE	$450,000	B
I/T SPACE INSTALL	$38,000	B
STAINLESS STEEL STAIRS	$137,000	B
SS DOORS OTHER THAN DOCK	$225,000	B
EXT/STEEL PLATFORM STAIRS	$80,000	B
UNDERFLOOR WATERPROOFING	$120,000	B
FIRE PROTECTION	$850,000	B
ELECTRICAL WORK	$4,071,531	B
LIGHTING FIXTURES	$328,469	B
VARIOUS UTILITIES	$10,000	B
LIGHT BOXES/DEFUSERS	$6,000	B
NORTHWESTERN ENERGY	$35,000	B
MUTH ELECTRIC	$916	B
EATON ELECTRIC	$11,128	B
HVAC SYSTEMS/OFFICE	$300,000	B
UNDERFLOOR HEAT B/RAMP	$5,000	B
FLOOR DRAINS	$146,000	B
HARR PLUMBING	$65,712	B
MAIN PLANT PLUMBING	$2,453,288	B
MANHOLE/GRATE/PUMPS	$5,000	B
CONSTRUCTION SUPPLIES	$10,000	B
DAKOTA SUPPLY GROUP	$114,843	B
FASTENAL	$803	B
GRAYBAR ELECTRIC	$257	B

VENDOR NAME	PROJECTED COST	USES CODING
QUALITY WELDING	$772	B
RIVERSIDE INDUSTRIES	$847	B
RUNNINGS	$1,084	B
UBC	$1,807	B
GUARDHOUSE	$90,000	B
STRUCTURAL STEEL FOR RAILS	$240,000	B
CONCRETE INC- Rendering - Pre-Cast Walls & Roof	$1,641,134	B
CONCRETE CONTRACTORS INC - Foundation	$170,000	B
ALL OTHER VENDORS	$58,018	B
EMPLOYEE WELFARE	$10,000	B
CONCRETE CONTRACTORS INC -Flooring	$300,000	B
LIFT STATION PITS/ENCLOSURE	$120,000	B
ELECTRICAL WIRING/SENSORS	$350,000	B
CONCRETE CONTRACTORS INC -Flooring	$21,644	B
Total	$35,530,422	
AUX PUMP LAGOON/FIRE	$450,000	E
REFRIG/PENTHOUSE TOWERS	$116,000	E
BUG ZAPPER/AIR CURTAINS	$22,000	E
LOADOUT BLDG/EAST REND	$36,000	E
PARTS CAGE	$30,000	E
OVERHEAD TROLEY SYSTEM COMP	$10,000	E
SS STEEL FLOOR CHUTES	$100,000	E
PUGLEASA COMPANY	$173,884	E
PALLET LIFT ELEVATOR	$50,000	E
ALL OTHER VENDORS	$521,471	E
HAARSLEV-RENDERING EQUIP DEPOSIT	$2,000,000	E
HOT WATER TANKS	$572,800	E
BLESSI EVANS	$867,819	E
TRANSFER PUMPS ETC	$285,000	E
FLOAT/SLUDGE TANKS/PUMPS	$60,000	E
VALVE FLOW METER EQUIP	$110,000	E
POND AERATION EQUIPMENT	$105,000	E
SCREENS	$210,000	E
DAF TANK SYSTEM/EQUIP	$395,000	E
EQUALIZATION TANK	$236,000	E
COMPLETE CHEM FEED SYSTEM	$110,000	E
LAB AND EQUIPMENT	$35,000	E
EQUIPMENT INSTALL	$300,000	E
POND SECURITY FENCING	$60,000	E
Total	$6,855,974	
BRUEKELMAN & WOODS	$593,183	ENG
PIERCE & HARRIS	$236,542	ENG
BRINK ENGINEERING	$22,333	ENG
UMD INC	$420,000	ENG
ROGER DREYER	$189,927	ENG
AMERICAN TECHNICAL SERVICES	$20,000	ENG

VENDOR NAME	PROJECTED COST	USES CODING
STRUCTURAL ENGINEERS	$850,000	ENG
DAKOTA DRAFTING & DESIGN	$10,608	ENG
KIRKVOLD ASSOCIATES	$2,128	ENG
MID CITY DESIGN	$1,123	ENG
PIERCE & HARRIS	$44,538	ENG
ALL OTHER VENDORS	$479,496	ENG
CONSULTING USDA LOAN PKG	$5,000	ENG
AGRI FOODS SOLUTIONS	$100,000	ENG
MOGLADREY & PULLEN	$11,741	ENG
DORSEY & WHITNEY	$18,571	ENG
ALL OTHER VENDORS	$227,892	ENG
BANTZ GOESCH & CREMER	$75,000	ENG
ALL OTHER VENDORS	$46,661	ENG
ALL OTHER VENDORS	$273,809	ENG
BRINK-ENGINEERING FEES	$20,000	ENG
SOIL TESTING	$15,000	ENG
Total	$3,663,552	
LAND PURCHASE	$908,596	L
Total	$908,596	
INVESTMENT FEES	$2,000,000	N
EIDE BAILLY	$85,000	N
SCOTT OLSON SUIT	$150,000	N
BANTZ GOESCH & CREMER	$19,060	N
EIDE BAILLY	$5,438	N
Total	$2,259,498	
SCOTT OLSON DIGGING - rap & Fill	$2,600,000	S
HANLON BROS - Fill	$36,648	S
JENSEN ROCK & SAND - Fill	$419	S
FISHER SAND & GRAVEL - Fill	$37,922	S
SOUTHERN DAKOTA CONTRACTING - Prep work & Fill	$400,000	S
PETERSON CONTRACTORS INC - Geopiers	$998,532	S
SCOTT OLSON DIGGING - Excavation	$276,686	S
SOUTHERN DAKOTA CONTRACTING - Fill & Excavation	$707,748	S
RED WILK CONSTRUCTION	$395,000	S
ALL OTHER VENDORS	$460,908	S
INDUSTRIAL WASTE	$110,000	S
SANITARY WASTE	$60,000	S
EXTERIOR WATER LINES	$140,000	S
FIRE HYDRANTS	$24,000	S
RED WILK CONSTRUCTION - Parking & roadway	$2,451,758	S
PAVEMENT STRIPING	$3,000	S
EXTERIOR SIDEWALKS	$60,000	S
LANDSCAPING	$120,000	S
EXTERIOR LIGHTING	$164,000	S

	VENDOR NAME	PROJECTED COST	USES CODING
	PERIMETER FENCING	$118,000	S
	PETERSON CONTRACTORS INC - Geoplers	$364,279	S
	SCOTT OLSON DIGGING	$208,086	S
	LAGOONS-DIRT WORK	$462,878	S
	LAGOONS-RIP RAP	$228,000	S
	LAGOONS-BENTONITE	$305,500	

Total Project Cost GOED Application	$61,817,769
Sales/Use Tax Recapture	-$2,800,000

Total Construction Cost $59,017,769

	LAGOONS-BORING	$80,000	S
	DISCHARGE SEDIMENT PONDS	$330,000	S
	LAGOONS-PIPING TO/FROM	$324,000	S
	LAGOONS-INSTALLATION	$324,000	S
	LAGOONS-VENTS	$36,000	S
	SOUTHERN DAKOTA CONTRACTING - Fill & Excavation	$792,365	S
	Total	$12,599,727	

Working Capital			
1	Start-Up Losses	$1,474,517	
2	Working Capital	$17,000,000	
3	Interest/Lease Payment Reserves	$8,947,496	
4	Equipment Lease Down Payment	$4,396,397	E
5	TIF FINANCING/UNDERWRITING FEE	$2,719,597	
6	GOED/AGENCY LOAN FEE	$468,000	
	Sub-total	$35,006,007	

Total Project Cost $94,023,776

LEGEND
L = LAND
S = SITE DEVELOPMENT B = BUILDING
E = EQUIPMENT
ENG = ENG/LEGAL/ACCOUNTING N = Ineligible for GOED financing

CATTLE PROCUREMENT

- NBP will have three purchase alternatives: live (in the feedlot), in the meat (hot carcass weight after slaughter), and on a value-based grid (after chilling and grading, based on USDA Quality and Yield grades and product specifications, such as Natural). Cattle Procurement must be accountable for Brand Quality and Yield and enforce the Company Residue Control Program.

- NBP Cattle Procurement shall be responsible to purchase only cattle, which are properly identified and traceable with RFID tags.

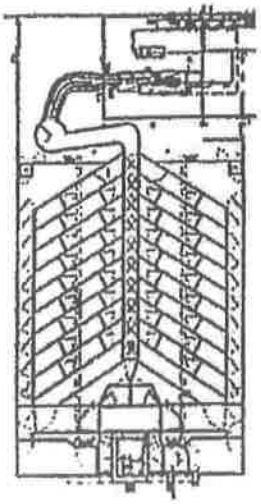
- An NBP cattle buyer will view participating feedlot show lists each week.

- NBP will schedule delivery and pay the freight on cattle purchased in the meat or on the grid.

CATTLE RECEIVING AND HOLDING

- Cattle will be received between two and four hours prior to slaughter and kept in a low-stress environment. Pens shall be clean, and cattle shall have easy access to water.

- The flow from the cattle unloading chutes, scale, pens, and drive alleys is designed to ensure smooth, low-stress, safe operations for cattle and employees. Gentle, stress-free movement is essential to prevent red meat color problems, *i.e.* "dark-cutting beef," which is the result of long-term stress, or "blood-shot" muscle defects, which result from adrenaline-based excitement immediately prior to bleeding. Dr. Temple Grandin (Professor of Animal Science, Colorado State University) has reviewed and approved the humane animal handling features of this facility. Humane livestock handling will be monitored 24 / 7 by a video camera system, which will report problems, the recorded intra-net web address, and written protocol to management.



- Cattle will be driven down the exterior alleys as they enter the facility. The central cattle drive will deliver the cattle to the restrainer, where they will be gently immobilized and killed just before the left hind foot is shackled and suspended on the chain drive rail.

- The cattle then are weighed, number scanned, and entered into the NBP Bar Code-tracking system that remains with the carcass and meat until boxed and labeled for shipment.

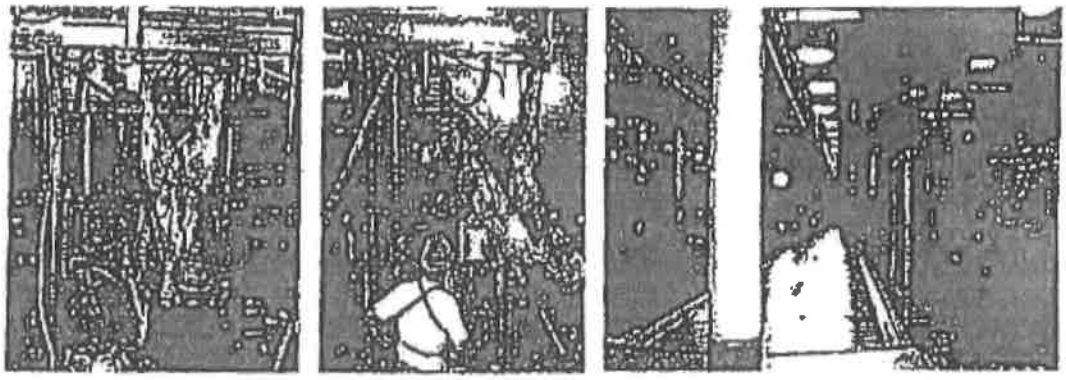
HIGH BENCH OPERATION

- The hide will then be opened and carefully skinned from the fat side of the carcass. Employees will be carefully trained and monitored to assure that Standard Operating Procedures and the HACCP Plan are followed diligently (previously described in the "Marketing Plan" [Food Safety] section). At NBP, FOOD SAFETY will not be an afterthought, nor will it be managed by a few Food Safety technicians. Rather, each employee will be measured and held accountable for SAFE FOOD PRODUCTION within his workstation.

- Three sequential hide-pullers will mechanically pull the hide: first, a side-pull apparatus pulls from the belly mid-line out; second, a tail stripper pulls the hide from mid-back off the end of the tail; and third, a clothespin apparatus rolls the hide down over the fore-quarter, fore-shanks, and, finally, the head. Not only is the hide-pulling operation designed to reduce hand labor (and people), the process, if executed properly, also reduces carcass fecal contamination and skinning defects.

CARCASS EVISCERATION AND OFFAL HARVEST

- With the hide removed, the outside dirty work is complete, and the carcass will be washed in a pre-evisceration wash and rinsed with a bactericide (previously described in the "Marketing Plan" [Food Safety] section). A barrier wall restricts air flow from following the clean carcass to the clean area. Throughout the plant, clean air, people, and water flow toward dirty, not vice versa.



- The head and tongue will be removed, inspected by USDA for disease, and washed and acid rinsed prior to boning.

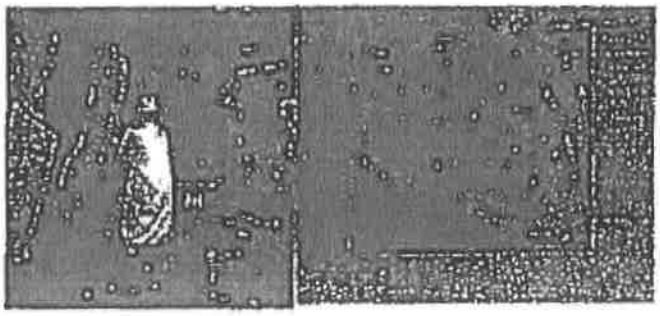
- The carcass will be eviscerated on a moving-top viscera table (above right), split into opposing sides, USDA-inspected for contamination and disease, washed, and pasteurized (previously described in the "Marketing Plan" ['Food Safety'] section).

- Once USDA carcass inspection has been accomplished, the conventional "hot weight" or pay scale weight will be obtained and recorded. At this point the carcass will be "hot-fat-trimmed" to remove the kidney, pelvic, heart fat, the collar fat over the inside round, and the fat over the loin edge and brisket. The trimmed carcass weight will then be obtained and recorded in the carcass file. The weight of this removed fat will be approximately 45 - 95 pounds, which, if left on the carcass, would serve as insulation and an added burden to the carcass chill system. Additionally, the differential weight from these two scales becomes an excellent indicator of the expected red meat Yield from each carcass, providing carcass sorting capability prior to chill and subsequent grading.

- Each side of the carcass will then be electrically stimulated to hasten the onset of *rigor mortis*, prevent cold-toughening, and enhance uniform red meat color development. Electrical stimulation, first used by Benjamin Franklin to tenderize turkey carcasses, has been proven in numerous trials to improve beef tenderness by 20% - 26% (Dr. Jeff Savell, Professor of Meat Science, Texas A&M University).

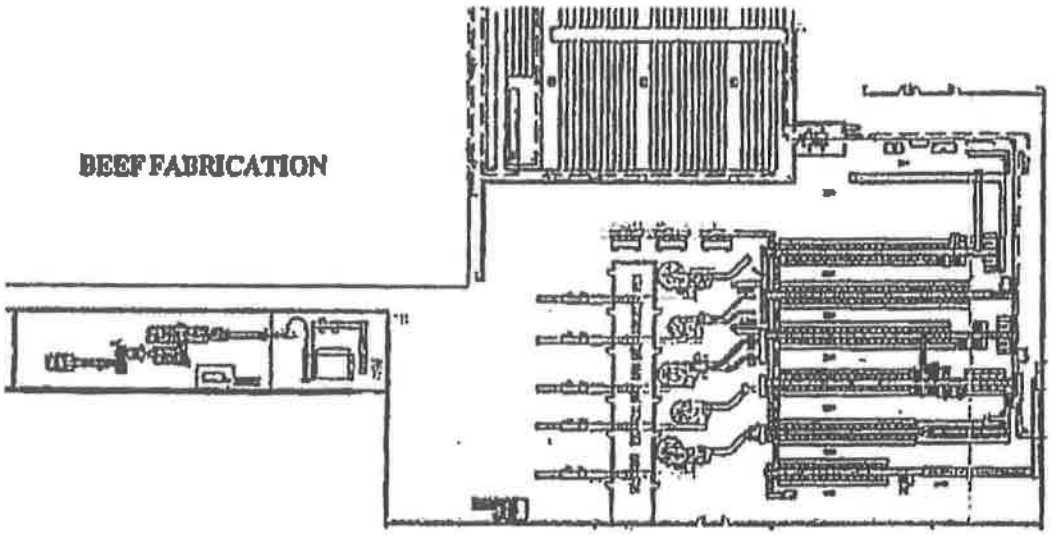
CARCASS CHILLING AND GRADING

- Carcasses will then be chilled for 36 - 48 hours, graded for Quality and Yield grades by USDA-AMS, sorted into like product specifications, and staged for fabrication.



- NBP will use computer-assisted grading (shown above) to combine hot-fat trim Yield predictions, electronically measured rib-eye area, and marbling with the USDA grader's evaluation and final assessment. Such an evaluation / sorting system will facilitate much more objective measurement and data accumulation. This terminal end of the ID management system will automatically interface with the animal identification / trace back system initiated on the ranch with the cow and calf / feeder cattle. DNA and the IdentiGEN system will assure identification through the fabrication plant and into the box.

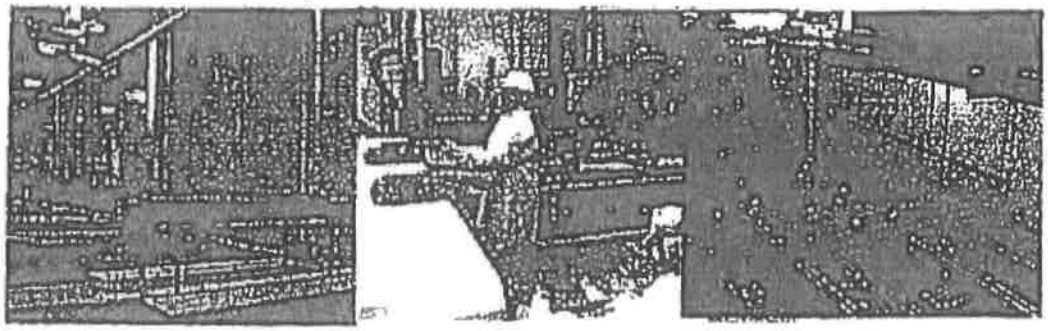
BEEF FABRICATION



- In the sales cooler, beef carcasses will be sorted and staged into large groups of like Grade and Production Specialization requirements, *i.e.* USDA Choice—Natural. NBP will follow a Standard Operating Procedure for USDA-approved Grade Labeling to assure that all primals are labeled accurately.

- The fabrication process is a further disassembly procedure designed to separate thick from thin, fat from lean, tough from tender, and valuable from less valuable. Just as in the carcass sorting system, the fabrication system groups like-kind with like-kind; the fabricated meat cuts are segregated, vacuum packaged, boxed, and stored for shipment in a first-in-first-out inventory system.

- Comprehensive Yield analysis will be accomplished by combining the hot-fat-trim and carcass grade data with boxed weight data into a predicted *vs.* actual red meat Yield analysis.



NBP ENVIRONMENTAL MANAGEMENT STRATEGY

Why will the NBP plant not be considered a public nuisance when many plants in the industry are not wanted in their communities?

PLANT SEGMENT	WATER* USAGE GAL / HD	POTENTIAL WATER* RECLAMATION GAL / HD	PAUNCH / MANURE** MANAGEMENT LB / HD	AIR QUALITY MANAGEMENT CONCERNS
HOLDING PENS	30	23	16	DUST / ODOR
SLAUGHTER	600	125	40	RENDERING
FABRICATION	50	0		NONE
VALUE-ADDED	20	0		NONE
WASTE WATER TREATMENT	(300)	23	6	ODOR

Water for Livestock and Agriculture: Availability and Conservation, Ben Wichelman, et al, TAMU
***Natural Resources Management: Air Quality, Water Quality & Manure Management, John Sweeten, et al, TAMU*

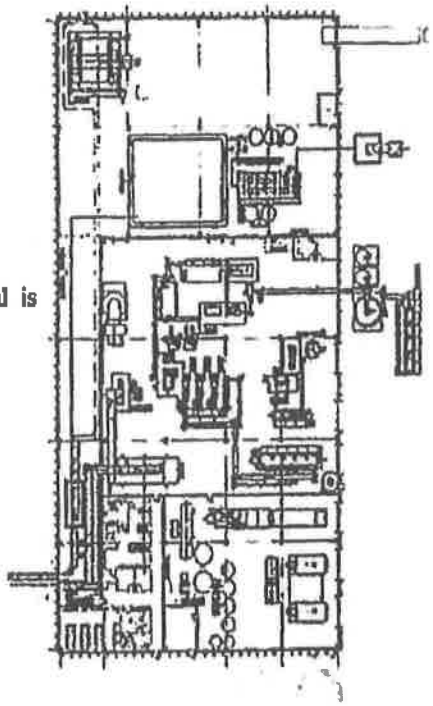
- Cattle pens will be enclosed, and manure will be flushed with recycled water after each set of cattle; thus, dust, flies, and odor will not be allowed to become a problem.

- All plant liquid waste streams will be pumped and circulated in aerobic pre-treatment lagoons with long retention times to allow a consistent 24-7 flow to the City plant and residual storage in the event of City maintenance problems. Oxygenation and circulation will continuously eliminate odor. Constant agitation prevents the formation of bacterial by-products, such as hydrogen sulfide, which create foul odors.

- Waste water treatment will follow a long-tried and -true method. The suspended solids will be removed by dissolved air flotation (DAF), chemically coagulated, aerated, and allowed to settle in numerous lagoons. Water quality will be carefully monitored and managed within a narrow pH range to prevent accumulation of gas and odor.

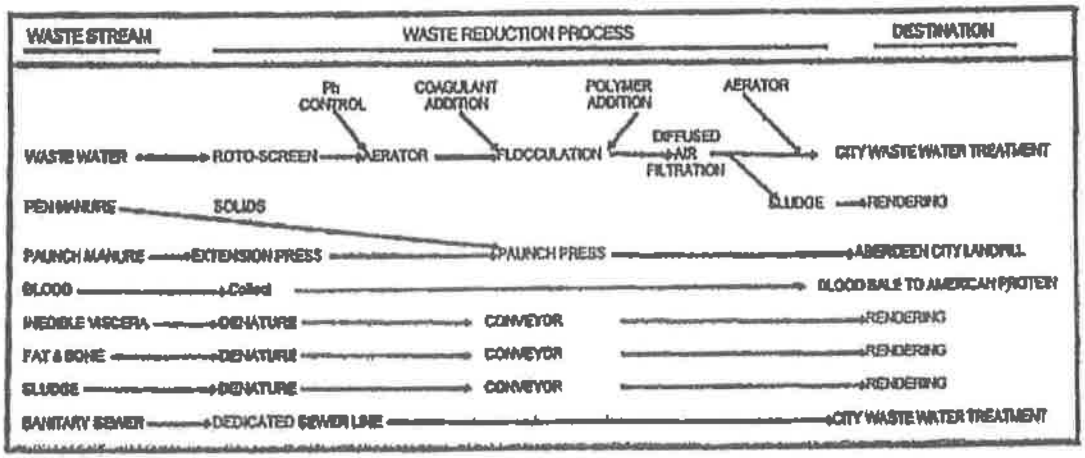
- Waste water will be chlorinated and recycled, used to clean and flush cattle handling facilities and trucks.

- Final NBP waste water will be treated in the Aberdeen city treatment plant adjacent to the plant site. Kirkvold and Associates of Lincoln, Nebraska, a civil and environmental engineering firm that specializes in packing plant waste water treatment, have designed and submitted the plans, which have been approved by the South Dakota Department of Environment and Natural Resources and the City of Aberdeen, South Dakota. (The State letter of approval is included in Appendix C.)



- NBP solid waste will be deposited into the City landfill.
- NBP cattle blood will be collected and sold to a blood protein company.
- Sanitary sewer is always isolated from the plant waste pre-treatment system and is treated independently by the City wastewater treatment facility.
- Additional environmental analysis is included in Appendix E.

WASTE STREAM TREATMENT



SUMMARY OF CRITICAL MANAGEMENT FUNCTIONS

This company has been built to function proactively to prevent problems rather than to wait and fix any problems that occur. RIGHT THE FIRST TIME is the NBP management function.

SYSTEM SEGMENT	PRODUCTION MANAGEMENT	FOOD SAFETY MANAGEMENT	ANIMAL HEALTH MANAGEMENT	ENVIRONMENTAL MANAGEMENT	VALUE-ADDED MANAGEMENT
PROCUREMENT	Breed Accountability	Residues Control	Feedback on Injection Sites to Producers		Carcass Quality / Yield
SLAUGHTER	Prevent Carcass Bruising Meat Product Shelf Life Meat Color Meat Quality / Tenderness	Pathogen Exclusion Bacteria Shelf Life Cold Chain	Feedback	Water Water Treatment Manure Composting Solid Waste Disposal	Carcass Grading
FABRICATION	Feedback Loss Product Identity	Cold Chain	Feedback on Injection Sites	Dry Clean-up	Feedback
VALUE-ADDED	Meat Quality Consumer Convenience	Cold Chain		Dry Clean-up	Feedback
DISTRIBUTION	Inventory Management Receivables Management	Cold Chain	Meat Quality		
CONSUMER	Cold Chain Cooking Clean Containerization	Cold Chain Trace Back Pathogens	Feedback		

- **Right the first time is a trained / learned bottom-up leadership culture requiring steady and repeated empowerment training.**
- **Employee Safety training and Food Safety training will be required of each**
- **employee prior to that person's entering the NBP work force. This edict especially INCLUDES MANAGEMENT!**
- **Training will also focus on team building and individual accountability!**
- NBP is currently recruiting a talented management team to the Aberdeen area. (Resumes follow in Appendix A.) The objective of the Board of Directors is to couple **THE BEST RESOURCES, THE BEST FACILITIES AND EQUIPMENT, AND THE BEST MANAGEMENT TEAM.**
- Direct labor pools are available as a result of significant under-employment in the area. Supervisory personnel will be selected for their skills in very specific work areas, and these employees will likely bring skilled people with them from other plants.
- **NBP is committed to local hiring and is committed to hiring all minorities, including Native Americans.**
- **NBP one-shift labor crewing provides 563 full-time, direct labor jobs with benefit packages to include health insurance, 401(k) match, and paid vacation.**

GOVERNANCE AND COMMUNITY IMPACT

EMPLOYEE / WORK LOCATION / YEAR

How many jobs will NBP provide?

EMPLOYEE WORK LOCATION YEAR	TOTAL 2010
MANAGEMENT	69
SLAUGHTER DIVISION	153
FABRICATION DIVISION	316
PLANT MAINTENANCE	25
TOTAL PLANT	563

- **NBP will provide 563 jobs by 2010.**
  Aberdeen does not currently have a meat packing industry; consequently, the multiple of supporting infrastructure jobs is estimated to be 5X to 8X incremental people, or 3,942 new paychecks (assumes 7X on 563 base jobs = 3,942).

Exhibit 2

Investors
1. Shen, Youping
2. Xue, Nan
3. Shen, Jiangbo
4. Zhao, Hong
5. Zheng, Caiwen
6. Zhao, Shanjie
7. Huo, Feng
8. Feng, Wei
9. Xiao, Daili
10. Dong, Lin
11. Wang, Xinping
12. Dong, Jing
13. Liu, Zhenhuan
14. Zhang, Xueqin
15. Zhang, Xuexiao
16. Liu, Xia
17. Shu, Bin
18. Qu, Hehua
19. Chen, Zhoujie
20. Gao, Changchun
21. Wang, Zhaohong
22. Luan, Bin /Li, Shanjie
23. Yin, Xuezhong
24. Jiang, Weihua
25. You, Jingping
26. Wang, Yuan
27. Li, Yongtao
28. Fang, Fang
29. Qu, Qing Guo
30. Yin, Li
31. Ye, Junwen
32. Li, Deliang
33. Chen, Lingling
34. Yang, Xu
35. Wang, Gang

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

* *

LP6 CLAIMANTS, LLC,

Plaintiff,

-vs-

SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, THE STATE OF SOUTH DAKOTA, SDRC, INC., SD INVESTMENT FUND, LLC and JOOP BOLLEN,

Defendants and Third-Party Plaintiffs,

-vs-

HENRY ZOU, an Individual Resident of the People's Republic of China, and HENRY GLOBAL CONSULTING GROUP, a/k/a HENRY GLOBAL, a/k/a HENRY GLOBAL GROUP, a/k/a HENRY GLOBAL CONSULTING USA, Incorporated Under the Laws of the People's Republic of China,

Third-Party Defendants.

File No. 15-312

MOTION TO DISMISS

* *

BEFORE: HONORABLE MARK BARNETT

Pierre, South Dakota

March 10, 2016

commencing at 1:30 P.M.

* * * * * * * * * * *

APPEARANCES:

FOR THE PLAINTIFF:	Mr. Steven D. Sandven 3600 South Westport Ave, Suite 200 Sioux Falls, SD 57106
	Mr. Ezio Scaldaferri Feder Kaszovitz LLP 845 3rd Avenue New York, NY 10022
FOR THE DEFENDANT SD DEPT. OF TOURISM:	Mr. Bob L. Morris PO Box 370 117 5th Avenue Belle Fourche, SD 57717
	Mr. Paul E. Bachand PO Box 1174 Pierre, SD 57501
FOR DEFENDANTS BOLLEN, GOED INVESTMENT FUND LLC, AND SDRC:	Ms. Julie M. Dvorak 415 S. Main Street PO Box 490 Aberdeen, SD 57402
FOR THE THIRD-PARTY DEFENDANT:	Ms. Nichole J. Mohning (Telephonically) PO Box 1400 Sioux Falls, SD 57101

PROCEEDINGS

THE COURT: All right. This is the time and place set for hearing in LP6 Claimants versus Department of Tourism, et cetera, et cetera.

Mr. Bachand, are you or Mr. Morris speaking for your side?

MR. BACHAND: Mr. Morris, Your Honor.

THE COURT: All right. And then for the other side, Mr. Scaldaferri -- did I say that correctly?

MR. SCALDAFERRI: Yes, sir.

THE COURT: You are speaking for LP6?

MR. SCALDAFERRI: Correct.

THE COURT: Mr. Sandven is co-counsel. Mr. Morris, you have the floor then.

MR. MORRIS: Thank you, Your Honor. Bob Morris, Morris Law Firm, Belle Fourche, South Dakota. And I'm appearing today under my designation as a Special Assistant Attorney General for the State of South Dakota.

(INTERRUPTION BY THE COURT REPORTER TO GET MS. NICHOLE MOHNING ON THE TELEPHONE.)

MS. MOHNING: Hello, this is Nichole Mohning.

THE COURT: Ma'am, this is Judge Barnett in open court. I've got what I assume to be all the other lawyers here.

MS. MOHNING: Your Honor, thank you again for

allowing me to appear by phone.

THE COURT: So, Mr. Morris, for the state.

MR. MORRIS: Thank you, Your Honor.

Pending before the Court is the Complaint that was filed by LP Claimants LLC. It's my understanding this was an LLC created in New York in October of 2014. The members of that LLC are 35 Chinese nationals who participated in an EB-5 program wherein they invested $500,000 apiece in a project here in South Dakota. The money was invested -- or they became members of a limited partnership called SDIF, Limited Partnership 6.

This lawsuit is brought by the Plaintiff essentially alleging that they wish to seek redress for alleged fraud pertaining to the EB-5 program as to the LP6 Claimants.

Now, among the Defendants is the State of South Dakota, the South Dakota Department of Tourism, the State Development, the Governor's Office of Economic Development, which is normally referenced by its acronym GOED, and then the South Dakota Department of Tourism.

In the Complaint the allegation is each of these agencies is engaging in a commercial enterprise in regards to the EB-5 program and the designation under South Dakota -- in South Dakota and under federal law.

The State of South Dakota and its agencies move

to dismiss the Complaint against them for three reasons: One is state level sovereign immunity, two is statute of limitations, and three is the lack of 321-2 notice.

Now, the statute of limitations I'll address briefly, Your Honor. When we looked at the Complaint filed, we focused on paragraphs 32 and 33, which is -- of the Complaint, Amended Complaint, which essentially indicates that in July 2013, National Beef Packers filed for bankruptcy; and at that time they disclosed in July of 2013 in the bankruptcy filings that there was insufficient capital and financing and that the project was not financially sound.

And that's one of the allegations that the Claimants base their fraud claim on. Now, when we looked at that, we interpreted that to be an admission that the LP6 Claimants knew or should have known of the alleged fraud, and so that's why we did a statute of limitations.

THE COURT: Okay. Mr. Morris, just a question. Correct me if I'm wrong here. Statute of limitations is a defense that must be affirmatively pled?

MR. MORRIS: That's correct, Your Honor.

THE COURT: And that means it wouldn't ordinarily fall inside of an Answer or other responsive pleading?

MR. MORRIS: That's correct, Your Honor.

THE COURT: And a Motion to Dismiss is not a responsive pleading, is it?

MR. MORRIS: It is not, under Guthmiller versus Deloitte Touche.

THE COURT: All right. So is there a reason I would get to statute of limitations until you affirmatively pleaded in an Answer or other responsive pleading?

MR. MORRIS: No, Your Honor. And I agree with you. The reason I addressed the issue was because of context. We interpreted that to essentially be a judicial admission. The Plaintiffs have indicated that that is not when they had knowledge.

THE COURT: All right. Well --

MR. MORRIS: I'll move on to the next issue.

THE COURT: Before you do I have sort of a question.

MR. MORRIS: Sure.

THE COURT: You folks are all living in this lawsuit, and I dabble in it when you show up. You know more about it than I do.

When the beef plant filed for bankruptcy, was it legally one and the same as LP6? In other words, are you telling me that those two parties had some sort of privity or unity such that LP6 would be on notice over in China, as it were, that the Aberdeen plant is going under?

MR. MORRIS: Anecdotally, I can address that, Your Honor. We're constrained to a certain extent to the four

corners of the pleadings and injecting matters outside the pleadings.

THE COURT: All right. Well, we don't have to try that case now anyway but --

MR. MORRIS: Right.

THE COURT: -- it's just going to be the first question I will throw at you if and when we get there.

MR. MORRIS: I'll answer it now just for the Court's information. The LP, the SDIF, Limited Partnership, LP6, is a limited partnership created under South Dakota law. There's a general partner to that is called SDIF, LLC-6.

Now, in this particular situation, this was what we call the loan model under the EB-5 program. Each one of these LP6 members put $500,000 into the limited partnership. And then through a loan process, the cumulative amount of the collective individuals, certain monies was then loaned to the beef packers.

And you go through the security process, et cetera, and they were essentially a creditor of the beef packers. So when the beef packers would file for bankruptcy, under normal bankruptcy proceedings, the documentation would indicate that LP6 was a creditor.

THE COURT: And was notified as a creditor.

MR. MORRIS: You would assume so, Your Honor.

THE COURT: All right. So we don't know that

yet, but we'll flesh that out when the day arrives.

MR. MORRIS: We will.

THE COURT: All right. And we're not doing statute of limitations today; is that correct?

MR. MORRIS: We are not. But I -- the issue is raised because of the interpretation that appeared to be a judicial admission. That has been disputed. We do not dispute that Guthmiller says you should not address that at this moment.

THE COURT: All right.

MR. MORRIS: The next issue for the moment was the lack of 3-20 -- the 3-21-2 notice. Now, in the 3-21-2 notice, the plaintiff -- when there's a plaintiff when they're suing a state for the tort must give statutory notice within 180 days.

The response to our motion for lack of 3-21 notice is, well, this isn't a tort, it's a contract. So from the -- but when you look at the Complaint, the Complaint clearly is a tort allegation, fraud and all the intended breach of fiduciary duty, pierce the corporate veil, so it's a tort.

THE COURT: You can have a fraud within a contract, though, can't you? So, for instance, fraud in the inducement of the contract?

MR. MORRIS: You can, but there's no assertion in

the Complaint that there's any type of privity of contract between the LP6 Claimants, the Limited Liability 6 Claimants, and any of the Defendant state agencies in the State of South Dakota.

So we view -- when we looked at this, we're viewing it as an independent fraud due to the alleged relationships of the parties.

And that's another one of the issues with the Complaint is is that it talks about -- it lumps the Defendants together, and that includes Mr. Bollen and SDRC, Inc.

So in looking at the Complaint, when you have an independent tort allegation of fraud, then that cues the lack of 3-21 notice. And their argument is is that this is a contract claim, not a fraud claim, but there's nothing in the Complaint that says there's any contractual relationship between LP6 and the state agencies.

THE COURT: And was there any contractual relationship between LP6 and the state agencies?

MR. MORRIS: No, Your Honor.

THE COURT: So but --

MR. MORRIS: And that's the statute of limitations and the 3-21 are secondary positions. Our primary position is that the State of South Dakota is entitled to sovereign immunity.

THE COURT: Let me ask you this: And I haven't

looked yet to see whether there's a case that answers this. Is the 3-21-2 also an affirmative defense needing to land within a responsive pleading?

MR. MORRIS: I don't believe it is for this purpose: I have always viewed it as a jurisdictional assertion, the 3-21. A lot of the times when you look at the 3-21 you also have situations involving municipalities and other public entities. And, in my view, when it comes to the state and the state level sovereign immunity is that part of the reason for the 3-21 is to give the state an appropriate amount of time and notice in order do an adequate investigation to determine whether sovereign immunity exists or there's a potential that the Legislature has codified the waiver of sovereign immunity. So I believe it becomes jurisdictional.

But that -- again, that's a secondary argument. The primary argument, and we'd like to focus on, is the sovereign immunity defense, which essentially is immunity from suit and liability.

I start with the High-Grade Oil case, Your Honor. In that case the Supreme Court addressed state level sovereign immunity. And it recognized that as to the state, there's no distinction between governmental or proprietary functions. The word proprietary has also been used, in my view, our view, interchangeably with the allegation of commercial enterprise.

So what the Plaintiffs did in this case is when they asserted that the agencies were engaging in a commercial enterprise, it's very evident that they were cognizant of the fact that sovereign immunity was going to be a big issue in this case. And so they have asserted that because the agencies were engaging in a commercial enterprise, that that somehow waives sovereign immunity.

When you go to High-Grade Oil, when you look at High-Grade Oil, it talks about at the state level there is no distinction between a sovereign and a non-sovereign capacity of the state. Then it goes on to say that the essence is that sovereign immunity exists totally at the state level.

And the only way that sovereign immunity, whether you want to call it proprietary, whether you want to call it commercial, or otherwise, at the state level sovereign immunity exists unless the Legislature -- unless the Legislature only expressly waives that sovereign immunity.

THE COURT: Didn't they say somewhere along the road of those cases that if the Legislature -- if the Legislature or the government buy insurance -- so, for instance, on state vehicles, I think they must buy insurance and then that's a waiver to the extent of the insurance? Is that -- or am I mixing up cases?

MR. MORRIS: No, you're -- well, I hate to tell you you're mixing up, but you are, Your Honor.

THE COURT: Oh, all right. Well, I'm assuming you handle those, too, don't you?

MR. MORRIS: The example you use is driving an automobile is a state employee acting in the course and scope of employment and engaging in a ministerial action. Okay?

Under SDCL 21-32-15, the State of South Dakota, through the Commissioner of Administration, may obtain and pay for public liability insurance to the extent and for the purpose considered expedient by the Commissioner for the purpose of insuring the liability of the state, its officers, agents, or employees.

And so that's insurance. And then you have the People Fund that takes care of the ministerial acts of employees during the course and scope of their employment.

And so there has to be -- in order for there to be a waiver -- and that's an example of a waiver -- where the Legislature has said -- the Supreme Court says, Legislature, you can waive, then the Legislature says we're going to waive to this extent.

THE COURT: Understood.

MR. MORRIS: Now, let's assume there was insurance. The problem with fraud is it's against public policy to insure for fraud. So then you would invoke if there was insurance, you would invoke.

THE COURT: Well, if there's not insurance my

question is moot, isn't it?

MR. MORRIS: Correct.

THE COURT: All right. Continue then.

MR. MORRIS: So when the Supreme Court addressed High-Grade, they made a distinction between state level sovereign immunity and what I would call or we would call lower level immunity, sovereign immunity that may be derived or may be available to municipalities, townships, or to counties.

But the importance of High-Grade is is that the state has sovereign immunity unless the Legislature expressly waives it. And in High-Grade they gave two examples, which was SDCL 31-2-34 through 31-2-39. And in those statutes, they allowed the South Dakota Department of Transportation to be sued by contractors who entered into contracts for highway projects.

And then also they referenced another waiver, which was SDCL 21-32-8, and that statute allowed the state to be a defendant in actions involving claims concerning personal property and real property.

So we start with the premise of High-Grade Oil. At the state level the state agencies have broad sovereign immunity. The Legislature can only expressly waive that. And at this point in the process the Plaintiffs have not pointed to any express waiver of sovereign immunity.

Then we move on to -- it's kind of an interesting trilogy that developed. In Arcon Construction the state had a cement plant -- used to, it's since been sold. But that State Cement Plant was created under the Constitution. And Arcon entered into contracts with the State Cement Plant regarding delivery of cement and there was a shortage. So Arcon sued the State Cement Plant.

And what's important is is that the State Cement Plant asserted sovereign immunity. And the Supreme Court says the Cement Plant is clearly an arm of the state. The state retains its sovereign immunity status in pursuing Cement Plant operations. So the Cement Plant was cloaked with state level sovereign immunity.

The next question became did the Legislature expressly waive sovereign immunity? And what the court said at that time is that when the Legislature enacted the UCC, the Uniform Commercial Code, it expressly waived sovereign immunity for the Cement Plant whenever the Cement Plant entered into contracts for sale of goods.

So in the Arcon case, the court recognized that the Cement Plant had sovereign immunity. So then they moved to the issue, was it waived. And the Supreme Court said, yes, it was waived for contracts the Cement Plant entered into regarding cement because of the Uniform Commercial Code.

THE COURT: And I assume -- and I haven't read --

I haven't gone back to Arcon. It has been a long time since I've read it. There were particular statutes which made that expressly clear?

MR. MORRIS: The codification of the Uniform Commercial Code.

THE COURT: Okay.

MR. MORRIS: The whole uniform body of the Uniform Commercial Code. And part of it was is that I believe when they -- the Uniform Commercial Code, when it talked about business, it talked about state, governmental, or otherwise.

THE COURT: So what separates this case from that case?

MR. MORRIS: Well, it's -- again, I indicated it's kind of this trilogy. We're continuing on that the Cement Plant was an arm of the state. It has sovereign immunity. It was an agency of the state. The Supreme Court found there was waiver by the UCC.

The Plaintiffs, the LP6 Claimants in this case, even if you use the Cement Plant case, Arcon as the framework, they still have not showed us where the express waiver has been done by the Legislature.

So then we move on to the third -- I'll call it the third part of the trilogy and that's L.R. Foy Construction, Your Honor. Now, this was another Cement Plant case. You will recall that in Arcon the court already said

sovereign immunity is waived to the extent of the UCC. In L.R. Foy additional claims over and above contract claims arose. There were commercial tort claims of fraud, bad faith, and some other issues.

The court in L.R. Foy said, well, we've already addressed Arcon. The Cement Plant had sovereign immunity. The Legislature expressly waives sovereign immunity by adoption of the UCC. That was for contract claims. Now we have some tort claims here. Has there been a waiver? Is there still a waiver of sovereign immunity as to tort claims?

And the court determined that due to the fact that sovereign immunity was waived by the Legislature for certain contracts with the Cement Plant under the UCC, the logical extension of that is is that any commercial tort claims arising out of that Uniform Commercial Code business contracts are also such that sovereign immunity is waived and the case was allowed to go forward.

Now, the important thing in the L.R. Foy case is is that they went back to High-Grade. And they addressed High-Grade and they said this: The decision we are making is not inconsistent with High-Grade. Specifically, they said this: "Our decision here to extend this waiver to commercial tort claims is expressly limited to the operations of the Cement Plant and does not affect the general rule as set forth in High-Grade."

When we go back to High-Grade, the general rule is at the state level there's sovereign immunity. Where there's a non-sovereign enterprise or a sovereign enterprise, there's no distinction at the state level between proprietary and governmental. You still have to find a waiver somewhere.

Plaintiffs, again, have not pointed to any expressed waiver against these state agencies or the state for their claims made in the Complaint.

Well, then to kind of throw a little bit of more of a distinction -- and both parties have cited to what I call the Aune case, A-U-N-E, versus B-Y Water District. Now, in Aune versus B-Y Water District, the water district was created by the Legislature -- or statutes were created by the Legislature to allow water districts as public corporations to be formed. And when they did that, the Legislature gave these public corporations sovereign immunity.

And what happened in the Aune case is that Aune was hooked up, was paying certain fees, but wasn't getting water, so sued B-Y Water District and said we want our water. The jury found that B-Y Water District had engaged in tortious conduct and had also violated statutes.

One of the defenses that had been raised by B-Y is that we have sovereign immunity. The Legislature gave it to us. But the Supreme Court says the Legislature could not give it to you because you were not a state level agency. You

are a public corporation created by a statutory framework. And the sovereign immunity is for the state only, and the Legislature cannot give you any sovereign immunity.

And why Aune becomes sort of in this process is because Aune talks about commercial versus governmental. And in the Aune case the Supreme Court said, well, this public corporation is purely a commercial enterprise. They're deriving income, they have expenses, and they're therefore profit-driven.

When the court addressed Aune, what they did, in my view, is created a third level of public entity, the top level of public entity at the state level being the State of South Dakota. The lesser public entities under South Dakota law being the municipality, being the county, and the school districts. And even a lesser public entity than that is this public corporation that was created through the codification of laws to allow it to become so.

So in Aune, we didn't even get to the issue is there sovereign immunity; therefore, we didn't even get to the issue of waiver. And the -- Aune is a public corporation. The clear distinction in this case is is that the three agencies are agencies' arms of the government and the State of South Dakota.

So and the other important thing about Aune was is under 46A-9-3, through the codification of the laws, the

Legislature provided for sue or be sued statute. There is no sue or be sued statute against any of the three agencies or the State of South Dakota, so we don't even need to go down that road as to what a sue or be sued means because it doesn't exist in this case.

So our position, Your Honor, is is that the state -- if you want to assume that the legal conclusion is is that these three agencies are engaging in a commercial enterprise, even if that's the case, it doesn't matter. Because under High-Grade Oil, at the state level, these agencies and the state are entitled to sovereign immunity. And the only way that sovereign immunity goes by the wayside is if there has been a legislatively-expressed waiver, and such does not exist.

THE COURT: So to point out, I suppose it has to be an express waiver, it cannot be a waiver by behavior, so to speak?

MR. MORRIS: No, Your Honor. It cannot even be a waiver by the Executive Branch. It's the Legislature, and in the High-Grade Oil they gave some examples. The other examples are -- is the liability insurance provision, insurance, under 21-32-15 and 21-32-16, to the extent there's coverage. And the People Fund is a risk pool, but that is not insurance under South Dakota law. So that in and of itself with the fact that it exists is not considered a waiver of the

state level of sovereign immunity.

If the Court had further questions, I would be happy to answer them the best I can.

THE COURT: Well, I might come back to you after I hear what Mr. Scaldaferri has to say.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Counselor, you can sit or stand, however you like.

MR. SCALDAFERRI: I'll stand, Your Honor, thank you.

I'm not quite sure where to begin. Maybe I'll start at the end. I started reading -- If one were to read what I'm about to read portions to you, Your Honor, in a vacuum -- I'll let you come to your own conclusion, and I'll tell you what mine was. When I read that the purpose of this entity is --

THE COURT: Which entity?

MR. SCALDAFERRI: We'll get to that in a moment.

THE COURT: Okay.

MR. SCALDAFERRI: -- is to assist in the expansion and the diversification of existing businesses, to encourage and facilitate the initiation of new enterprises and the development of new products that respond to identifiable markets, whatever that means, to establish a viable basis of financing business operations with a substantial venture

capital fund, managed effectively and with the flexibility that will permit application of funding needs to start-up, expansion, and production, to recognize markets that can be expanded and to discover new markets for products, manufactured goods, and services.

THE COURT: Sounds like you're reading me the statute creating GOED, I'm guessing?

MR. SCALDAFERRI: Your Honor, when I first read this, I hadn't seen the page before. I thought I was reading the operational clause of an LLC operating agreement for an investment banker.

THE COURT: And what is it?

MR. SCALDAFERRI: This is GOED.

THE COURT: All right.

MR. SCALDAFERRI: That's exactly what an investment banker does, Your Honor. Every single one of these envisioned tasks is what the guys on Wall Street do. And then they go out and then they get people to do whatever they do, they take their fees, and then they walk away, which is basically exactly what happened here, as alleged in the Complaint.

THE COURT: I'm sorry?

MR. SCALDAFERRI: As alleged in the Complaint. These LP6 members, my LP6, the LLC, these individuals, were solicited to make an investment for commercial purposes,

purely commercial purposes. You come in here, you make a loan, you're going to make money, we're going to make money. The state was going to make money. As Your Honor knows, a portion of the funds that these ventures were going to generate were going to go into an insurance fund to protect the state.

Mr. Morris has done an excellent job reviewing those cases. I have read them and reread them, and I must confess that sometimes perhaps because judges use words a little too absolutely, sometimes it creates problems.

But what it comes down to here, I think, is those cases which find sovereign immunity are cases where, whether it be an agency, whether it be a district, or whether it be the state itself, is engaging in governmental functions. Provide police, provide roads. Right?

Those cases that go the other way recognize that when the state, either individually or through one of its agencies, comes to you or to me or to these people in China, and says, "Hey, let's make a deal. You invest with me. You will make some money. We'll make some money. Everybody will be happy." Well, in those instances, the state cannot simply walk away and say, "Oh, wait, if things go wrong, I'm immune."

THE COURT: Let me jump in with a couple of questions.

MR. SCALDAFERRI: Sure.

THE COURT: I take it that LP6 has claimed or will claim that employees of these particular state agencies dealt directly with them? There was -- you say we'll make money, you will make money. Is the "we" Mr. Bollen or the "we" GOED, or was Mr. Bollen both? Or help me out with that.

MR. SCALDAFERRI: Excellent question. Up until, I believe it's December of 2009, Mr. Bollen was an employee of the state. And that state agency, whichever one it was because I get confused. I think it was Department of Tourism at that point -- was administering the program and dealing with these people.

In 2009 that state agency entered into a contract with Mr. Bollen's entity, SDRC, whatever it is, for Bollen to administer the program under the supervision and control of the state agency. That state agency was later merged into or abolished and replaced by GOED in 2011.

THE COURT: And Regents had this for a while?

MR. SCALDAFERRI: Yes, the Regents had it for a while. Before that -- I believe we have a little chronology when this started back in '94. It is an intricate sort of -- or tortuous sort of road. It goes this way and that way, but this is where it ends up.

So getting back to the immunity, the simple example that I was giving of you and I doing business, it isn't just me. The mere fact that a corporation is an agency

of the state does not in and of itself render it immune from suit. It has been held that as matter of policy that such corporations should be subject to suit, especially when embarking upon commercial ventures. That's the general American Jurisprudence concept.

Well, that was picked up by the Supreme Court in Foy. And if I may, Foy says the purpose for which a governmental corporation is created, or the function which it is designed to fulfill, is generally regarded as of importance in determining whether such a corporation is subject to suit.

For example, where a state creates or organizes a corporation and operates same for a commercial purpose, it is ordinarily held subject to suit, the same as any public corporation organized for the same purpose.

Your Honor, when we responded to the state's simple assertion of immunity, yes, we focused precisely on the commercial aspects of this venture because that's exactly what it is. That's exactly what it was. Our clients were to make an investment guided through some limited partnerships. At the end of the day it really doesn't make that much difference. And it was run under the auspices, if you will, of the State of South Dakota which had contracted with Bollen to physically run it.

THE COURT: Okay. Your example said "we," the state, went to the Chinese investors and said you will make

money, we'll make money, et cetera?

MR. SCALDAFERRI: Sure.

THE COURT: All right. My question is, is this a deal where the state was actually going to get a percent of profits from the business investment, or was this a case where the state's benefit is a growing economy and a tax base?

MR. SCALDAFERRI: No, there was exactly the monetary benefit. It's something that will have to develop in discovery to find out a bit more. But the way I understand it so far, the way this deal worked, the money was pooled. A loan was made. Points were charged on the loan by the borrower. A percentage of those points went to the state. And I believe it is -- the percentages and just how the machinations work is set forth in more detail, I believe, in the contract. I don't have the actual numbers, but there was -- there was a profit purpose in this also.

THE COURT: And I don't know whether it would matter, but if they get a percentage of the points on a loan, what is -- is that their margin of profit, or is that a recovery of their fees in promoting the business? Or do you know that yet?

MR. SCALDAFERRI: If I may interrupt you here, those fees were paid separately. Each investor actually put up 530,000. The 30,000 went for additional fees and expenses.

THE COURT: Okay. Well, let me put it to you

this way just because I don't know the business model. I'm sure I'll know it before we're done.

MR. SCALDAFERRI: I'm sure we all will, Your Honor. We're struggling with it too.

THE COURT: Someone in China writes a check for 530, how much goes to tourism, economic development, et cetera?

MR. SCALDAFERRI: After they signed the contract with the Bollen entity, or was administering it, that money went into a limited partnership run by Bollen under the supervision of the government. At the end of the day -- I understand your question. I don't know the exact number.

THE COURT: Because it strikes me -- and, again, I don't know at this stage whether it will matter. But it strikes me that if they write a check for 530 and Bollen -- is it Bollen or Bollen?

MR. BACHAND: Bollen.

MR. SCALDAFERRI: Thank you.

THE COURT: Bollen. If they write a check to Bollen for 530 and then he goes off and does things you don't think he should have done, and you think because the state is involved with Bollen, there is some connection or umbrella, or you can get to that pocket -- you know, I'm trying to figure out whether or not Bollen is the commercial enterprise or whether or not the state is close enough to Bollen to qualify

as a commercial enterprise.

MR. SCALDAFERRI: The state commissioned Bollen to administer the state's program, and it reserved control, oversight. It had to approve each program. I hate to say it so simply, Your Honor, but part of the problem here is -- or a lot of the problem here is that somebody fell asleep up there and never bothered to check. Everyone is finding that out now.

The state now has to answer the Feds when the Feds say we're terminating your EB-5 program because of what happened and what didn't happen. And the state is reduced now to making apologies, essentially, for what happened and pointing its finger at Bollen.

I represent the victims, the ones that lost the cash. Your Honor, look, this program wasn't a simple little, okay, let's try to build a street, or a public entertainment or something. These people traveled to China to solicit half million dollar investments. Yes, these people were wealthy enough to be able to afford it, but that doesn't change the fact that they, too, are entitled to be told what was going on. And they weren't. They said here is a memorandum offering, it's a contract.

THE COURT: Mr. Scaldaferri, this is not closing argument, and I'm not the jury.

MR. SCALDAFERRI: I'm sorry, Your Honor. It's

just that I feel it.

THE COURT: Look, I spent a lot of my career fighting for victims, so I'm not telling you I'm unsympathetic to someone who wrote a check over there and didn't get what they thought they were going to get, or even didn't get honest treatment. I don't know if that's true or not.

What I'm trying to figure out is whether or not you can establish that not Mr. Bollen, but the agencies themselves were a commercial enterprise. And then I've got to figure out whether or not Mr. Morris is right or wrong that even if it was a commercial enterprise, they're still immune.

MR. SCALDAFERRI: Okay.

THE COURT: So you might make a great case on Bollen under immunity, that he doesn't have any. He's not a state agency. And when he did whatever he did or didn't do that you don't like, he would have been an individual and/or a corporation. But the one thing he probably was not was a government agency so...

MR. SCALDAFERRI: Your Honor, I'll read you from the contract that's appended to the motion papers.

THE COURT: All right.

MR. SCALDAFERRI: SDRC, Bollen, may not begin promoting a project without first obtaining the state's written consent, which consent may not be unreasonably withheld. And the state may withhold its consent for any

reasonable cause, including but not limited to the proposed project is not feasible, the project violates public policy, et cetera, et cetera, et cetera.

THE COURT: Can we go back to a question I had a minute ago?

MR. SCALDAFERRI: Sure.

THE COURT: You know, again, you said we make money, you make money. And I'm just trying to sort out whether this was a venture that the Legislature set up saying to GOED/Tourism, we want you to go out and make money for your department. And at the end of the contract, whether money rolled in to the Department of Tourism or Economic Development, did they get dough out of this?

I realize you're talking about, shall we say, privity of a contract and liability between the agency and Bollen. I'm trying to drive at -- because it seems to me that if the state agency was getting a check in every month, that sounds commercial. We were making money off the deal.

MR. SCALDAFERRI: They were. Again, the same contract, Your Honor. The expense fund, et cetera, shall be funded from a fee collectable from Bollen for those projects. The fee for each project shall be agreed upon in writing by the state and Bollen, and said writing shall be appended to this agreement, blah, blah, blah, blah, blah. It was there.

And GOED, it has a kind of independent

proprietary function itself. It may accept private donations. Fine. It has a special revenue fund that does not revert to the general fund. It may make loans. It may take title. It may sell property without the state's consent. It operates as any corporation would. And it has this sort of hybrid entity because it does really perform corporate functions.

Here, SDCL 153 provides that the Governor's Office of Economic Development shall forge a private/public partnership among government, communities, higher education, and the private sector to create jobs and goods and services; and in the meantime it also could take in some money. My point, Your Honor, is that --

THE COURT: In a revolving fund.

MR. SCALDAFERRI: Correct. And my point, Your Honor, is that at the end of the day -- well, let me start with Arcon. The way I read Arcon and Foy, by enacting the UCC, it is not an express waiver. The state didn't say with respect to this Cement Plant I waive immunity. No, the court had to find a sort of implicit waiver, which is often the case in these types of cases.

Here, by participating in it and creating agencies intended to generate funds and explicitly hybrid private public that run by themselves and run a commercial enterprise, yes, that's a waiver.

THE COURT: Mr. Morris.

MR. SCALDAFERRI: At the end of the day that's a waiver.

THE COURT: I'll jump over to Mr. Morris a second. Is there still a REDI Fund? Or do they call it something else now?

MR. MORRIS: Pardon, Your Honor?

THE COURT: A REDI Fund, Revolving Economic Development, something like that.

MR. MORRIS: I believe there's probably -- I don't know if the REDI Fund is still in existence.

THE COURT: Your clients are nodding their heads yes. I've not sworn them, but I can't imagine they would lie about such a thing.

MR. MORRIS: There's a number of funds, Your Honor, and a number of programs that are established under the governmental function of economic development.

THE COURT: Here's my question: So the REDI Fund -- and, again, I'm going to study all this before I ever decide anything. But I think the structure of the REDI Fund was that they would put all this money into a fund and they would essentially segregate that fund from the ordinary operation of state government.

I believe it was the money is decided and loaned by a, more or less, independent board; and then that board decides where to put dough out. We're going to help a nut and

bolt manufacturer go to Canton, and we're going to give them some cheap loans, but they got to hire so many jobs. I think that's the structure as I once understood it.

And I suspect, you tell me -- and both sides can tell me later if you read up on this and figure out I'm wrong. I suspect the reason that the government, the Legislature decided -- one of the reasons they decided to have at least a Chinese wall, if not a true legal wall, between the GOED and the REDI Fund was so that GOED would not take on the exposure of being drug into lawsuits when the nut and bolt company folded and everybody was looking for defendants.

You tell me. I mean, has anyone penetrated from REDI, something they don't like about a loan in the REDI Fund, over to direct liability against GOED?

MR. MORRIS: Not that I'm aware of, Your Honor. And, you know, the establishment of a REDI Fund or any other type of fund within the GOED can only, in my view, be done by the Legislature. You have the Governor's Office of Economic Development. But if you're starting to establish funds, there's got to be legislative authority to do that.

And then the next question is if that is -- if GOED is an agency and there are funds, the question is can somebody sue the agency over those funds? And that would have to be addressed in the legislative authority, And that's where we're at with this in this. And the question -- Mr. -- I

can't --

MR. SCALDAFERRI: Scaldaferri. That's okay.

MR. MORRIS: It's easier to say Ezio.

MR. SCALDAFERRI: Say Ezio, please.

MR. MORRIS: Mr. Ezio, where he argued was is that, well, the UCC isn't an express waiver. It's kind of an implied waiver. But in Arcon, at paragraph -- no, at page 410, the South Dakota Supreme Court said, "We do find, however, for the following reasons: That when the Legislature enacted the UCC, it expressly waived sovereign immunity for the Cement Plant whenever the Cement Plant enters into contract for the sale of goods."

So it's the creation of the contract, or it's the creation of the statute that expressly waives sovereign immunity. They don't have to say it does.

Again, in High-Grade we talked about the issues concerning the Department of Transportation, highway contracts, the state being involved in litigation involving personal and real property.

And one of the things that I think we need to make clear here, Your Honor, is that these agencies are engaged in the economic development programs and processes that essentially either create jobs, tourism, or anything, so that people spend money and pay sales tax. That's what it boils down to. The more workers you have, the money they

spend on groceries or whatever, that's where South Dakota generates their funds is from sales taxes generally.

So economic development -- it cannot be argued whatsoever that economic development is not a governmental function. Because the state --

THE COURT: Well, it does strike me that the Cement Plant was directly in sales.

MR. MORRIS: Right.

THE COURT: And I don't think it ever mattered whether they were selling cars or concrete. They're selling directly essentially to the public. Whereas, it strikes me that Economic Development is promoting sales between exterior parties. And the point I've got to look at closer is their contention that, put in rough terms, the more that GOED gets in bed with someone who is part of that economic promotion, but not a part of the government, the more that sovereign immunity comes down.

That's roughly stated, Mr. Scaldaferri, but I think that's what you're telling me, isn't it?

MR. SCALDAFERRI: Yes, Your Honor.

THE COURT: The closer the tie, the thinner the immunity.

MR. SCALDAFERRI: Yes. And if I might add, we use -- we've been using the term the EB-5 program, the South Dakota EB-5 program. EB-5 is principally private. I think

besides South Dakota with its regional center declaration, I think only Vermont and one other state, I believe, calls it a government, or has the government directly involved. Of the other 360 EB-5 programs, 330, whatever, they're all private.

I mean, the one example that jumps to my mind because I'm a local, somebody in his infinite wisdom decided to build a sports arena dead in the middle of Brooklyn, as if the Garden in New York wasn't enough. They call it the Barkley Center. The New York Mets play there and the Islanders. Over $130 of financing for that project was an EB-5 program.

THE COURT: It was?

MR. SCALDAFERRI: It was. And they've paid back, from what I understand, up until recently, every penny. For the developer it's a great deal. It's free financing. Because they charge much, much less, or virtually free financing. If he has to go to a bank, it's a lot of money. But it is private in nature.

THE COURT: The City of Pierre, I think, went out and bought a big chunk of land; and I think they donated it to Menards. So then if Menards rips off the customers, is the city on the hook because they had -- they promoted this investment?

MR. SCALDAFERRI: No, I don't believe that that's a fair --

THE COURT: I know that's a stretch.

MR. SCALDAFERRI: -- comparison, Your Honor.

THE COURT: But I'm comparing. You know, the best way I can figure out who's got the law right is by pushing their position by stretching it out and seeing how far it reaches.

MR. SCALDAFERRI: May I suggest we look at it a slightly different way?

THE COURT: Sure.

MR. SCALDAFERRI: Let's assume for a moment that in December 2009 Bollen did not enter into this managing -- the consulting agreement with the state and that Bollen remained in charge of the EB-5 program --

THE COURT: Inside the GOED.

MR. SCALDAFERRI: Inside the GOED. He had been doing it for fourteen years. Now, now it seems to me that the GOED has its feet, hands, up to its chest, up to their nose in it. The only difference upon which perhaps the state relies is that contract. That consulting contract is nothing other than, hey, you are my state employee. Here, you're independent, now you make a couple bucks yourself and you run the program for me. I'll keep an eye on you. I'm going to supervise you. I'm going to make sure that you don't screw anything up.

But it's the same as the state. It has to be one

and the same. Otherwise, what we end up doing, Your Honor -- and in some of the distinctions that I've heard today and that I've read in the brief is really bringing form over substance to a degree that would be almost absurd.

I'm not sure I understand -- and I know that English is not my first language. But I'm not sure I really understand the distinction the state makes between municipalities and districts, or these lower life forms and the state and its agencies.

There's a definition in one of the statutes here where public entities are all grouped together; and they include those very districts, et cetera, et cetera, et cetera. Now, maybe I'm misreading it, as I said. But that kind of form over substance and technical argument sometimes depends on the simple facts. Think of it again, but for Bollen having that contract, I'm not sure that we would be having this conversation today.

And on that, I would suggest, Your Honor, that it would be a travesty to have these people have to walk away and not be able to -- they dealt with the state.

THE COURT: Well, Mr. Scaldaferri, I don't think the question today is whether they ought to recover. The question is who they ought to recover from.

MR. SCALDAFERRI: But at the very least, they should be able to make the claim and have the party on the

other side answer and face them and talk to them. Thank you, Your Honor.

THE COURT: All right. Well, part of it is I got to determine who is the party on the other side, or how many of the parties on the other side are on the hook. And that will be driven by what the cases say.

So let me ask you one final question, Mr. Scaldaferri: Do you believe High-Grade, Arcon, L.R. Foy and Aune are the correct cases, and that if I read and apply those cases correctly, you will succeed on this motion? Or are you arguing for an expansion or distinction from those cases?

MR. SCALDAFERRI: No, I think those cases are the general universe there. There are one or two more that I refer to in there that are cited by the court. One comes to mind, if Your Honor gives me a moment?

THE COURT: But you would agree with me they're good law?

MR. SCALDAFERRI: Yes. The problem with them, Your Honor, as I said before, sometimes when we use words in absolute terms, we create problems rather than solve them. I find it very difficult to reconcile them all except for that one vital distinction, which is when the state engages in a commercial enterprise, let's put aside the niceties of which corporation or agency. It waives. It waives. And they say

it repeatedly.

THE COURT: Okay.

MR. SCALDAFERRI: Thank you, Your Honor.

THE COURT: Mr. Morris, you want a final shot?

MR. MORRIS: Just briefly. When Mr. Bollen, up until 2009 was involved, he was under the auspices and jurisdiction of the Board of Regents. Last thing, Your Honor --

THE COURT: And they're not in this, are they?

MR. MORRIS: What's that? No, they're not.

THE COURT: Okay. Go ahead.

MR. MORRIS: And you can take the trilogy of High-Grade, Arcon, and L.R. Foy, and then you can take Aune, which is a distinction of the trilogy, and when you apply those cases to this Complaint, you will make the right decision.

THE COURT: All right. Now, we have an attorney on the phone. Should we -- Counselor, have you got a dog in this particular fight?

MS. MOHNING: No, Your Honor, we do not.

THE COURT: And you're here representing?

MS. MOHNING: The third-party defendants, Your Honor. They're not a party to this motion.

THE COURT: All right. And the third-party defense is Mr. Bollen, et cetera? Or, no --

MS. MOHNING: They're the third-party plaintiffs, Your Honor. It's Henry Global Consulting Group and the similar associated DBA's, along with Henry though.

THE COURT: Oh, all right. All right. So I -- yeah, I guess I can't see how you would have a dog in the fight. You just want to know what we're doing.

MS. MOHNING: Exactly, Your Honor.

THE COURT: Anybody else need to be heard? You're on your feet.

MS. DVORAK: Judge Barnett, I don't know that I need to be heard. I just wanted to note my appearance that --

THE COURT: You need to be named.

MS. DVORAK: Julie Dvorak here on behalf of SDRC, Inc., SD Investment Fund LL6 and Mr. Bollen.

MR. SCALDAFERRI: Your Honor, may I -- I'm sorry, I don't mean to --

THE COURT: Go ahead.

MR. SCALDAFERRI: There was something I wanted to point out to you, and I had it on the line that I just missed it.

THE COURT: Go ahead.

MR. SCALDAFERRI: I mentioned before that the Feds have sought to terminate the EB-5 program. The state responded. It's one of the documents in our Appendix. It's a response letter from Aaron Schiebe on behalf of the South

right to drag you all back in here for some more pointed questions.

So anybody else have anything else to say?

MR. MORRIS: Nothing, Your Honor. Thank you.

THE COURT: All right. Thank you.

MR. SCALDAFERRI: Thank you, Your Honor.

MR. BACHAND: Thank you, Your Honor.

(The hearing concluded at 2:38 p.m.)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

I, Lori J. Grode, Registered Merit Reporter and Registered Professional Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that the above hearing, pages 1 through 43, inclusive, was recorded stenographically by me and reduced to typewriting.

I FURTHER CERTIFY that the foregoing transcript of the said hearing is a true and correct transcript of the stenographic notes at the time and place specified hereinbefore.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Pierre, South Dakota, this ^ x day of ^ x 2016.

/s/ Lori J. Grode
Lori J. Grode, RMR/RPR
Notary Public
My Commission Expires 08-01-19

South Dakota Codified Laws
Title 47. Corporations (Refs & Annos)
Chapter 47-31b. Uniform Securities Act of 2002 (Refs & Annos)
Article 1. General Provisions

SDCL § 47-31B-102

47-31B-102. Definitions

Effective: July 1, 2018
Currentness

In this chapter, unless the context otherwise requires:

(1) "Director," the director of insurance;

(2) "Agent," an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. But a partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by rule adopted or order issued under this chapter;

(3) "Bank,":

(A) A banking institution organized under the laws of the United States;

(B) A member bank of the Federal Reserve System;

(C) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the comptroller

of the currency pursuant to Section 1 of Public Law 87-722 (12 U.S.C. § 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this chapter; and

(D) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (A), (B), or (C);

(4) "Broker-dealer," a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(A) An agent;

(B) An issuer;

(C) A bank or savings institution if its activities as broker-dealer are limited to those specified in subsection 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(4));

(D) An international banking institution; or

(E) A person excluded by rule adopted or order issued under this chapter;

(5) "Depository institution,":

(A) A bank; or

(B) A savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National

Credit Union Share Insurance Fund, or a successor authorized by federal law. The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A Morris Plan bank; or

(iii) An industrial loan company;

(6) "Federal covered investment adviser," a person registered under the Investment Advisers Act of 1940;

(7) "Federal covered security," a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933 (15 U.S.C. § 77r(b)) or rules or regulations adopted pursuant to that provision;

(8) "Filing," the receipt under this chapter of a record by the director or a designee of the director;

(9) "Fraud," "deceit," and " defraud," are not limited to common law deceit;

(10) "Guaranteed," guaranteed as to payment of all principal and all interest;

(11) "Institutional investor," any of the following, whether acting for itself or for others in a fiduciary capacity:

(A) A depository institution or international banking institution;

(B) An insurance company;

(C) A separate account of an insurance company;

(D) An investment company as defined in the Investment Company Act of 1940;

(E) A broker-dealer registered under the Securities Exchange Act of 1934;

(F) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(G) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(H) A trust, if it has total assets in excess of ten million dollars, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (F) or (G), regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(I) An organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars;

(J) A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. § 681(c)) with total assets in excess of ten million dollars;

(K) A private business development company as defined in Section 202(a) (22) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(22)) with total assets in excess of ten million dollars;

(L) A federal covered investment adviser acting for its own account;

(M) A qualified institutional buyer as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);

(N) A major United State institutional investor as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);

(O) Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars not organized for the specific purpose of evading this chapter; or

(P) Any other person specified by rule adopted or order issued under this chapter;

(12) "Insurance company," a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state;

(13) "Insured," insured as to payment of all principal and all interest;

(14) "International banking institution," an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933;

(15) "Investment adviser," a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(A) An investment adviser representative;

(B) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(C) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(D) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(E) A federal covered investment adviser;

(F) A bank or savings institution;

(G) Any other person that is excluded by the Investment Advisers Act of 1940 from the definition of investment adviser; or

(H) Any other person excluded by rule adopted or order issued under this chapter;

(16) "Investment adviser representative," an individual employed by or associated with an investment adviser or federal covered investment adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages

accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(A) Performs only clerical or ministerial acts;

(B) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(C) Is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in this state as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3a) and is:

(i) An investment adviser representative as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3a); or

(ii) Not a supervised person as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(25)); or

(D) Is excluded by rule adopted or order issued under this chapter;

(17) "Issuer," a person that issues or proposes to issue a security, subject to the following:

(A) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;

(B) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate;

(C) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty is the owner of an interest in the lease or in payments out of production under a lease, right, or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale;

(18) "Nonissuer transaction" or "nonissuer distribution," a transaction or distribution not directly or indirectly for the benefit of the issuer;

(19) "Offer to purchase," an attempt or offer to obtain, or solicitation of an offer to sell, a security or interest in a security for value. The term does not include a tender offer that is subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(d));

(20) "Person," an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity;

(21) "Place of business," of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(A) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(B) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients;

(22) "Predecessor act," chapter 47-31A;

(23) "Price amendment," the amendment to a registration statement filed under the Securities Act of 1933 or, if an amendment is not filed, the prospectus or prospectus supplement filed under the Securities Act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price;

(24) "Principal place of business," of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser;

(25) "Record," except in the phrases "of record," "official record," and "public record," information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(26) "Sale," includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value, and offer to sell includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. Both terms include:

(A) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

(B) A gift of assessable stock involving an offer and sale; and

(C) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security;

(27) "Securities and Exchange Commission," the United States Securities and Exchange Commission;

(28) "Security," a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a security; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:

(A) Includes both a certificated and an uncertificated security;

(B) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or other specified period;

(C) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974;

(D) Includes as an investment contract an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a common enterprise means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(E) Includes as an investment contract, among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement or similar agreement;

(29) "Self-regulatory organization," a national securities exchange registered under the Securities Exchange Act of 1934, a national securities association of broker-dealers registered under the Securities Exchange Act of 1934, a clearing agency registered under the Securities Exchange Act of 1934, or the Municipal Securities Rule-making Board established under the Securities Exchange Act of 1934;

(30) "Sign," with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach or logically associate with the record an electronic symbol, sound, or process;

(31) "State," a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Credits

Source: SL 2004, ch 278, § 2; SL 2018, ch 278, § 4.

S D C L § 47-31B-102, SD ST § 47-31B-102

Current through 2019 Session Laws, Executive Order 19-1 and Supreme Court Rule 19-18

South Dakota Codified Laws
Title 47. Corporations (Refs & Annos)
Chapter 47-31b. Uniform Securities Act of 2002 (Refs & Annos)
Article 5. Fraud and Liabilities (Refs & Annos)

SDCL § 47-31B-501

47-31B-501. General fraud

Currentness

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) To employ a device, scheme, or artifice to defraud;

(2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Credits
Source: SL 2004, ch 278, § 29.

S D C L § 47-31B-501, SD ST § 47-31B-501
Current through 2019 Session Laws, Executive Order 19-1 and Supreme Court Rule 19-18

South Dakota Codified Laws
Title 47. Corporations (Refs & Annos)
Chapter 47-31b. Uniform Securities Act of 2002 (Refs & Annos)
Article 5. Fraud and Liabilities (Refs & Annos)

SDCL § 47-31B-503

47-31B-503. Evidentiary burden

Currentness

(a) Civil. In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.

(b) Criminal. In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden of going forward with evidence of the claim.

Credits
Source: SL 2004, ch 278, § 31.

S D C L § 47-31B-503, SD ST § 47-31B-503
Current through 2019 Session Laws, Executive Order 19-1 and Supreme Court Rule 19-18

South Dakota Codified Laws
Title 47. Corporations (Refs & Annos)
Chapter 47-31b. Uniform Securities Act of 2002 (Refs & Annos)
Article 5. Fraud and Liabilities (Refs & Annos)

SDCL § 47-31B-509

47-31B-509. Civil liability

Currentness

(a) Securities Litigation Uniform Standards Act. Enforcement of civil liability under this section is subject to the Securities Litigation Uniform Standards Act of 1998.

(b) Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of § 47-31B-301 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at Category D, § 54-3-16 from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it,

and interest at Category D § 54-3-16 from the date of the purchase, costs, and reasonable attorneys' fees determined by the court.

(c) Liability of purchaser to seller. A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of the purchase price, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest at Category D § 54-3-16 from the date of the sale of the security, costs, and reasonable attorneys' fees determined by the court.

(d) Liability of unregistered broker-dealer and agent. A person acting as a broker-dealer or agent that sells or buys a security in violation of § 47-31B-401(a), 47-31B-402(a), or 47-31B-506 is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3), or, if a seller, for a remedy as specified in subsections (c)(1) through (3).

(e) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of § 47-31B-403(a), 47-31B-404(a), or 47-31B-506 is liable

to the client. The client may maintain an action to recover the consideration paid for the advice, interest at Category D § 54-3-16 from the date of payment, costs, and reasonable attorneys' fees determined by the court.

(f) Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at Category D § 54-3-16 from the date of the fraudulent conduct, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) Joint and several liability. The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f):

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f), unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f), including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f), unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) Right of contribution. A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(i) Survival of cause of action. A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(j) Statute of limitations. A person may not obtain relief:

(1) Under subsection (b) for violation of § 47-31B-301, or under subsection (d) or (e), unless the action is instituted within one year after the violation occurred; or

(2) Under subsection (b), other than for violation of § 47-31B-301, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

(k) No enforcement of violative contract. A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or order issued under this chapter, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter, may not base an action on the contract.

(l) No contractual waiver. A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.

(m) Survival of other rights or remedies. The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this section or § 47-31B-411(e).

Credits
Source: SL 2004, ch 278, § 37.

S D C L § 47-31B-509, SD ST § 47-31B-509
Current through 2019 Session Laws, Executive Order 19-1 and Supreme Court Rule 19-18

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29129

LP6 CLAIMANTS LLC,

Plaintiff / Appellant,

v.

SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, AND THE STATE OF SOUTH DAKOTA,

Defendants / Appellees,

and

SDRC, INC., SD INVESTMENT FUND, LLC 6 and JOOP BOLLEN,

Third-Party Plaintiffs and Appellees,

v.

HENRY GLOBAL CONSULTING GROUP A/K/A HENRY GLOBAL A/K/A HENRY GLOBAL GROUP A/K/A HENRY GLOBAL CONSULTING USA, incorporated under the laws of the People's Republic of China,

Third-Party Defendants and Appellees.

Appeal from the Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable John L. Brown
Circuit Court Judge

Appellee's Brief

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PRELIMINARY STATEMENT

In this brief, Defendants and Appellees, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development, South Dakota Department of Tourism, and the State of South Dakota will be referred to as "State." Plaintiff and Appellant, LP6 Claimants LLC, will be referred to as "Claimants." References to the Hughes County Clerk of Courts' record will be made using the initials "CR" and the page number(s). References to State's Appendix will be made using the initials "SA" and the page number(s).

JURISDICTIONAL STATEMENT

Claimants appeal The Honorable John L. Brown's Memorandum Decision and Order dismissing Defendants-Appellees, entered in the Sixth Judicial Circuit Court on July 18, 2017. CR 891-898. This Court denied Claimants' petition for intermediate appeal on October 2, 2017. CR at 913.

Judge Brown's Order became final following The Honorable Christina Klinger's Judgment of Dismissal as to the non-Appellee defendants on August 15, 2019. CR 959. Claimants filed a Notice of Appeal with this Court on September 18, 2019. CR 965. This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

Appellees submit there is one dispositive legal issue for this appeal:

1. Absent the legislature's express waiver of sovereign immunity, is the State of South Dakota entitled to sovereign immunity in a suit to recover damages stemming from the failure of a private business?

The court below held the State enjoyed complete immunity from such a suit.

Relevant Authorities:

Hallberg v. S.D. Board of Regents, 2019 S.D. 67, __ N.W.2d __

Hernandez v. Avera Queen of Peace Hosp., 2016 S.D. 68, 886 N.W.2d 338

High-Grade Oil Co., Inc. v. Sommer, 295 N.W.2d 736 (S.D. 1980)

Kelo v. New London, 545 U.S. 469, 484 (2005)

S.D. CONST. ART 3, § 27

STATEMENT OF THE CASE AND FACTS

Claimants' suit against Defendants-Appellees State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development, and South Dakota Department of Tourism (collectively, "State")[1] seeks damages for investment funds lost with the bankruptcy of the Northern Beef Packers processing plant in Aberdeen, South Dakota. Claimants contend State operated a commercial enterprise and through third parties, namely SDRC, Inc. and SDIF Limited Partnership 6 ("LP6"), induced investment in the plant by alleged misrepresentations material to Claimants' investment decision. On January 1, 2016, State moved under S.D. Codified Laws ("SDCL") § 15-6-12(b)(5) to dismiss Claimants' suit on sovereign immunity grounds. Judge Brown issued a Decision and Order granting

[1] Plaintiff-Appellant includes separate state agencies as defendants. Executive Reorganization Order 2011-01 abolished the Department of Tourism and State Development ("DTSD") and created the Governor's Office of Economic Development ("GOED") and the Department of Tourism (see: https://sdsos.gov/general-information/executive-actions/executive-orders/search/Document.aspx?CabId=523E2A2A&DocGuid=6255b14a-df93-4264-8264-726590b9392d). GOED is DTSD's successor in interest with respect to economic development and the EB-5 program. S.D. Codified Laws § 1-53-2.

State's motion on July 18, 2017, holding State immune from suit as a matter of law. CR 891-898.

This case centers around the federal immigrant investor visa ("EB-5") program, which offers foreigners U.S. immigrant visas in return for investing $1 million in commercial projects in the United States and creating a specified number of jobs. 8 U.S.C. § 1153(b)(5). Under the EB-5 program, public or private entities supporting projects in certain economically disadvantaged or rural areas may qualify as a "regional center," which entitles foreign nationals to a reduced investment threshold ($500,000) in connection with their visa application. *See* Dep't of Comm., Justice, and State, the Judiciary, and Related Agencies Approp. Act, 1993, Pub. L. No. 102-395 § 610, 106 Stat. 1874; 8 U.S.C. § 1153(b)(5)(C)(ii). State received a regional center designation, which was first managed by Joop Bollen, then a state government employee. SA 8. Separate from his state government employment, which ended in December 2009, Bollen created SDRC, Inc. SA 8. Rather than administer South Dakota's regional center within the Board of Regents or another state agency, the then-Department of Tourism and State Development contracted with SDRC, Inc. on December 22, 2009, after Bollen left state employment, to "… administer the Regional Center for [State]…." *DTSD-SDRC, Inc. Consulting Contract ("Consulting Contract")*, CR 663. SDRC, Inc.'s regional center responsibilities thereafter included interfacing with federal authorities, maintaining compliance with federal program requirements, and "[s]ervicing existing EB5 [sic] Program projects in South Dakota…." CR 664. SDRC, Inc.'s contract to service *pre-existing* EB-5 projects on behalf of the State's regional center included an initial equity

investment in the Northern Beef Packers project, but not the later LP6 investment at issue in this action. CR 672 Exhibit A.

This contract also provided SDRC, Inc. with a "non-exclusive right and privilege to market projects for development within the regional center's territory…." CR 664. It affirmed SDRC, Inc. had a free hand to participate in projects in other regional centers' territory in the event there were no available projects in South Dakota. CR 664. SDRC, Inc. was not obligated to market projects proposed by State if SDRC, Inc. judged the project was not "feasible, financially sound, marketable, and competitive." CR 664. SDRC, Inc. could also propose and manage its own projects, but could not advance them for immigration benefits under the regional center without State's consent. CR 665. State could withhold its consent if it believed the project was unfeasible, violated public policy, or was inconsistent with State's overall economic development plans.[2] CR 665.

After individually investing $500,000 plus $30,000 for expenses, each Claimants member became a limited partner in LP6, a South Dakota limited partnership. *SDRC, Inc.'s Confidential Offering Memorandum ("Offering Memo")*, CR 568-569. The Offering Memo identified the use of investors' funds as the construction and fit-out of the Northern Beef Packers plant through one or more investments in the project, structured as either loans or equity investment. CR 568. The Offering Memo also advised Claimants' members their investment was "final and irrevocable," "involves certain risks," and is

[2] A project sponsored by a regional center is not a requirement to receive an immigration benefit under the EB-5 program. Under federal statute, State's refusal to consent would have simply applied the higher $1 million investment threshold and direct job creation requirements to foreign investors, not removed the project entirely from EB-5 program eligibility. *See* 8 U.S.C. § 1153(b)(5).

"SUITABLE ONLY FOR INVESTORS WHO DO NOT REQUIRE LIQUIDITY IN THEIR INVESTMENTS AND WHO CAN AFFORD THE LOSS OF THEIR ENTIRE INVESTMENT." CR 569-570 (capitalization in original). It goes on to state explicitly:

> THE [LP6 MEMBERSHIP] UNITS … HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE U.S. SECURITIES AND EXCHANGE COMMISSION (the "SEC") OR THE SECURITIES COMMISSION OF ANY STATE, NOR HAS THE SEC OR THE SECURITIES COMMISSION OF ANY STATE PASSED UPON THE ACCURACY OR ADEQUACY OF THESE MATERIALS OR ANY OTHER INFORMATION THAT MAY BE FURNISHED TO PROSPECTIVE INVESTORS….

CR 570-571 (capitalization in original).

Given the investment's risk, the Offering Memo also indicated to Claimants' members there was "no assurance that investors will obtain final immigration status…." CR 570. The sole general partner of LP6 was SD Investment Fund LLC 6, an "affiliate of SDRC, Inc." CR 568. SDRC, Inc. was identified in the Offering Memo as the "Promoter" of the investment offering. CR 568. The Offering Memo's letterhead referred only to "SDRC Inc." and the non-governmental website address www.sdeb5.com. CR 567. No State entity or official State website was included. *Id.* Neither the State of South Dakota nor any of the entities comprising "State" in this matter is referred to as an owner of – or investor in – the Northern Beef Packers plant, SDRC, Inc., or LP6 in the Offering Memo. CR 567-654.

Claimants' alleged in their complaint that LP6 loaned investors' money to Northern Beef Packers Limited Partnership ("NBP LP") as detailed in the Offering Memo. SA 12. Claimants also alleged that in or about July 2013, the Northern Beef Packers project filed for bankruptcy protection. SA 15. Claimants alleged they ultimately lost the entirety of their investment in the project. SA 15.

ARGUMENT

A. THE TRIAL COURT CORRECTLY APPLIED SOVEREIGN IMMUNITY TO BAR CLAIMANTS' ACTION BECAUSE THERE IS NO APPLICABLE LEGISLATIVE WAIVER OF IMMUNITY AND NO GENERALIZED COMMERCIAL EXCEPTION TO STATE'S SOVEREIGN STATUS.

The sole issue on appeal is whether sovereign immunity applies to bar Claimants' action, a question answered squarely in the affirmative by the court below. *See Memorandum Decision and Order*, CR 891-898. As a threshold matter, Claimants' brief to this Court ignores settled law by claiming, "South Dakota did not contest [below] that plaintiff's members were duped into investing in the foredoomed Project, or that South Dakota had participated in deceiving them." Appellant's Brief at 10. A motion under SDCL 15-6-12(b)(5) is a pre-answer motion, not a responsive pleading in which State must take a position on Claimants' allegations. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 8, 699 N.W.2d 493, 497 (internal citations omitted). State's 12(b)(5) motion to dismiss for failure to state a claim is reviewed *de novo*. *Total Auctions & Real Estate LLC v. S.D. Dept. of Revenue & Regulation*, 2016 S.D. 95 ¶ 8, 888 N.W.2d 577, 580 (2016) (*internal citation omitted*).

On review, a court must "[a]ccept the material allegations as true and construe them in a light most favorable to the pleader to determine whether the allegations allow relief." *Id.* (*internal citation omitted*). However, to survive a motion to dismiss under SDCL 15-6-12(b)(5) the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 23, 886 N.W.2d 338, 346 (quoting *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808). The Court is therefore free to ignore Claimants' legal conclusions, unsupported conclusions, unwarranted inferences, and *sweeping legal conclusions cast in*

the form of factual allegations. Nygaard v. Sioux Valley Hospitals, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (internal citation omitted) (emphasis added).

As detailed below, the circuit court correctly applied sovereign immunity as a complete bar to Claimants' action under settled South Dakota law. Claimants' conclusory, self-serving assertion that State engaged in commercial activity through SDRC, Inc. and LP6 and thus does not enjoy sovereign immunity is simply a legal conclusion disguised as a series of factual allegations – one the Court is free to disregard in rendering its decision.

1. South Dakota's Law on Sovereign Immunity is Well Settled and a Complete Bar to Claimants' Amended Complaint.

In South Dakota, only the Legislature has the authority to direct how State may be sued: "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. CONST. ART 3, § 27. Whether sovereign immunity applies is thus a question of law. *Bickner v. Raymond Township*, 2008 S.D. 27, ¶ 10, 747 N.W.2d 668, 671 (2008). It is long settled that "absent specific constitutional or statutory authority, an action *cannot be maintained* against the state." *Hallberg v. Board of Regents*, 2019 S.D. 67, ¶ 14 (citing *Pourier v. S.D. Dept. of Rev. & Reg.*, 2010 S.D. 10, ¶ 14, 778 N.W.2d 602, 606). In South Dakota, "an *express* waiver of sovereign immunity is required." *Adrian v. Vonk*, 2011 S.D. 84 ¶ 12, 807 N.W.2d 119, 123 (citing *Lick v. Dahl*, 285 N.W.2d 594, 599 (S.D. 1979); *Pourier*, 2010 S.D. 10, ¶ 14, 778 N.W.2d 602, 606). This approach is not unique to South Dakota; a similar Nebraska constitutional provision is also not self-executing. *Gentry v. State*, 174 Neb. 515, 518, 118 N.W.2d 643, 645 (1962).

This Court clearly outlined the limits of South Dakota's sovereign immunity in a trilogy of cases dating to the 1980's. *See High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736 (S.D. 1980), *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407 (S.D. 1984), and *L.R. Foy Const. Co, Inc. v. South Dakota State Cement Plant Com'n*, 399 N.W.2d, 340 (S.D. 1987).[3] In *High-Grade Oil*, the Court grappled with a suit against a state highway engineer alleging negligent design in carrying out a proprietary or commercial function. Explaining the claim arose from the performance of the engineer's duties and was in reality a suit against the State of South Dakota, the Court found the state immune, reaffirming its earlier rule that "…as to the state *there is no distinction* between governmental and proprietary functions." 295 N.W.2d at 738 (*emphasis added*). The Court also reaffirmed any change to the extent of the state's sovereign immunity must come from the legislature, not the courts. *Id.* at 738-39.

This Court's subsequent sovereign immunity exceptions involved direct sales to customers and were rooted in express legislative waiver. In *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407, the Court examined the effect of the legislature's enactment of the Uniform Commercial Code ("U.C.C.") on state immunity from contract claims following *High-Grade Oil*. Here, the state's cement plant contracted *directly* with a customer, but had in fact oversold cement to other clients. *See id.* at 409. The plant ultimately breached two contracts, causing the customer financial damages. *Id.* While finding the cement plant "clearly an arm of the state," the Court held the inclusion of "government agency" in the adopted U.C.C. definition of "organization"

[3] At oral argument in circuit court, counsel for Claimants conceded these three cases, along with *Aune v. B-Y Water Dist.*, 464 N.W.2d 1 (S.D. 1990), were not only controlling, but also "good law." CR 873.

evinced the legislature's express waiver of sovereign immunity as to contracts for the sale of goods. *Id.* at 410. However, the Court specifically declined to reach immunity waiver considerations outside the U.C.C. context, leaving its holding best understood as a narrow exception to the broad state-level immunity endorsed in *High-Grade Oil*. *See id.*

Next, in *L.R. Foy Const. Co, Inc. v. South Dakota State Cement Plant Com'n*, 399 N.W.2d 340, the Court examined whether immunity applied to tort claims arising from cement plant contracts under the U.C.C. As in *Arcon*, the state's cement plant oversold product to a number of customers, but additionally engaged in a variety of tortious acts to disguise its breach of contract. *L.R. Foy*, 399 N.W.2d at 349. While maintaining the cement plant was a state entity, the Court also viewed it as "…created solely for the purpose of engaging in a commercial function, and … wholly unrelated to any governmental function of the [s]tate." *Id.* at 346. Given the purely commercial nature of the cement plant's operations, the Court reasoned, it was in keeping with its holding in *Arcon* to find a waiver of immunity for commercial tort claims involving "obligations and remedies within the intent and meaning of the [U.C.C.]." *Id.* at 348-349. Again, as in *Arcon*, the Court expressly limited its holding to the operations of the cement plant under the U.C.C., reaffirming the general rule of broad state-level immunity in *High-Grade Oil*. *Id.* at 349.

2. Sovereign Immunity Exceptions for Lower-Level Public Entities are Inapplicable because Appellees are State Government Agencies.

Claimants cite *Aune v. B-Y Water Dist.*, 464 N.W.2d 1 (S.D. 1990) in support of its contention sovereign immunity does not apply to the State when it operates in a commercial capacity. However, *Aune* is easily distinguishable. First, the *Aune* court found the legislature enacted an express waiver to suit by passing SDCL § 46A-9-3.

Aune, 464 N.W.2d at 2. Second, the Court's commercial-governmental analysis dealt with the sovereign immunity of lower-level public entities, not state agencies, as in the case at bar. *Id.* at 3. The *Aune* court clearly recognized this distinction, stating, "Indeed, a water district functions more like a cooperative than a state agency…." *Id*. Like municipalities, lower-level public entities enjoy the state's sovereign immunity only "to a lesser extent." *Id.* at 5; *accord Olesen v. Town of Hurley*, 2004 S.D. 136, 691 N.W.2d 324 (finding no sovereign immunity for municipality operating a bar-restaurant). In the *Aune* court's view, "We must remind ourselves (and the Legislature) that the state's sovereign immunity is the state's sovereign immunity and nothing more. *It belongs to the state and to no one else.*" *Aune*, 464 N.W.2d at 5 (emphasis added).

Taken together, the *High-Grade Oil-Arcon-L.R. Foy* trilogy has repeatedly endorsed broad state-level immunity from suit. While Claimants argue for a commercial-governmental analysis as an alternate method of waiving immunity, it is clear the Court has instead relied on the legislature's express waiver under the U.C.C. in exposing one state entity – the cement plant – when it directly sold goods to customers.

Similarly, *Aune*, involving an express waiver and a low-level public entity, offers no authority to support a waiver of sovereign immunity as to State. In fact, the *Aune* Court's solicitude for state-level sovereign immunity, as opposed to that of municipalities or water districts, is best read as reaffirming the central premise of *High-Grade Oil*, rather than overturning it as Claimants contend. Thus, the *High-Grade Oil* Court's holding that "…there cannot be successfully maintained … a distinction between … a 'sovereign' and 'nonsovereign' capacity of the state…" without legislative waiver remains undisturbed. *High-Grade Oil v. Sommer*, 295 N.W.2d at 738.

The entities comprising State (*i.e.*, the State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development, and South Dakota Department of Tourism) are all state-level agencies of the government of South Dakota or the state itself, no legislative waiver applies, and they are thus immune. Even if the Court accepts as fact that the state agencies comprising State in this action were engaged in a commercial enterprise, it ultimately makes no difference; State remains immune under *High-Grade Oil*. *Id.* As such, the trial court properly dismissed Claimants' action.

B. THE TRIAL COURT CORRECTLY APPLIED SOVEREIGN IMMUNITY TO BAR CLAIMANTS' ACTION BECAUSE EVEN UNDER A GENERAL COMMERCIAL-GOVERNMENTAL ANALYSIS, STATE DID NOT AND COULD NOT ACT IN A COMMERCIAL CAPACITY.

Claimants' assertion that State's alleged commercial activity operated as a waiver of its sovereign immunity in essence asks this Court to find an implicit waiver whenever State promotes economic development, rather than the express legislative waiver previously required by this Court. Assuming, *arguendo*, the Court is otherwise inclined to accept this invitation to abrogate state-level sovereign immunity judicially and engage in a general commercial-governmental function analysis, State's actions still fall short of the commercial conduct necessary to waive immunity. Not only were State's economic development efforts governmental in nature, but also, as a matter of law, State did not have the ability to act in the commercial capacity Claimants advance.

1. State's Promotion of Economic Development Does Not Make Its Actions Commercial, Even If Implemented by a Third Party.

Claimants invite the court to accept as fact a *legal* conclusion that the State acted commercially "through various agencies operating as commercial enterprises."

Appellant's Brief at 9. In so doing, Claimants ignore not only the obvious role of government in promoting economic development, but also United States Supreme Court precedent endorsing the same. *See Kelo v. New London*, 545 U.S. 469 (2005). That Court, construing the use of government action to facilitate a private economic development project, conclusively stated, "Promoting economic development is a *traditional and long-accepted function of government*." *Kelo,* 545 U.S. at 484 (emphasis added). Furthermore, the government may choose to rely on a private entity to implement its economic development purpose without losing its essential governmental character. *Id.* at 486 (quoting *Berman v. Parker*, 348 U.S. 26, 33-34 (1954) (stating, "The public end may be as well or better served through an agency of private enterprise than through a department of government, or so the [legislature] might conclude….")).

Claimants' brief makes no mention of *Kelo*, but instead advances a litany of authority – mostly of limited precedential value to this Court – in an attempt to bolster its analogy that State's actions were commercial, rather than governmental, in character. None concerns implementation of state-level economic development policy and each is easily distinguishable from this action.

Calif. Sand & Gravel, Inc. v. United States, a U.S. Claims Court case, involved a congressional waiver of sovereign immunity under the Tucker Act, 28 U.S.C. 1491 (1988), on an underlying U.S. Army Corps of Engineers contract. 22 Cl. Ct. 19, 23 (1990), *aff'd*, 937 F.2d 624 (Fed. Cir. 1991). Claimants' refer to a specific passage to support its contention of a broad commercial activity exception to sovereign immunity:

> Whenever the United States casts off its cloak of sovereign immunity to engage in a business-type activity with a business-minded purpose, it must be treated as a private commercial contractor.

Id. at 29 (citing *Standard Oil Co. v. United States*, 267 U.S. 76, 79 (1925)).

Claimants' reference is misleading. In fact, the quotation simply introduces the U.S. Claims Court's discussion of what standard is appropriate for interpreting the Corps of Engineers' contract in a dispute over termination, not whether immunity applied to the Corps of Engineers. *Id.* at 30. The court used the passage as the basis for concluding the contract should be interpreted "as if the government were a private enterprise." *Id.* The court then found government contracts must be given "the meaning imputed to a 'reasonably intelligent contractor'" in the circumstances and ultimately tested the government's contract favorably against the standard a private enterprise would have for termination. *Id.* No similar legislative waiver akin to the Tucker Act is at issue here. Under Claimants' own approach, State's contract with SDRC, Inc. disclaims any commercial relationship between them, and the contract must be – and most naturally is – interpreted as such.

Claimants' invocation of U.S. Supreme Court cases involving the State of Georgia is similarly misplaced. A close reading of the Court's opinion in *Georgia v. City of Chattanooga* suggests Georgia's *acquisition of land* in Tennessee was more critical to the Court's immunity analysis than its commercial activity, as the Court concluded Tennessee's own sovereign power of eminent domain would be extinguished by holding her sister state immune. 264 U.S. 472, 480 (1924). In the background was Georgia's prior request for – and receipt of – permission from Tennessee for the railroad acquisition, which, in the Court's view, further served to waive Georgia's immunity. *See id.* at 480-81. No such sister-state tension is at issue here, nor is actual State ownership of the commercial enterprise at issue, as was the case in *Bank of the United States v.*

Planters' Bank of Georgia, 22 U.S. 904 (1824). The *Planters'* court may have indeed, as Claimants assert, announced that when a government becomes a "partner" in a company "it devests [sic] itself … of its sovereign character…," but the Court also required the state partner – unlike State here – actually to "hold[] an interest in it." *Id.* at 907.

The common theme in Claimants' lengthy recitation of other out-of-state authority is that a limitation of sovereign immunity exists for lower-level governmental entities engaged in commercial activity. *See Junior Coll. Dist. of St. Louis v. St. Louis*, 149 S.W.3d 442 (Mo. 2004) (finding no immunity for municipal water service), *Pierson v. Cumberland County Civic Ctr. Comm'n*, 540 S.E.2d 810 (N.C. Ct. App. 2000) (granting no immunity for county-run event center), *Nestman v. South Davis County Water Improv. Dist.*, 398 P.2d 203 (Utah 1965) (holding no immunity for regional water district), *Hutton v. Martin*, 252 P.2d 581 (Wash. 1953) (allowing no immunity for municipal garbage service). These cases admirably reflect this Court's own precedent in *Aune*, 464 N.W.2d 1, and *Olesen*, 2004 S.D. 136, but like *Aune* and *Olesen* they concern only lower-level government entities, not the State of South Dakota and its agencies. These cases therefore add little to the discussion and offer no support for abrogating the sovereign immunity standard in place under *High-Grade Oil*, 295 N.W.2d 736.

In this case, the South Dakota legislature created the agencies comprising State and charged them with a broad economic development mission.[4] State chose to pursue federal designation as an EB-5 regional center to assist in supporting its economic

[4] During the years in question, the economic development purpose and functions of the Department of Tourism and State Development were codified in SDCL 1-52-3.2 and 1-52-3.3. These statutes were transferred to the Governor's Office of Economic Development in 2011 and now appear as SDCL 1-53-3 and 1-53-4. Exec. Order No. 2011-01. Ch. 1, S.D. Sess. Laws 2011.

development policy. State contracted with SDRC, Inc. to manage the regional center as an independent contractor and allowed a separate mechanism through which investors associated with commercial projects SDRC, Inc. proposed could receive favorable federal immigration benefits. That SDRC, Inc.'s commercial projects may have furthered South Dakota's economic development does not transform them into State's commercial enterprises as a matter of law. Rather, State's pursuit of economic development was akin to the condemnation action in *Kelo* and the use of a private entity to effect a governmental community redevelopment plan in *Berman*. State's contract with SDRC, Inc. was fully governmental, not commercial activity that waives sovereign immunity.

2. State's Implementation of the Federal EB-5 Program Was Governmental, Not Commercial, Activity Under South Dakota Law.

Governmental activity "can be generally defined as the State's obligation to provide for the health, safety, or general welfare of the public generally." *L.R. Foy,* 399 N.W.2d at 340. This standard compares favorably with the statutory purpose of the Governor's Office of Economic Development: "The Governor's Office of Economic Development shall forge a private-public partnership … *to create jobs* that create goods and services … *which results in the creation of new wealth*." SDCL 1-53-3 (emphasis added). State's activities aimed at promoting the general welfare through creation of jobs and new wealth would thus be consistent with not only the U.S. Supreme Court's approach in *Kelo*, but also this Court's approach to governmental activity under *L.R. Foy*. *See L.R. Foy*, 399 N.W.2d at 346.

A clear distinction exists between *Arcon* and *L.R. Foy*, where the Court dealt with an entity created in the state constitution to sell goods, and State's management of a federal immigration program as part of its overall efforts to promote the general welfare

through economic development. Unlike the cement plant, State had no "goods" to sell other than perhaps South Dakota's business climate and its potential advantage to projects. Further, State employed a number of tools to advance South Dakota's economic development through the Northern Beef Packers project, of which the EB-5 program was but one example. CR 606 (listing $8 million in proposed State of South Dakota financing through State's EDFA and REDI loan programs). The EB-5 program is thus best understood as a policy tool utilized by State as part of its toolkit, not an independent venture set up for commercial purposes.

3. State Could Not Engage in Commercial Activity Through SDRC, Inc. Because It Lacked Authority Under South Dakota Law.

As a matter of law, both the South Dakota constitutional framework surrounding state-owned enterprises and State's own Consulting Contract with SDRC, Inc. contradict Claimants' assertion State engaged in commercial activity via SDRC, Inc. and LP6. As such, the Court is free to disregard Claimants' sweeping legal conclusions about State's commercial conduct when disguised, as they are here, as factual allegations. *Nygaard*, 2007 S.D. 34 at ¶ 9.

Constitutionally, the State of South Dakota is prohibited from engaging in a business venture unless "its authority over the project is to be absolute." *In re Request for an Adv. Op. Concerning Const. of H.B. 1255, H.B. 1132, and H.J.R. 1004*, 456 N.W.2d 546, 549 (S.D. 1990). Partial state government ownership of a business venture is therefore unconstitutional, because such ownership does not carry with it absolute management and control. *Id.*

Consistent with this restriction, State's contract with SDRC, Inc. stated:

> 23. Nothing in this Agreement shall be construed to give rise to a partnership or joint venture between SDRC and [State]. Rather, SDRC shall be acting as an independent contractor and this Agreement is intended to be in the nature of a professional services and licensing agreement.

CR 671. Nothing in the Consulting Contract *required* SDRC, Inc., as an independent contractor, to form limited partnerships to make loans to projects, or even to pursue projects at all. *See generally* CR 663-673. Any control State had over SDRC, Inc.'s activities was limited by the contract to general project approval and ensuring SDRC, Inc.'s administration of the regional center under federal guidelines. CR 663-665. Under the contract, SDRC, Inc. could even pursue projects without State approval if they were otherwise eligible under the higher investment threshold for those EB-5 projects not associated with a regional center. State's involvement was thus properly cabined off from the commercial activities of SDRC, Inc. under the Consulting Contract, in accordance with the constitutional limits that apply to all state government entities.

4. Claimants' Foreign Sovereign Immunities Act Analysis Not Only Misconstrues South Dakota Law, But Also Fails on Its Own Terms.

Claimants also rely on a line of Foreign Sovereign Immunities Act (28 U.S.C. § 1602 *et seq.*) ("FSIA") cases for the proposition that "a sovereign's solicitation of investments and/or misrepresentations concerning securities … are commercial activities to which sovereign immunity does not apply." Appellant's Brief at 14. This contention again assumes, incorrectly, the Court's holding in *High-Grade Oil* has been supplanted by a functional test for sovereign immunity under South Dakota law. In place of *High-Grade Oil*, Claimants instead urge this Court to import FSIA jurisprudence into South

Dakota law, yet misunderstands both how FSIA is used procedurally at the federal level and how these FSIA cases undermine its own argument.[5]

First, FSIA is a jurisdictional statute enacted by Congress that makes foreign states presumptively immune from the subject-matter jurisdiction of U.S. courts. *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 344 (D.C. Cir. 2018). The logic of FSIA in promoting comity among nations is apparent: subjecting foreign states to suit in U.S. courts chills relationships of value to U.S. diplomacy and potentially exposes the United States to the same abroad. *See Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 583 (E.D. Pa 1985). A foreign state, its political subdivisions, and majority-owned agencies or instrumentalities may all benefit from FSIA. *See* 28 U.S.C. § 1603(a). A commercial activity exception under FSIA applies to acts in the United States or to extraterritorial acts having a direct effect in the United States. 28 U.S.C. § 1605(a)(2). However, unlike the comity-based subject-matter jurisdiction analysis to which FSIA applies under federal Rule 12(b)(1), in the state-level Rule 12(b)(5) posture here, state sovereign immunity is a defense that bars relief, not a bar to the court's jurisdiction over the matter. Thus, FSIA analysis is *a priori* inapposite.

Second, Claimants FSIA cases provide no compelling authority to overrule the Court's *High-Grade Oil* standard. Of the five cases cited in Claimants' brief, two are

[5] Claimants also advance a collateral argument that state sovereign immunity does not extend to acts committed beyond the state's borders. Appellant's Brief at 17, n. 6. Both cases cited by Claimants, *State v. City of Hudson*, 42 N.W.2d 546 (Minn. 1950), and *City of Cincinnati, Ohio v. Commonwealth ex rel. Reeves*, 167 S.W.2d 709 (Ky. 1942) concern municipal, rather than state, ownership of *physical property* in adjacent states and are thus more akin to *Aune* and distinguishable from the present case. Further, in *Hair v. Tennessee Cons. Retirement System*, a federal district court examined the same quotation Claimants cite from *Cincinnati* and *Hudson*, labeling it "dicta" and applying instead a state "alter ego" analysis. 790 F.Supp. 1358, 1362 (M.D. Tenn. 1992).

out-of-circuit federal district court cases construing federal, not state, law, and thus entitled to no deference by this Court when determining how sovereign immunity applies to State. *Tucker* concerns a national government agency of the Bahamas, while *Wasserstein Perella Emerging Markets Fin., L.P. v. Province of Formosa*, 2000 WL 573231 (S.D.N.Y. 2000), concerns a sub-national province of Argentina akin to a state. The remaining three circuit court cases (*Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984); *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016); *EIG Energy*, 894 F.3d 339 (D.C. Cir. 2018), similarly construe federal law and concern instrumentalities of foreign governments, not actual state government agencies, as in the case at bar. Each ultimately undermines Claimants' own argument as follows.

In *Tucker*, 620 F. Supp. 578, plaintiffs sought to hold the Bahamian government liable for injuries suffered while horseback riding on vacation. The court rejected plaintiffs' contention the government's regulation of the tourism industry was commercial activity under FSIA, finding such involvement instead "peculiarly governmental." *Id.* at 584. While the court did find the government's advertising and promotion of tourism could be commercial activity under FSIA, it also required a "nexus between the plaintiff's grievance and the sovereign's commercial activity…." *Id.* In the court's view, the negligence of a private tour operator was too remote to hold the government accountable under FSIA. *Id.* at 585. The nexus between State's regulation, development, and implementation of economic development policy and the acts of SDRC, Inc. and LP6 while soliciting investors, such as Claimants, is similarly attenuated.

Wasserstein, 2000 WL 573231, tested whether an investment banking transaction qualified as commercial activity under FSIA when it involved an Argentine province's wholly owned bank, which was later privatized, after which the province stepped directly into negotiations with the U.S. party before ultimately refusing to close on the deal. On a complex set of facts, the court held FSIA's commercial activity exception applied to the province because "[r]etaining a private investment bank to raise money for a loan, like borrowing money and issuing debt instruments, is an inherently commercial transaction." *Id.* at 9. However superficial the similarities with Claimants' case may be, *Wasserstein* is fully distinguishable on three grounds. First, the circumstances first giving rise to the claim began when the bank, unlike SDRC, Inc. and LP6, was wholly owned by the province. Second, unlike the present case, there was direct governmental action: a provincial official stepped in to negotiate directly with the plaintiff following the bank's privatization. Third, the province executed a written instrument and later provided comfort letters to the plaintiff before ultimately reneging on the deal.

Wolf, *Atlantica*, and *EIG Energy* are all similar in that they involved entities either wholly or majority owned by foreign governments. In each case, for broadly similar reasons, the court found the FSIA commercial activity exception applied. However, Claimants ignore an important U.S. Supreme Court decision construing the limits of state ownership under FSIA applicable here. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Court announced that for purposes of 28 U.S.C. § 1603(b) (FSIA's definition of "agency or instrumentality of a foreign state"), indirect subsidiaries of a foreign state are *not* instrumentalities of the foreign state because "only *direct* ownership of a majority

of shares [by the foreign state] satisfies the statutory requirement." *Id.* at 474 (emphasis added).

Here, there is no direct State ownership of SDRC, Inc., as in *Wolf, Atlantica, and EIG Energy*, and therefore certainly no ownership of SD Investment Fund LLC 6 or LP6 given the Court's approach in *Dole*. There is no direct State engagement with Claimants akin to *Wasserstein*, but at best the attenuated relationship the district court rejected in *Tucker*. Thus, even under Claimants' own FSIA analogy, there is insufficient basis to waive State's sovereign immunity.

5. Claimants' Argument on Appeal for a State Securities Law Immunities Exception Was Waived and Never Pled, But in Any Event Requires Commercial Activity Not Present Here.

Claimants, for the first time, now contend the legislature's enactment of the Uniform Securities Act of 2002 (SDCL 47-31B-101 *et seq.*) ("Act") operates as a waiver of sovereign immunity against State in the same manner as the U.C.C. did with the state cement plant in *Arcon* and *L.R. Foy*. Appellant's Brief at 19. Claimants failed to present this argument to the trial court, and thus it is waived on appeal. *Cain v. Fortis Ins. Co.*, 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714 (citing *Action Mech., Inc. v. Deadwood Historic*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755).

Just as Claimants failed to present this argument to the trial court, Claimants also failed to allege specifically any violation of the Act in its Amended Complaint. *See* CR 114-125.[6] Allowing this new argument on appeal would allow Claimants to amend constructively its Complaint a second time to add a cause of action after the circuit

[6] The Amended Complaint details five counts: Common Law Fraud, Breach of Fiduciary Duty, Aiding and Abetting Breach, and Pierce the Corporate Veil. No count in the Amended Complaint invokes the Act or any specific provision for relief in Chapter 47.

court's dismissal below. This Court roundly rejected such a result in *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 23, 886 N.W.2d 338, 346 (refusing to address claim of discrimination because appellant "never asserted [such] a cause of action" in her complaint). Claimants' Securities Act waiver argument is similarly infirm.

Should the Court nevertheless consider this new argument on appeal, it will find Claimants' analogy falls far short of this Court's requirements in a Rule 12(b)(5) context and in the U.C.C. cases involving sovereign immunity above. As noted at the outset of this brief, overcoming a motion to dismiss for failure to state a claim requires more than a speculative right to relief. *Hernandez*, 2016 S.D. 68, ¶ 23. Assuming, *arguendo*, the Court applies the Act's definition of "person" set forth at SDCL 47-31B-102(20) to State as it did in the U.C.C. context with "organization," civil liability under the Act still does not attach unless State "sells" a security. SDCL 47-31B-509(b). "Sale" of a security is defined elsewhere in the Act as "every contract of sale, [or] contract to sell … [a security], and offer to sell includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security…." SDCL 47-31B-102(26). Setting aside the Consulting Contract's bar, South Dakota's own Constitution barred State from owning shares in SDRC, Inc. or any of its affiliates that sold or offered LP6 securities.[7] Claimants have not alleged State directly offered or sold LP6 securities to investors. The Offering Memo provided to Claimants was issued by SDRC, Inc., not by State. The general partner of the

[7] *See infra*, Section B.3 for a complete discussion of restrictions on State's commercial activity under South Dakota law and State's contract with SDRC, Inc.

limited partnership was an affiliate of SDRC, Inc., not of State. State was *at minimum* three steps removed from the sale of the LP6 securities.[8]

In advancing its new Securities Act argument on appeal, Claimants now invite the Court to fill in the blanks for Claimants, seeking to transform the broad assertions in its own Amended Complaint into Court-supplied facts in an effort to "raise more than a speculative right to relief." *Hernandez,* 2016 S.D. 68, ¶ 15 (citing *Sisney,* 2008 S.D. 71, ¶ 8, 754 N.W.2d at 643). The generalized facts as pled in the Amended Complaint, even if true, stand in stark contrast to the direct sale of cement to customers by a wholly state-owned enterprise the Court had in mind when applying the U.C.C. to waive sovereign immunity in *Arcon* and *L.R. Foy*. Claimants' redress under the Act, if any, ultimately lies with SDRC, Inc., not State. The legislature's enactment of the Uniform Securities Act of 2002 is therefore simply insufficient to waive sovereign immunity given the Court's approach in *Hernandez* and the U.C.C. cases above.

[8] LP6 (entity allegedly issuing securities) to SD Investment Fund LLC 6 (general partner) to SDRC, Inc. (consultant) to State.

CONCLUSION

For the reasons stated above, State urges this Court to affirm the trial court's Order dismissing Claimants' case below.

Dated this 16th day of January, 2020.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Aaron P. Scheibe, one of the attorneys for the Appellee, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

a. Appellee's Brief does not exceed 32 pages.

b. The body of Appellee's Brief was typed in Times New Roman 12-point typeface; and

c. The body of Appellee's brief contains 6,610 words and 35,914 characters with no spaces and 42,822 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

Dated this 16th day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellees, State of South Dakota, hereby certify that on the 16th day of January, 2020, a true and correct copy of Appellee's Brief was served by electronic mail to:

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APPENDIX

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MEMORANDUM DECISION

Defendants in the above captioned matter, State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development and South Dakota Department of Tourism, have filed a Motion to Dismiss the Plaintiff's Complaint pursuant to SDCL § 15-6-12(b)(5) for failing to state a claim upon which relief can be granted. Specifically, Defendants assert that sovereign immunity bars this suit against the State.

BACKGROUND

Plaintiff is a limited liability company who claims its members were fraudulently induced by the Defendants' misrepresentations to invest over $500,000 each through a limited partnership, SDIF Limited Partnership 6 ("LP6"), in a beef processing plant ("Project"). Opposition to Defendants' Motion to Dismiss at 1. Said Project was intended to comply with a federal program known as the immigrant investment program ("EB5 Program") which provides preferred immigration status to foreign nationals who invest over $500,000 in projects designed to boost employment in designated areas of the United States. Id. This includes the area of South Dakota where the beef processing plant was located. Id.

Plaintiffs contend that at the time its members were induced to invest, the beef processing plant was "undercapitalized and lacked the financial wherewithal to be a viable investment". Id. at 2. Plaintiff goes on to allege,

> "The State of South Dakota, through various agencies operating as commercial enterprises[1], oversaw the EB5 Program in South Dakota. In 2009, South Dakota engaged defendant SDRC, Inc., a corporation wholly owned by a former South Dakota employee, defendant, Bollen, to administer and promote the EB5 program in South Dakota. Together, the defendants were in the business of soliciting investments in EB5 projects in South Dakota, together they induced plaintiff's members to invest in the Project through misrepresentations, and together they are liable for the damages they caused."

Id.

During oral arguments held on March 10, 2016, in front of Honorable Judge Mark Barnett, Sixth Circuit, Defendants acknowledged that though they initially

[1] Plaintiff refers to 'State of South Dakota', 'South Dakota Department of Tourism and State Development', 'South Dakota Governor's Office of Economic Development', and 'South Dakota Department of Tourism' collectively as "South Dakota".

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had three reasons to dismiss the Complaint, they were only focused on one: sovereign immunity. Reason number two was the applicable statute of limitations, which counsel agreed was a defense that must be affirmatively pled in an Answer or other responsive pleading. Hr'g Tr. at 5:17-23. Judge Barnett and Counsel then agreed that a Motion to Dismiss was not a responsive pleading, and therefore there was no reason to address statute of limitations until it was affirmatively pled. Id. at 5:24-6:10. Further, Defendants' Counsel concedes that the issue of notice under SDCL § 3-21-2 is a secondary issue. Id. at 9:21-22. The primary issue in determining the Motion to Dismiss is whether the State of South Dakota is entitled to sovereign immunity. Id. at 9:22-24. As such, this Memorandum Decision will focus on the issue of sovereign immunity.

QUESTION PRESENTED

I. Whether this suit against the State of South Dakota is barred by sovereign immunity?

LEGAL STANDARD

Sovereign Immunity is the right of public entities to be free from liability for tort claims unless waived by legislative enactment. *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 7 n. 3, 658 N.W.2d 64, 67 n. 3 (citing *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 2247, 144 L.Ed.2d 626 (1999)). Whether sovereign immunity applies is a question of law. *Bickner v. Raymond Township*, 2008 SD 27, ¶ 10, 747 N.W.2d 668, 671.

ANALYSIS

I.

Whether this suit against the State of South Dakota is barred by sovereign immunity?

In South Dakota, the Legislature has the authority to direct how the State of South Dakota may be sued. As provided by our State's Constitution, "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. Art. 3, § 27. In the absence of constitutional or statutory authority, an action *cannot be maintained* against the State. *Public Entity Pool for Liability v. Score, supra*, (citing generally *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979); *Darnall v. State*, 79 S.D. 59, 108 N.W.2d 201 (1961); *Griffis v. State*, 68 S.D. 360, 2 N.W.2d 666 (1942); *Mullen v. Dwight*, 42 S.D. 171, 173 N.W. 645 (1919)) (emphasis added).

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Defendants take the position that "[t]he South Dakota Department of Tourism and State Development, the Governor's Office of Economic Development and the South Dakota Department of Tourism are State agencies and thus entitled to sovereign immunity." Motion to Dismiss at 4. The South Dakota Supreme Court has "consistently held that it is the exclusive province of the legislature and not the courts to abrogate or limit the doctrine of sovereign immunity. In the absence of an express statutory waiver, [they] strictly adhere to this constitutionally mandated doctrine." *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407 (see also *Kringen v. Shea*, 333 N.W.3d 445 (S.D. 1983); *Merrill v. Birhanzel*, 310 N.W.2d 522 (S.D. 1981); *High-Grade Oil Co., Inc. v. Sommer*, *infra*; *Arms v. Minnehaha County*, 69 S.D. 164, 7 N.W.2d 722 (1943).

Plaintiffs make two distinct arguments against the applicability of sovereign immunity in this case. One is that sovereign immunity was waived pursuant to SDCL § 21-32A-1. Opposition to Defendants' Motion to Dismiss at 3. The second is that "sovereign immunity does not apply to commercial enterprises such as South Dakota's efforts to get people to invest in EB5 projects in South Dakota." Id. Each of these arguments will be addressed in turn.

A. Did the State waive sovereign immunity pursuant to SDCL § 21-32A-1?

Defendants argue that the State agencies have not waived sovereign immunity, nor could they because the authority to waive sovereign immunity is vested *solely* in the Legislature. Motion to Dismiss at 4 (emphasis added). Moreover, Defendants hold out to this Court that "at no time has the Legislature, in accordance with Article III, § 27, enacted a waiver of the State's sovereign immunity." Id.

Plaintiff's argument of waiver is rooted in SDCL § 21-32A-1, which reads,

> "To the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented to suit in the same manner that any other party may be sued. The waiver contained in this section and §§ 21-32A-2 and 21-32A-3 is subject to the provisions of § 3-22-17."

SDCL § 21-32A-1.

Plaintiffs point to a Consulting Agreement providing for SDRC to administer and market the EB5 program. Opposition to Defendants' Motion to Dismiss at 5, n.

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4. Plaintiffs contend that this Agreement required SDRC to "purchase at least $3 million of insurance, naming [South Dakota Department of Tourism and State Development] as an additional insured, to cover 'SDRC's obligations to indemnify provided for herein ... .'." Id. Plaintiff's position then, is that the State agencies participated in a "risk sharing pool" and "coverage was afforded thereunder," and the State has thus waived any protections which sovereign immunity might have otherwise provided. Id.

However, this Court looks to *High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, in which the South Dakota Supreme Court addressed the issue of whether the purchase of liability insurance constitutes a waiver of immunity. The Supreme Court declined to rule that the purchase of liability insurance constituted a waiver of governmental immunity. *High-Grade Oil Co., Inc.* at 739. The Court first found that there was no statutory authority for the departments or agencies to purchase the policies. *Id.* Similarly, in the current case, the Plaintiffs have not directed this Court to anything other than a Consulting Agreement which allowed for the purchase of insurance. The *High-Grade* Court went on to hold that neither of the agencies that purchased the insurance had "constitutional or statutory authority to waive the governmental immunity by purchasing liability coverage." *Id.* The Court goes on to hold that it is "*only the legislature*, expressing the will of the sovereign people, that is authorized to make this decision. No state official or board can usurp that authority." *Id.* (emphasis added).

In the case before this Court, there has been no indication or documentation that shows that the legislature has waived sovereign immunity. This Court, in accordance with South Dakota case law, declines to hold that purchase of insurance by SDRC constitutes waiver under the law.

B. Was the State engaged in a commercial enterprise, which would bar them from asserting sovereign immunity?

Defendants contend that the State is shielded by sovereign immunity, regardless of an issue of "commercial enterprise", because the "proprietary/commercial function is not applicable to the State of South Dakota." Motion to Dismiss at 4, n. 4 (citing *High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 738 (S.D. 1980). Their argument continues,

> "'The functions of a [non-state] public entity which are proprietary or commercial, as opposed to governmental, are not shielded by sovereign immunity.' *Aune v. B-Y Water Dist.*, 464 N.W.2d 1, 3 (S.D. 1990). As to the State itself, 'there is no distinction between governmental and proprietary functions.' *High-Grade Oil Co., Inc.*, [*supra*, at 738]. Therefore, the inquiry into whether a function is

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> governmental or proprietary is only relevant in the case of non-state public entities like municipalities, which participate in the State's sovereign immunity only, 'to a lesser extent.' *Aune v. B-Y Water Dist.*, 464 N.W.2d at 5."

Id.

Plaintiffs, in their response, cite to *Aune v. B-Y Water Dist., supra*, "where a state creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily subject to suit, the same as any private corporation organized for the same purpose." *Aune* at 3. However, Defendants point out that *Aune*, is distinguishable from the current case. "In *Aune*, the S.D. Supreme Court held that SDCL 46A-9-3 provided the direct manner in which a water user district (i.e. B-Y Water District) could be sued. The Court determined that B-Y was a business enterprise with a commercial purpose, and that sovereign immunity does not extend to business enterprises with a commercial purpose." State's Response to Plaintiff's Opposition to Motion to Dismiss at 3-4. This Court agrees with the Defendant's position that a water district, such as that in *Aune*, is much more like a municipality, and far removed from the sovereign immunity that the State enjoys. Id. at 4. Also, in *Aune*, SDCL 46A-9-3 was a specific *legislative* enactment which would constitute a waiver of sovereign immunity. As discussed above, no such enactment exists in the current case.

Both parties also point this Court to two cases involving the South Dakota State Cement Plant: *Arcon Const. Co., Inc. v. South Dakota Cement Plant*, 349 N.W.2d 407, and *L.R. Foy Const. Co., Inc. v. South Dakota State Cement Plant Com'n*. The Supreme Court in both cases found that sovereign immunity had been waived, however, these cases are factually distinguishable from the current case. In *Arcon*, the South Dakota Supreme Court first found that the cement plant is an arm of the state under Article XIII, § 10 of the South Dakota Constitution, which declares that the manufacture, distribution, and sale of cement and cement products is a function of state government, thus it retains sovereign status. *Arcon* at 410. However, the Court goes on to hold that "when the legislature enacted the UCC it expressly waived sovereign immunity for the cement plant whenever the cement plant enters into contracts for the sale of goods." *Id.* In the current case there is no UCC claim which can apply, thus making the *Arcon* case unrelated to the facts before this Court.

Plaintiff also cited *L.R. Foy Const.*, stating that, "[w]here the State elects to operate a business enterprise solely for commercial purposes, it ought not be permitted to avoid its legal responsibility by invoking the doctrine of governmental immunity. [It] should be amenable to suit for mismanagement, bad faith actions and negligent conduct, just as the private sector is made responsible." *L.R. Foy Const.* at 346. Again, this Court finds that the *L.R. Foy Const.* case is not analogous to facts found in the case before it. In *L.R. Foy Const.*, the South Dakota

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Supreme Court again held that the commercial tort claims involved were related to obligations and remedies within the intent and meaning of the UCC, which they previously found to be an express waiver of sovereign immunity by the Legislature.

There is no foundation by which the Plaintiffs have shown that the State was engaged in any sort of similar commercial activity as that contemplated by the State Supreme Court in the cement plant cases where the activity was an ongoing, contractual, obligation to sell cement. Certainly there are no activities that would fall under the purview of the UCC. Further, there have been no constitutional enactments regarding the EB5 Program as a commercial enterprise engaged in by the State.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss is GRANTED.

Honorable John Brown
Presiding Sixth Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.:	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

LP6 CLAIMANTS LLC,	)	
	)	
Plaintiff,	)	
	)	CIV. NO. 15-312
v.	)	
	)	
SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, THE STATE OF SOUTH DAKOTA, SDRC INC., SD Investment Fund LLC 6, and JOOP BOLLEN,	)	AMENDED COMPLAINT
	)	
Defendants.	)	

COMES NOW Plaintiff, LP6 Claimants LLC ("Plaintiff or Claimants LLC"), by and through its undersigned counsel and for its cause of action against Defendants states and alleges as follows.

NATURE OF THIS ACTION

1. Plaintiff brings this action to redress the fraud committed by Defendants by which Plaintiff's members were unlawfully solicited to invest in and provide financing for a project undertaken by Northern Beef Packers Limited Partnership ("NBP") to build, develop and operate a beef processing plant in South Dakota (the "Project"). Defendants induced the members of Plaintiff to pay $530,000 dollars each to invest and become limited partners in SDIF Limited Partnership 6 ("LP 6"), a South Dakota limited partnership, which Defendants created and

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promoted as an investment vehicle for the Project, and to take advantage of a federal program known as the immigrant investment program pursuant to 8 U.S.C. § 1155(b)(5) (the "EB-5 Program") which facilitates foreign investment in certain communities in the United States for projects that will significantly benefit those communities by creating needed jobs. Under the program, in exchange for making approved investments, the foreign investors and their immediate families are granted conditional lawful permanent resident status, which can become unconditional after two years.

2. Defendants solicited the investment in the Project through written materials, including Confidential Offering Memoranda (the "Offering Memo" [Exhibit 1 hereto]) which resulted in investments in LP6. The Offering Memo contained material misrepresentations and omissions upon which the investors relied, which resulted in the aggregate loss of more than $18 million in investments.

PARTIES

3. Claimants LLC is a New York limited liability company created and organized to pursue claims of its members against Defendants. Each member of Claimants LLC, identified on Exhibit 2 hereto, is a Chinese national [residing in China], each made an investment in LP6, and each has assigned his/her claim(s) against Defendants to Claimants LLC.

4. Defendant South Dakota Department of Tourism and State Development (the "Department") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. The Department was at all relevant times responsible to oversee EB 5 Program investments in the "regional center" that was designated by the U.S. Customs and Immigration Service for purposes of the EB 5 Program in

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South Dakota.

5. Defendant South Dakota Governor's Office of Economic Development ("GOED") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. GOED is the successor of the Department, and succeeds and assumes the rights and obligations of the Department in any contract or other transaction.

6. Defendant South Dakota Department of Tourism ("DOT") is a South Dakota State Agency with its principal place of business in Hughes County. It is a commercial operation of the State of South Dakota. DOT is the successor of the Department, and succeeds and assumes the rights and obligations of the Department in any contract or other transaction.

7. Defendant State of South Dakota controls and administers the Department, GOED, and DOT, and is responsible for their actions. The State of South Dakota, the Department, GOED, and DOT are hereinafter collectively referred to as "South Dakota."

8. Defendant SDRC Inc. ("SDRC") was engaged by South Dakota in 2009 to run and promote South Dakota's EB 5 Program pursuant to a Consulting Contract dated December 22, 2009 (the "Consulting Contract").

9. Defendant Joop Bollen ("Bollen") was the sole owner of SDRC and was a former employee of the State of South Dakota.

10. Defendant SD Investment Fund LLC 6 ("GP 6") is a South Dakota limited liability company organized by Bollen, and is the sole General Partner of LP6. Bollen is the sole member of GP 6.

11. At all relevant times, South Dakota and Bollen used SDRC and GP 6 as mere

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instrumentalities to further the conduct alleged herein.

FACTS

The EB-5 Program.

12. Defendants are involved in the business of soliciting and securing investments in EB5 projects in South Dakota. The EB5 program is the result of a federal law that allows foreign investors to obtain lawful permanent resident status for themselves and their families by making qualifying investments in the United States. Under this program, an employment-based preference immigrant visa category was created for immigrants seeking to enter the United States to engage or invest in a commercial enterprise that will benefit the U.S. economy and create jobs per the requirements of the EB-5 Program.

13. The requirements for the program include a minimum $1 million investment, which is reduced to $500,000 if it is made for a project within a designated regional center. The South Dakota International Business Institute Dairy Economic Development Region ("SD Regional Center") is an approved regional center.

14. Upon the making of a qualified investment, lawful permanent resident status may be granted to the investor, his spouse and children less than 21 years of age. The lawful permanent resident status is initially provided on a conditional basis; the investor and his family can file an 1-829 petition to have the conditional status removed after two years by showing that the investor and the commercial enterprise have complied with the requirements of the EB-5 Program.

The Solicitation

15. South Dakota is empowered and directed to administer the EB5 Program in South Dakota and enter into ventures for that purpose. It acts and acted at all relevant times in a

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commercial capacity to increase investment in South Dakota.

16. Pursuant to the Consulting Contract, South Dakota was responsible (a) for approving all EB 5 Program projects; (b) for rejecting projects for lack of feasibility or financial soundness, and (c) to ensure that the Project was not marketed if not financially sound.

17. South Dakota acted in concert with the other Defendants at all relevant times to secure investments in EB 5 Program entities, including NBP.

18. SDRC held itself out to the public, and more particularly to potential EB 5 Program investors, as a promoter and manager of the SD Regional Center for and on behalf of South Dakota, and as the general partner of the investment vehicles for EB5 programs (such as LP6) so that it could protect the interests of investors, that is, creation of jobs sufficient to secure permanent residency and repayment of the investment.

19. With the knowledge and approval of South Dakota, SDRC and Bollen solicited investments into LP6 through the Offering Memo.

20. Each investor paid $530,000 ($30,000 of which was for fees and expenses) to acquire a Unit Certificate representing a limited partnership interest in LP6. Plaintiff's members made such investments commencing in May 2010.

21. LP6 loaned the invested money to NBP for completion and operation of the Project.

Defendants' Misrepresentations and Failure To Disclose Material Risks And Facts.

22. Defendants defrauded the investors in LP6 through material misrepresentations and omissions of material facts in the Offering Memorandum which Defendants knew were false or were made recklessly, including that:

- the NBP facility was substantially complete and that the funding to be provided by LP6 would allow for the completion of remaining construction and the operation of the facility;

- the Project was competitive and had a sustainable business model;

- the Project was sufficiently capitalized to generate revenue from operations commencing upon the investment(s) being made;

- the Project would meet or exceed the minimum number of jobs required under the EB5 Program;

- Defendants had carefully reviewed the financial information of the Project and recommended it as sufficiently sound to generate jobs and repay the loan from the investors;

- the Project had a competitive advantage over other major competitors in the beef packing industry;

- the investors were protected because the loan being made to the Project would be secured by security interests on equipment, a corporate guarantee, and a mortgage on the property;

- NBP will be locally owned and led by recognized beef industry experts.

23. Each of the representations set forth above was materially false in that:

- the Project did not have adequate financing to achieve sufficient revenue to create the required jobs or repay loans or support any refinancing;

- given the poor financial condition of the Project the investors could not be adequately secured;

- the Project did not have any favorable or competitive position and did not have

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sufficient capital to commence operations and generate revenue;

- the Project was owned by foreign investors and not run by beef industry experts; and

- that the project was already plagued by years of delays and was already in need of additional financing.

24. In addition, the Offering Memo contained material omissions, including that:

- NBP had been unable to sell tax increment financing bonds to finance the Project;

- the Project had experienced financial difficulties and the initial foreign EB 5 investors had ousted NBP's management and had become the managers and owners of NBP;

- additional investments or loans of at least $30 million would be required for the Project to begin operations;

- NBP had itself acknowledged that loans to the Project were extraordinarily high-risk because the Project was undercapitalized and its assets were not sufficient to repay or secure any loan;

- substantial liens had been filed against the Project;

- NBP was unable to pay, or was delinquent on, property taxes due and owing;

- other EB-5 investors had lost their money in a similar project promoted and administered by Defendants relating to the Veblen East Dairy in South Dakota;

- the Project's business was subject to legally imposed restrictions and obligations that placed it at a disadvantage.

25. The members of Plaintiff relied on the misrepresentations and omissions set forth

above, and purchased limited partnership interests in LP6.

26. As a result of Defendants' fraud set forth above the entire investment was lost.

The Colossal Failure of NBP

27. Even with the infusion of as much as $35,000,000 of EB 5 loans, including the investment made by Plaintiff's members, the Project was not financially sound, construction was not completed in 2010, and the plant was not operational that year as represented.

28. NBP did not begin operations until October 2012.

29. The delay was the result of the Project's need of additional financing, beyond LP6's loan, requiring subordination of LP6's loan, which vitiated the secured position that Defendants had represented would protect the investors.

30. NBP was never profitable.

31. Within eight months of commencement of operations, in April 2013, NBP laid off 108 of its employees because of inadequate financing.

32. In or about July 2013, NBP filed for bankruptcy protection.

33. In the bankruptcy proceeding, NBP disclosed that its failure was the result of insufficient capital and financing, and that the Project was not financially sound, as Defendants had represented.

34. The bankruptcy concluded with the sale of the NBP plant to one of its priority creditors, and the plant has yet to re-open.

35. Plaintiff's members lost their entire $18,550,000 investment.

COUNT I

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(FRAUD)

36. Plaintiff repeats and realleges each and every allegation in paragraphs 1-35 above as if repeated at length herein.

37. Defendants made the above representations of fact and omissions knowing them to be false at the time, or else were reckless in making them.

38. Defendants made those representations and material omissions with the intent to deceive and for the purpose of inducing Plaintiff's members to act upon them.

39. Plaintiff's members relied on the representations and omissions.

40. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000, together with interest thereon.

41. Plaintiff is entitled to recover the losses its members suffered due to Defendants' fraud.

COUNT II

(BREACH OF FIDUCIARY DUTY)

42. Plaintiff repeats and realleges each and every allegation in paragraphs 1-41 above as if repeated at length herein.

43. GP6, as the general partner of LP6, and Bollen, who directly and solely controlled GP6, owed a fiduciary duty of utmost loyalty to the limited partners, including the members of Plaintiff.

44. GP 6 and Bollen breached their fiduciary duty to Plaintiff by (i) failing to disclose the numerous problems with the Project; (ii) failing to properly manage LP6 and the Plaintiffs' members' status as limited partners therein; (iii) placing its interests and the interest of SDRC and Bollen above the interests of the Investors (iv) making the misrepresentations and omissions

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set forth above.

45. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000, together with interest thereon.

46. Plaintiff is entitled to recover the losses its members suffered due to these Defendants' breaches of fiduciary duty.

COUNT III

AIDING AND ABETTING BREACH

47. Plaintiff repeats and realleges each and every allegation in paragraphs 1-46 above as if repeated at length herein.

48. GP6 and Bollen breached their fiduciary duties to Plaintiff's members, as set forth above.

49. South Dakota aided and abetted GP6 and Bollen in such breach by, *inter alia*, permitting them to administer EB5 projects, and the LP6-NBP venture in particular, without proper supervision and approval.

50. South Dakota knew that GP6's and Bollen's conduct *vis-a-vis* the limited partners of LP6 constituted a breach of their fiduciary duties.

51. By reason of the foregoing, Plaintiff's members suffered damages of at least $18,550,000.

COUNT IV

PIERCE THE CORPORATE VEIL

52. Plaintiff repeats and realleges each and every allegation in paragraphs 1-51 above as if repeated at length herein.

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53. At all relevant times, Bollen exerted complete dominion and control over the corporate Defendants, and used those entities as mere instrumentalities to further their improper conduct alleged herein.

54. Upon information and belief, Bollen controls all outstanding shares of stock in SDRC, and he is the sole member of GP 6, Bollen is the sole officer and director of SDRC, and he is the sole member manager of GP 6. Thus, there is a unanimity of control between the two entities and Bollen.

55. Continued recognition of the Defendant entities as separate legal entities would produce injustice and inequitable consequences by allowing Bollen to attempt to avoid personal liability for his wrongful conduct and the wrongful conduct committed by SDRC or GP 6 as mere instrumentalities of Bollen and South Dakota. Making Bollen and South Dakota personally liable for any damages or liability created by SDRC or GP 6 would prevent this injustice and inequitable consequences.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant judgment in favor of Plaintiff as follows:

A. For Plaintiff and against each Defendant, jointly and severally, in the amount of $18,550,000 together with prejudgment interest thereon;

B. For costs and attorneys' fees incurred by Plaintiff in this action; and

C. For such other and further relief as the Court may deem appropriate.

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Dated: December 8, 2015

STEVEN D. SANDVEN LAW OFFICE PC

/s/ Steven D. Sandven

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§27. Suits against the state.

The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.

1-53-3. Purpose of Governor's Office of Economic Development. The Governor's Office of Economic Development shall forge a private-public partnership among state government, local communities, higher education, and the private sector to create jobs that create goods and services for use within the state and for export outside the state, which results in the creation of new wealth.

Source: SL 1987, ch 390 (Ex. Ord. 87-1), § 32; SDCL § 1-33-18; SL 2005, ch 10, § 14; SDCL § 1-52-3.2; SL 2011, ch 1 (Ex. Ord. 11-1), § 56, eff. Apr. 12, 2011.

1-53-4. Functions of Governor's Office of Economic Development. The Governor's Office of Economic Development shall perform the following functions to seek new employment opportunities, strengthen existing employment opportunities, and spawn new and innovative economic development opportunities:

(1) To attract to South Dakota those business enterprises or those subsidiaries or satellite operations that can benefit from our favorable business environment.

(2) To assist in the expansion and diversification of existing businesses.

(3) To encourage and facilitate the initiation of new enterprises and development of new products that respond to identifiable markets.

(4) To establish a viable basis of financing business operations with a substantial venture capital fund, managed effectively, and with the flexibility that will permit application to funding needs of start-up, expansion, and production.

(5) To recognize markets that can be expanded and to discover new markets for agricultural products, manufactured goods, and services.

(6) To promote, by every possible means, all forms of goods and services, agricultural products, processing and packaging to maximize value added before delivery to national or international markets.

(7) To coordinate and exploit the capabilities that exist at the several public and private institutions of higher education and to encourage the development of new processes and technology through expanded programs of research.

(8) To take full advantage of the associations, the public and private organizations, the financial institutions and the governmental entities that exist at the local or community level in implementing programs and in accomplishing specific functions or tasks.

(9) To respond to opportunities that may develop and to meet such other responsibilities as may be assigned by executive or legislative direction.

Source: SL 1987, ch 390 (Ex. Ord. 87-1), § 33; SDCL § 1-33-19; SL 2005, ch 10, § 15; SDCL § 1-52-3.3; SL 2011, ch 1 (Ex. Ord. 11-1), § 56, eff. Apr. 12, 2011.

15-6-12(b). Manner of presenting defenses and objections. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Insufficiency of process;

(4) Insufficiency of service of process;

(5) Failure to state a claim upon which relief can be granted;

(6) Failure to join a party under § 15-6-19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

Source: SDC 1939 & Supp 1960, § 33.1002; SD RCP, Rule 12 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; as amended by Sup. Ct. Order No. 2, March 31, 1969, effective July 1, 1969; SL 2006, ch 285 (Supreme Court Rule 06-11), eff. July 1, 2006.

47-31B-102. Definitions. In this chapter, unless the context otherwise requires:

(1) "Director," the director of insurance;

(2) "Agent," an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. But a partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by rule adopted or order issued under this chapter;

(3) "Bank,":

(A) A banking institution organized under the laws of the United States;

(B) A member bank of the Federal Reserve System;

(C) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the comptroller of the currency pursuant to Section 1 of Public Law 87-722 (12 U.S.C. § 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this chapter; and

(D) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (A), (B), or (C);

(4) "Broker-dealer," a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(A) An agent;

(B) An issuer;

(C) A bank or savings institution if its activities as broker-dealer are limited to those specified in subsection 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(4));

(D) An international banking institution; or

(E) A person excluded by rule adopted or order issued under this chapter;

(5) "Depository institution,":

(A) A bank; or

(B) A savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law. The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A Morris Plan bank; or

(iii) An industrial loan company;

(6) "Federal covered investment adviser," a person registered under the Investment Advisers Act of 1940;

(7) "Federal covered security," a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933 (15 U.S.C. § 77r(b)) or rules or regulations adopted pursuant to that provision;

(8) "Filing," the receipt under this chapter of a record by the director or a designee of the director;

(9) "Fraud," "deceit," and " defraud," are not limited to common law deceit;

(10) "Guaranteed," guaranteed as to payment of all principal and all interest;

(11) "Institutional investor," any of the following, whether acting for itself or for others in a fiduciary capacity:

(A) A depository institution or international banking institution;

(B) An insurance company;

(C) A separate account of an insurance company;

(D) An investment company as defined in the Investment Company Act of 1940;

(E) A broker-dealer registered under the Securities Exchange Act of 1934;

(F) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from

registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(G) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(H) A trust, if it has total assets in excess of ten million dollars, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (F) or (G), regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(I) An organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars;

(J) A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. § 681(c)) with total assets in excess of ten million dollars;

(K) A private business development company as defined in Section 202(a) (22) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(22)) with total assets in excess of ten million dollars;

(L) A federal covered investment adviser acting for its own account;

(M) A qualified institutional buyer as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);

(N) A major United State institutional investor as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);

(O) Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars not organized for the specific purpose of evading this chapter; or

(P) Any other person specified by rule adopted or order issued under this chapter;

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(12) "Insurance company," a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state;

(13) "Insured," insured as to payment of all principal and all interest;

(14) "International banking institution," an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933;

(15) "Investment adviser," a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(A) An investment adviser representative;

(B) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(C) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(D) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(E) A federal covered investment adviser;

(F) A bank or savings institution;

(G) Any other person that is excluded by the Investment Advisers Act of 1940 from the definition of investment adviser; or

(H) Any other person excluded by rule adopted or order issued under this chapter;

(16) "Investment adviser representative," an individual employed by or associated with an investment adviser or federal covered investment adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as

providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(A) Performs only clerical or ministerial acts;

(B) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(C) Is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in this state as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3a) and is:

(i) An investment adviser representative as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-3a); or

(ii) Not a supervised person as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(25)); or

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(D) Is excluded by rule adopted or order issued under this chapter;

(17) "Issuer," a person that issues or proposes to issue a security, subject to the following:

(A) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;

(B) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate;

(C) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty is the owner of an interest in the lease or in payments out of production under a lease, right, or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale;

(18) "Nonissuer transaction" or "nonissuer distribution," a transaction or distribution not directly or indirectly for the benefit of the issuer;

(19) "Offer to purchase," an attempt or offer to obtain, or solicitation of an offer to sell, a security or interest in a security for value. The term does not include a tender offer that is subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(d));

(20) "Person," an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity;

(21) "Place of business," of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(A) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(B) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients;

(22) "Predecessor act," chapter 47-31A;

(23) "Price amendment," the amendment to a registration statement filed under the Securities Act of 1933 or, if an amendment is not filed, the prospectus or prospectus supplement filed under the Securities Act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price;

(24) "Principal place of business," of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser;

(25) "Record," except in the phrases "of record," "official record," and "public record," information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(26) "Sale," includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value, and offer to sell includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. Both terms include:

(A) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

(B) A gift of assessable stock involving an offer and sale; and

(C) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security;

(27) "Securities and Exchange Commission," the United States Securities and Exchange Commission;

(28) "Security," a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a security; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:

(A) Includes both a certificated and an uncertificated security;

(B) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or other specified period;

(C) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974;

(D) Includes as an investment contract an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a common enterprise means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(E) Includes as an investment contract, among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement or similar agreement;

(29) "Self-regulatory organization," a national securities exchange registered under the Securities Exchange Act of 1934, a national securities association of broker-dealers registered under the Securities Exchange Act of 1934, a clearing agency registered under the Securities Exchange Act of 1934, or the Municipal Securities Rule-making Board established under the Securities Exchange Act of 1934;

(30) "Sign," with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach or logically associate with the record an electronic symbol, sound, or process;

(31) "State," a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Source: SL 2004, ch 278, § 2; SL 2018, ch 278, § 4.

47-31B-509. Civil liability. (a) Securities Litigation Uniform Standards Act. Enforcement of civil liability under this section is subject to the Securities Litigation Uniform Standards Act of 1998.

(b) Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of § 47-31B-301 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at Category D, § 54-3-16 from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at Category D § 54-3-16 from the date of the purchase, costs, and reasonable attorneys' fees determined by the court.

(c) Liability of purchaser to seller. A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of the purchase price, or for actual damages as provided in paragraph (3).

(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph (3).

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest at Category D § 54-3-16 from the date of the sale of the security, costs, and reasonable attorneys' fees determined by the court.

(d) Liability of unregistered broker-dealer and agent. A person acting as a broker-dealer or agent that sells or buys a security in violation of § 47-31B-401(a), 47-31B-402(a), or 47-31B-506 is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3), or, if a seller, for a remedy as specified in subsections (c)(1) through (3).

(e) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of § 47-31B-403(a), 47-31B-404(a), or 47-31B-506 is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest at Category D § 54-3-16 from the date of payment, costs, and reasonable attorneys' fees determined by the court.

(f) Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at Category D § 54-3-16 from the date of the fraudulent conduct, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) Joint and several liability. The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f):

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f), unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f), including an individual having a similar status or

performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f), unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) Right of contribution. A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(i) Survival of cause of action. A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(j) Statute of limitations. A person may not obtain relief:

(1) Under subsection (b) for violation of § 47-31B-301, or under subsection (d) or (e), unless the action is instituted within one year after the violation occurred; or

(2) Under subsection (b), other than for violation of § 47-31B-301, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

(k) No enforcement of violative contract. A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or order issued under this chapter, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter, may not base an action on the contract.

(l) No contractual waiver. A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.

(m) Survival of other rights or remedies. The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this section or § 47-31B-411(e).

Source: SL 2004, ch 278, § 37.

CHAPTER 1

EXO 2011-01

EXECUTIVE ORDERS

EXECUTIVE REORGANIZATION ORDER 2011-01

WHEREAS, Article IV, Section 8, of the constitution of the state of South Dakota provides that, "Except as to elected constitutional officers, the Governor may make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the Legislature within five legislative days after it convenes, and shall become effective, and shall have the force of law, within ninety days after submission, unless disapproved by a resolution concurred in by a majority of all the members of either house"; and

WHEREAS, this executive order has been submitted to the 86th Legislative Assembly on the 2nd legislative day, being the 12th day of January, 2011;

IT IS, THEREFORE, BY EXECUTIVE ORDER, directed that the executive branch of state government be reorganized to comply with the following sections of this order.

GENERAL PROVISIONS

Section 1. This executive order shall be known and may be cited as the "Executive Reorganization Order 2011-01".

Section 2. Any agency not enumerated in this order, but established by law within another agency which is transferred to a principal department under this order, shall also be transferred in its current form to the same principal department and its functions shall be allocated between itself and the principal department as they are now allocated between itself and the agency within which it is established.

Section 3. "Agency" as used in this order shall mean any board, authority, commission, department, bureau, division or any other unit or organization of state government.

Section 4. "Function" as used in this order shall mean any authority, power, responsibility, duty or activity of an agency, whether or not specifically provided for by law.

Section 5. Unless otherwise provided by this order, division directors shall be appointed by the head of the department or bureau of which the division is a part, and shall be removable at the pleasure of the department or bureau head, provided, however, that both the appointment and removal of division directors shall be subject to approval by the Governor.

Section 6. It is the intent of this order not to repeal or amend any laws relating to functions performed by an agency, unless the intent is specifically expressed in this order or

Section 52. The Lottery Commission, created by chapter 42-7A and its functions in the former Department of Revenue and Regulation are transferred to the Department of Revenue created by this Executive Reorganization Order. The Secretary of Revenue shall perform the functions of the former Secretary of Revenue and Regulation, relating to the Lottery Commission.

Section 53. The Commission on Gaming, created by chapter 42-7B and its functions in the former Department of Revenue and Regulation are transferred to the Department of Revenue created by this Executive Reorganization Order. The Secretary of Revenue shall perform the functions of the former Secretary of Revenue and Regulation, relating to the Commission on Gaming.

Department of Tourism created

Section 54. There is hereby created a Department of Tourism. The head of the Department of Tourism is the Secretary of Tourism who shall be appointed and serve pursuant to the provisions of the Constitution of the State of South Dakota, Article IV, § 9.

Governor's Office of Economic Development created

Section 55. There is hereby created a Governor's Office of Economic Development within the Department of Executive Management. The head of the Governor's Office of Economic Development is the Commissioner of the Governor's Office of Economic Development who shall be appointed and serve pursuant to the provisions of the Constitution of the State of South Dakota, Article IV, § 9.

Section 56. Pursuant to § 2-16-9, the Code Commission and Code Counsel of the Legislative Research Council are requested to designate a new chapter 1-53, entitled Governor's Office of Economic Development and that § 1-52-3.2, 1-52-3.3, 1-52-3.4, 1-52-3.5, 1-52-13 be transferred to that chapter.

Department of Tourism and State Development abolished. Functions of former Department of Tourism and State Development transferred to other Departments

Section 57. The Department of Tourism and State Development is hereby abolished. The

position of Secretary of the Department of Tourism and State Development is hereby abolished.

Section 58. The Governor's Office of Economic Development referenced in chapter 1-52 and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the Governor's Office of Economic Development.

Section 59. The Office of Research Commerce and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the Office of Research Commerce.

Section 60. The Economic Development Finance Authority created by Chapter 1-16B and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic

Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the Economic Development Finance Authority.

Section 61. The Board of Economic Development created by Chapter 1-16G and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the Board of Economic Development.

Section 62. The South Dakota Housing Development Authority created by chapter 11-11, and its functions in the former Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of the Department of Tourism and State Development, relating to the South Dakota Housing Development Authority.

Section 63. The South Dakota Science and Technology Authority created by chapter 1-16H and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the South Dakota Science and Technology Authority.

Section 64. The South Dakota Energy Infrastructure Authority created by chapter 1-16I and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to

the activities of the South Dakota Energy Infrastructure Authority.

Section 65. The South Dakota Ellsworth Development Authority created by chapter 1-16J and its functions in the Department of Tourism and State Development are transferred to the Governor's Office of Economic Development created by this Executive Reorganization Order. The Commissioner of the Governor's Office of Economic Development shall perform the functions of the former Secretary of Department of Tourism and State Development relating to the activities of the South Dakota Ellsworth Development Authority.

Section 66. The Office of Tourism and its functions in the former Department of Tourism and State Development are transferred to the Department of Tourism created by this Executive Reorganization Order. The Secretary of Tourism shall perform the functions of the former Secretary of Tourism and State Development, relating to the Office of Tourism.

Section 67. The Board of Tourism created by chapter 1-52 and its functions in the former Department of Tourism and State Development are transferred to the Department of Tourism created by this Executive Reorganization Order. The Secretary of Tourism shall perform the functions of the former Secretary of Tourism and State Development, relating to the Board of Tourism.

Section 77. The Mental Health Planning and Coordination Advisory Board and its functions in the former Department of Human Services are transferred the Department of Social Services. The Secretary of the Department of Social Services shall perform the functions of the Secretary of the Department of Human Services, relating to the Mental Health Planning and Coordination Advisory Board.

Section 78. The Drug and Alcohol Abuse Advisory Council and its functions in the former Department of Human Services are transferred the Department of Social Services. The Secretary of the Department of Social Services shall perform the functions of the Secretary of the Department of Human Services, relating to the Drug and Alcohol Abuse Advisory Council.

Other Reorganization Provisions

Section 79. The authority of the State Brand Board to employ law enforcement officers pursuant to SDCL 40-18-14 and related functions are transferred to the Office of the Attorney General, Division of Criminal Investigation. The Attorney General of the State of South Dakota shall perform the functions relating to the enforcement of the provisions of chapters 40-19 to 40-22, inclusive, and chapter 40-29.

Section 80. That § 1-4-1 be transferred to chapter 1-54 and amended to read as follows:

1-4-1. The ~~Office~~ Department of Tribal ~~Governmental~~ Relations ~~is hereby established~~

~~to~~ shall aid in securing and coordinating federal, state, and local resources to help solve ~~Indian~~ problems and to serve as an advocate ~~of the Indian~~ for Native American people.

Section 81. That § 1-4-1.1 be repealed.

Section 82. That § 1-4-25 be transferred to chapter 1-54.

Section 83. That § 1-4-26 be transferred to chapter 1-54.

Section 84. That §1-16B-10 be amended to read as follows:

1-16B-10. The ~~secretary of tourism and state development~~ Commissioner of the Governor's Office of Economic Development shall serve as the chief administrative officer and direct and supervise the administration and technical affairs of the authority.

Section 85. That §1-16G-1 be amended to read as follows:

1-16G-1. There is created a Board of Economic Development and the Governor may appoint up to thirteen members to consult with and advise the Governor and the ~~secretary of tourism and state development~~ Commissioner of the Governor's Office of Economic Development in carrying out the functions of the office. The members of the board shall be appointed by the Governor for four-year terms of office so arranged that no more than four members' terms expire in any given year. Not all members may be from the same political party. The Governor shall designate the terms at the time of appointment. Any member appointed to fill a vacancy arising from other than the natural expiration of a term shall serve only the unexpired portion of the term.

Section 86. That §1-16G-24 be amended to read as follows:

1-16G-24. Earnings on the revolving economic development and initiative fund and the value added agriculture subfund may be used for the administrative costs of the Division of Finance of the Governor's Office of Economic Development. Such earnings shall be expended in accordance with the provisions of Title 4 on warrants drawn by the state auditor on vouchers approved by the ~~secretary of tourism and state development~~ Commissioner of the Governor's Office of Economic Development. Eligible expenses may not exceed total interest earnings during the previous fiscal year prior to the deduction of loan losses for the same fiscal year.

Section 87. That §1-16H-38 be amended to read as follows:

1-16H-38. The authority is attached to the ~~Department of Tourism and State~~ Governor's Office of Economic Development for reporting purposes. The authority shall submit such records, information, and reports in the form and at such times as required by the ~~secretary~~ commissioner. However, the authority shall report at least annually.

Section 88. That §1-16I-38 be amended to read as follows:

1-16I-38. The authority is attached to the ~~Department of Tourism and State~~ Governor's Office of Economic Development for reporting purposes. The authority shall submit such records, information, and reports in the form and at such times as required by the ~~secretary~~

commissioner. However, the authority shall report at least annually.

Section 89. That §1-16J-3 be amended to read as follows:

1-16J-3. The authority is attached to the ~~Department of Tourism and State~~ Governor's Office of Economic Development for reporting purposes. The authority shall submit such records, information, and reports in the form and at such times as required by the ~~secretary~~ commissioner of the ~~Department of Tourism and State~~ Governor's Office of Economic Development. However, the authority shall report to the Governor at least annually.

Section 90. That §1-18-1.1 be repealed.

Section 91. Pursuant to § 2-16-9, the Code Commission and Code Counsel of the Legislative Research Council are requested to amend the following sections by deleting "and State Development":

1-18-2; 1-18-2.2; 1-18-3; 1-18-20; 1-18-32.1; 1-18B-1; 1-18C-3; 1-18C-6; 1-19-2.1; 1-19B-8; 1-19-A-2; 1-19C-2.1; 1-20-19; 1-20-20; 1-22-5.1; 1-52-1; 1-52-14; 1-52-17; 5-15-49; 31-2-23; 31-29-62.

Section 92. That §1-22-2.3 be amended to read as follows:

1-22-2.3. The arts council shall continue, with all its functions, in the Department of Tourism ~~and State Development~~. The secretary of the Department of Tourism ~~and State Development~~ shall perform the functions formerly exercised by the former secretary of the Department of ~~Education and Cultural Affairs~~ Tourism and State Development, relating to the arts council.

Section 93. That §1-32-2 be amended to read as follows:

1-32-2. For the purposes of achieving reorganization under the terms of S.D. Const., Art. IV, § 8, the

(1) Office of Tourism;

(2) Board of Tourism;

(3) Office of History;

(4) State Historical Society Board of Trustees;

(5) State Arts Council; and

such other tourism related functions as the Governor shall direct.

The secretary of the Department of Tourism ~~and State Development~~ shall perform the functions of the former secretary of the Department of Tourism and State Development related to tourism.

Section 123. That § 1-52-3 be repealed.

Section 124. That § 1-52-4 be transferred to chapter 1-53 and amended to read as follows:

1-52-4. The Economic Development Finance Authority created by Chapter 1-16B and its functions in the Governor's Office of Economic Development, Department of Executive Management are transferred to the ~~Department of Tourism and State Development created by this Executive Reorganization Order. The secretary of the Department of Tourism and State~~ Governor's Office of Economic Development. The commissioner of the Governor's Office of Economic Development shall perform the functions of the former ~~commissioner of the Governor's Office of Economic~~ secretary of Tourism and State Development relating to the activities of the Economic Development Finance Authority.

Section 125. That § 1-52-5 be transferred to chapter 1-53 and amended to read as follows:

1-52-5. The Board of Economic Development created by Chapter 1-16G and its functions ~~in the Governor's Office of Economic Development, Department of Executive Management~~ are transferred to the ~~Department of Tourism and State Development created by this Executive Reorganization Order. The secretary of the Department of Tourism and State~~ Governor's Office of Economic Development. The commissioner of the Governor's Office of Economic Development shall perform the functions of the former ~~commissioner of the Governor's Office of Economic~~ secretary of the Department of Tourism and State Development relating to the activities of the Board of Economic Development.

Section 126. That § 1-52-6 be repealed.

Section 127. That § 1-52-7 be repealed.

Section 128. That § 1-52-8 be amended to read as follows:

1-52-8. The Cultural Heritage Center~~, Division of Cultural Affairs~~ and its functions ~~in the former Department of Education and Cultural Affairs~~ are transferred to the Department of Tourism ~~and State Development created by this Executive Reorganization Order~~. The secretary of the Department of Tourism ~~and State Development~~ shall perform the functions of the former secretary of the Department of ~~Education and Cultural Affairs~~ Tourism and State Development, relating to the Cultural Heritage Center.

§1153. Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

> (i) the alien is recognized internationally as outstanding in a specific academic area,
>
> (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
>
> (iii) the alien seeks to enter the United States—
>
> (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
>
> (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
>
> (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

> Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

> The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—
>
> > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> >
> > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction

Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date

The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) before the enactment date of this subsection. In the case of a physician for whom an application for a waiver was filed under subsection (b)(2)(B) prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

> Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

> Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

> Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

> (i) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

> Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

> In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

> In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

> Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

> The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

> In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—
>
> (I) is not a targeted employment area, and
>
> (II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

> The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

> The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas

"(A) who are nationals of any of the independent states of the former Soviet Union or the Baltic states; and

"(B) who are scientists or engineers who have expertise in nuclear, chemical, biological or other high technology fields or who are working on nuclear, chemical, biological or other high-technology defense projects, as defined by the Attorney General.

"SEC. 3. WAIVER OF JOB OFFER REQUIREMENT.

"The requirement in section 203(b)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(2)(A)) that an alien's services in the sciences, arts, or business be sought by an employer in the United States shall not apply to any eligible independent states or Baltic scientist who is applying for admission to the United States for permanent residence in accordance with that section.

"SEC. 4. CLASSIFICATION OF INDEPENDENT STATES SCIENTISTS AS HAVING EXCEPTIONAL ABILITY.

"(a) In General.—The Attorney General shall designate a class of eligible independent states and Baltic scientists, based on their level of expertise, as aliens who possess 'exceptional ability in the sciences', for purposes of section 203(b)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(2)(A)), whether or not such scientists possess advanced degrees. A scientist is not eligible for designation under this subsection if the scientist has previously been granted the status of an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

"(b) Regulations.—The Attorney General shall prescribe regulations to carry out subsection (a).

"(c) Limitation.—Not more than 950 eligible independent states and Baltic scientists (excluding spouses and children if accompanying or following to join) within the class designated under subsection (a) may be allotted visas under section 203(b)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(2)(A)).

"(d) Duration of Authority.—The authority under subsection (a) shall be in effect during the following periods:

"(1) The period beginning on the date of the enactment of this Act [Oct. 24, 1992] and ending 4 years after such date.

"(2) The period beginning on the date of the enactment of the Security Assistance Act of 2002 [Sept. 30, 2002] and ending 4 years after such date."

Immigration Program

Pub. L. 102–395, title VI, §610, Oct. 6, 1992, 106 Stat. 1874, as amended by Pub. L. 105–119, title I, §116(a), Nov. 26, 1997, 111 Stat. 2467; Pub. L. 106–396, §402, Oct. 30, 2000, 114 Stat. 1647; Pub. L. 107–273, div. C, title I, §11037(a), Nov. 2, 2002, 116 Stat. 1847; Pub. L. 108–156, §4, Dec. 3, 2003, 117 Stat. 1945; Pub. L. 111–83, title V, §548, Oct. 28, 2009, 123 Stat. 2177; Pub. L. 112–176, §1, Sept. 28, 2012, 126 Stat. 1325, provided that:

"(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

"(b) For purposes of the program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3,000 visas annually until September 30, 2015 to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)] and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], to accompany or follow to join such aliens.

"(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the program described in this section to establish reasonable methodologies for determining the number of jobs created by the program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the program.

"(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the program described in this section. Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence."

[Pub. L. 116–6, div. H, title I, §104, Feb. 15, 2019, 133 Stat. 475, provided that: "Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 [Pub. L. 102–395] (8 U.S.C. 1153 note) [set out above] shall be applied by substituting 'September 30, 2019' for 'September 30, 2015'."]

[Pub. L. 115–141, div. M, title II, §204, Mar. 23, 2018, 132 Stat. 1049, provided that: "Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 [Pub. L. 102–395] (8 U.S.C. 1153 note) [set out above] shall be applied by substituting 'September 30, 2018' for 'September 30, 2015'."]

[Pub. L. 115–31, div. F, title V, §542, May 5, 2017, 131 Stat. 432, provided that: "Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 [Pub. L. 102–395] (8 U.S.C. 1153 note) [set out above] shall be applied by substituting 'September 30, 2017' for 'September 30, 2015'."]

[Pub. L. 114–113, div. F, title V, §575, Dec. 18, 2015, 129 Stat. 2526, provided that: "Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 [Pub. L. 102–395] (8 U.S.C. 1153 note) [set out above] shall be applied by substituting 'September 30, 2016' for the date specified in section 106(3) of the Continuing Appropriations Act, 2016 (Public Law 114–53) [Dec. 11, 2015, which had been substituted as applied by Pub. L. 114–53, div. B, §131, Sept. 30, 2015, 129 Stat. 509]."]

[Pub. L. 110–329, div. A, §144, Sept. 30, 2008, 122 Stat. 3581, as amended by Pub. L. 111–8, div. J, §101, Mar. 11, 2009, 123 Stat. 988, provided that: "The requirement set forth in section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 [Pub. L. 102–395] (8 U.S.C. 1153 note) [set out above] shall continue through September 30, 2009."]

[Pub. L. 107–273, div. C, title I, §11037(b), Nov. 2, 2002, 116 Stat. 1848, provided that: "The amendments made by this section [amending section 610 of Pub. L. 102–395, set out above] shall take effect on the date of the enactment of this Act [Nov. 2, 2002] and shall apply to—

"(1) any proposal for a regional center pending before the Attorney General (whether for an initial decision or on appeal) on or after the date of the enactment of this Act; and

"(2) any of the following petitions, if filed on or after the date of the enactment of this Act:

"(A) A petition under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision) (or any predecessor provision), with respect to status under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)).

"(B) A petition under section 216A(c)(1)(A) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status."]

[Pub. L. 105–119, title I, §116(b), Nov. 26, 1997, 111 Stat. 2467, provided that: "The amendment made by subsection (a)(2) [amending section 610 of Pub. L. 102–395, set out above] shall be deemed to have become effective on October 6, 1992."]

Transition for Spouses and Minor Children of Legalized Aliens

Pub. L. 101–649, title I, §112, Nov. 29, 1990, 104 Stat. 4987, as amended by Pub. L. 102–232, title III, §302(b)(1), Dec. 12, 1991, 105 Stat. 1743, provided that:

"(a) Additional Visa Numbers.—

"(1) In general.—In addition to any immigrant visas otherwise available, immigrant visa numbers shall be available in each of fiscal years 1992, 1993, and 1994 for spouses and children of eligible, legalized aliens (as defined in subsection (c)) in a number equal to 55,000 minus the number (if any) computed under paragraph (2) for the fiscal year.

"(2) Offset.—The number computed under this paragraph for a fiscal year is the number (if any) by which—

"(A) the sum of the number of aliens described in subparagraphs (A) and (B) of section 201(b)(2) of the Immigration and Nationality Act [8 U.S.C. 1151(b)(2)] (or, for fiscal year 1992, section 201(b) of such Act) who were issued immigrant visas or otherwise acquired the status of aliens lawfully admitted to the United States for permanent residence in the previous fiscal year, exceeds

"(B) 239,000.

"(b) Order.—Visa numbers under this section shall be made available in the order in which a petition, in behalf of each such immigrant for classification under section 203(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1153(a)(2)], is filed with the Attorney General under section 204 of such Act [8 U.S.C. 1154].

"(c) Legalized Alien Defined.—In this section, the term 'legalized alien' means an alien lawfully admitted for permanent residence who was provided—

"(1) temporary or permanent residence status under section 210 of the Immigration and Nationality Act [8 U.S.C. 1160],

"(2) temporary or permanent residence status under section 245A of the Immigration and Nationality Act [8 U.S.C. 1255a], or

"(3) permanent residence status under section 202 of the Immigration Reform and Control Act of 1986 [Pub. L. 99–603, set out as a note under section 1255a of this title].

"(d) Definitions.—The definitions in the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] shall apply in the administration of this section."

any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

(June 25, 1948, ch. 646, 62 Stat. 940.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 79 (Mar. 3, 1911, ch. 231, § 36, 36 Stat. 1098).

Changes were made in phraseology.

FEDERAL RULES OF CIVIL PROCEDURE

Attachment or sequestration in federal court after removal, see rule 64, Appendix to this title.

Continuation of section, see note by Advisory Committee under rule 81.

Jury trial in removal actions, see rule 81.

§ 1451. Definitions

For purposes of this chapter—

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia.

(Added Pub. L. 91-358, title I, § 172(d)(1), July 29, 1970, 84 Stat. 591.)

EFFECTIVE DATE

Section effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

§ 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise.

(Added Pub. L. 98-353, title I, § 103(a), July 10, 1984, 98 Stat. 335.)

EFFECTIVE DATE

Section effective July 10, 1984, see section 122(a) of Pub. L. 98-353, set out as a note under section 151 of this title.

[CHAPTER 90—OMITTED]

CODIFICATION

Chapter 90, consisting of sections 1471 to 1482, which was added by Pub. L. 95-598, title II, § 241(a), Nov. 6, 1978, 92 Stat. 2668, and which related to district courts and bankruptcy courts, did not become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

TRANSITION TO NEW COURT SYSTEM

Pub. L. 95-598, title IV, § 409, Nov. 6, 1978, 92 Stat. 2687, as amended by Pub. L. 98-249, § 1(d), Mar. 31, 1984, 98 Stat. 116; Pub. L. 98-271, § 1(d), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98-299, § 1(d), May 25, 1984, 98 Stat. 214; Pub. L. 98-325, § 1(d), June 20, 1984, 98 Stat. 268; Pub. L. 98-353, title I, § 121(d), July 10, 1984, 98 Stat. 346, which provided for transfer to the new court system of cases, and matters and proceedings in cases, under the Bankruptcy Act [former Title 11] pending at the end of Sept. 30, 1983, in the courts of bankruptcy continued under section 404(a) of Pub. L. 95-598, with certain exceptions, and cases and proceedings arising under or related to cases under Title 11 pending at the end of July 9, 1984, and directed that civil actions pending on July 9, 1984, over which a bankruptcy court had jurisdiction on July 9, 1984, not abate, but continuation of such actions not finally determined before Apr. 1, 1985, be removed to a bankruptcy court under this chapter, and that all law books, publications, etc., furnished bankruptcy judges as of July 9, 1984, be transferred to the United States bankruptcy courts under the supervision of the Director of the Administrative Office of the United States Courts, was repealed by Pub. L. 98-353, title I, § 122(a), July 10, 1984, 98 Stat. 343, 346, eff. July 10, 1984.

CHAPTER 91—UNITED STATES CLAIMS COURT

HISTORICAL AND REVISION NOTES

1949 ACT

This section inserts in the analysis of chapter 91 of title 28, U.S.C., item 1505, corresponding to new section 1505.

AMENDMENTS

1984—Pub. L. 98-369, div. A, title VII, § 714(g)(3), July 18, 1984, 98 Stat. 962, added item 1509.

1982—Pub. L. 97-248, title IV, § 402(c)(18)(B), Sept. 3, 1982, 96 Stat. 669, added item 1508.

Pub. L. 97-164, title I, § 133(e)(2)(B), (f), (h), (j)(2), Apr. 2, 1982, 96 Stat. 41, substituted "UNITED STATES CLAIMS COURT" for "COURT OF CLAIMS" in chapter heading, substituted "Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act" for "Penalties imposed against contractors under eight hour law" in item 1499, and struck out items 1504 "Tort Claims" and 1506 "Transfer to cure defect of jurisdiction".

1976—Pub. L. 94-455, title XIII, § 1306(b)(9)(B), Oct. 4, 1976, 90 Stat. 1720, added item 1507.

1960—Pub. L. 86-770, § 2(b), Sept. 13, 1960, 74 Stat. 912, added item 1506.

Pub. L. 86-726, § 4, Sept. 8, 1960, 74 Stat. 856, substituted "Patent and copyright cases" for "Patent cases" in item 1498.

1954—Act Sept. 3, 1954, ch. 1263, § 43, 68 Stat. 1241, inserted "; actions involving Tennessee Valley Authority" in item 1491 and struck out item 1493 "Departmental reference cases".

1949—Act May 24, 1949, ch. 139, § 86, 63 Stat. 102, added item 1505.

RULES OF THE UNITED STATES CLAIMS COURT

See Appendix to this title.

CROSS REFERENCES

District courts, concurrent jurisdiction of actions or claims not exceeding $10,000, see section 1346 of this title.

Organization of Claims Court, see section 171 et seq. of this title.

Procedure in Claims Court, see section 2501 et seq. of this title.

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub. L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub. L. 96-417, title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub. L. 97-164, title I, § 133(a), 96 Stat. 39.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(1) (Mar. 3, 1911, ch. 231; § 145, 36 Stat. 1136).

District courts are given concurrent jurisdiction of certain claims against the United States under section 1346 of this title. (See also reviser's note under that section and section 1621 of this title relating to jurisdiction of the Tax Court.)

The proviso in section 250(1) of title 28, U.S.C., 1940 ed., relating to claims growing out of the Civil War, commonly known as "war claims," and other claims which had been reported adversely before March 3, 1887 by any court, department, or commission authorized to determine them, were omitted as obsolete.

The exception in section 250(1) of title 28, U.S.C., 1940 ed., as to pension claims appears in section 1501 of this title.

Words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action. In any event, the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act, sections 741-752 of title 46, U.S.C., 1940 ed., Shipping, vests exclusive jurisdiction over suits in admiralty against the United States in the district courts. *Sunday & Co. v. U.S.*, 1932, 76 Ct.Cl. 370.

For additional provisions respecting jurisdiction of the court of claims in war contract settlement cases see section 114b of Title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

REFERENCES IN TEXT

Section 10(a)(1) of the Contract Disputes Act of 1978, referred to in subsec. (a)(2), is classified to section 609(a)(1) of Title 41, Public Contracts.

The Tennessee Valley Authority Act of 1933, referred to in subsec. (b), is act May 18, 1933, ch. 32, 48 Stat. 58, as amended, which is classified generally to chapter 12A (§ 831 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 831 of Title 16 and Tables.

AMENDMENTS

1982—Subsec. (a)(1). Pub. L. 97-164 designated first two sentences of existing first undesignated paragraph as subsec. (a)(1) and substituted "United States Claims Court" for "Court of Claims".

Subsec. (a)(2). Pub. L. 97-164 designated third, fourth, and fifth sentences of existing first undesignated paragraph as par. (2) and substituted "The Claims Court" for "The Court of Claims" and "arising under section 10(a)(1) of the Contract Disputes Act of 1978" for "arising under the Contract Disputes Act of 1978".

Subsec. (a)(3). Pub. L. 97-164 added par. (3).

Subsec. (b). Pub. L. 97-164 designated existing second undesignated paragraph as subsec. (b) and substituted "United States Claims Court" for "Court of Claims", "conduct of, the Tennessee Valley Authority, or" for "actions of, the Tennessee Valley Authority, nor", "Tennessee Valley Authority Act of 1933" for "Tennessee Valley Authority Act of 1933, as amended,", and "actions by or against the Authority" for "suits by or against the Authority".

1980—Pub. L. 96-417 substituted "Court of Claims of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action" for "in suits" in second par.

1978—Pub. L. 95-563 provided that the Court of Claims would have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

1972—Pub. L. 92-415 inserted provisions authorizing the court to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records and to issue such orders to any United States official and to remand appropriate matters to administrative and executive bodies with proper directions.

1970—Pub. L. 91-350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1954—Act Sept. 3, 1954, inserted "; actions involving Tennessee Valley Authority" in section catchline and altered the form of first par. to spell out the general jurisdiction of the Court in paragraph form rather than as clauses of the par.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" near beginning of section, and inserted last par.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96-417, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

EFFECTIVE DATE OF 1972 AMENDMENT

Section 2 of Pub. L. 92-415 provided that: "This Act [amending this section] shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment [Aug. 29, 1972]."

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-350 applicable to claims and civil actions dismissed before or pending on July 23, 1970, if the claim or civil action was based upon a transaction, omission, or breach that occurred not more than six years prior to July 23, 1970, notwithstanding a determination or judgment made prior to July 23, 1970, that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States, see section 2 of Pub. L. 91-350, set out as a note under section 1346 of this title.

RULES OF THE UNITED STATES CLAIMS COURT

See Appendix to this title.

CROSS REFERENCES

Admiralty suits against United States, jurisdiction of district courts, see sections 741 et seq. and 781 et seq. of Title 46, Appendix, Shipping.

Costs, where United States is party, see section 2412 of this title.

District courts, concurrent jurisdiction of actions or claims not exceeding $10,000, see section 1346 of this title.

Limitation of actions, see section 2501 of this title.

Procedure in Claims Court, see section 2501 et seq. of this title.

Railroads, government-aided, action to recover freight withheld, see section 87 of Title 45, Railroads.

Tax Court jurisdiction, see section 7441 et seq. of Title 26, Internal Revenue Code.

Tennessee Valley Authority, use of patents by, see section 831r of Title 16, Conservation.

War contracts, jurisdiction and procedure to enforce termination claim, see sections 113, 114 of Title 41, Public Contracts.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2409a of this title; title 12 section 216b; title 20 section 1132f; title 25 section 1300i-11; title 41 sections 114, 602; title 42 section 4654; title 45 section 1018; title 46 App. section 1242; title 47 section 606.

§ 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Claims Court for a report in conformity with section 2509 of this title.

(June 25, 1948, ch. 646, 62 Stat. 941; Oct. 15, 1966, Pub. L. 89-681, § 1, 80 Stat. 958; Apr. 2, 1982, Pub. L. 97-164, title I, § 133(b), 96 Stat. 40.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 257 (Mar. 3, 1911, ch. 231, § 151, 36 Stat. 1138).

This section contains only the jurisdictional provision of section 257 of title 28, U.S.C., 1940 ed. The procedural provisions are incorporated in section 2509 of this title.

Changes were made in phraseology.

AMENDMENTS

1982—Pub. L. 97-164 substituted "chief judge of the United States Claims Court" for "chief commissioner of the Court of Claims".

1966—Pub. L. 89-681 substituted provisions allowing any bill, except a bill for a pension, to be referred by

§1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 109–2, §4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

Amendments

2005—Subsec. (b)(3). Pub. L. 109–2 substituted "(e)" for "(d)".

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–2 applicable to any civil action commenced on or after Feb. 18, 2005, see section 9 of Pub. L. 109–2, set out as a note under section 1332 of this title.

Effective Date

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as a note under section 1602 of this title.

§1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other

international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

LP6 CLAIMANTS LLC,
Plaintiff,

v.

SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM and THE STATE OF SOUTH DAKOTA,
Defendants

and

SDRC, INC., SD INVESTMENT FUND LLC6, and JOOP BOLLEN,

Defendants-Third Party Plaintiffs

v.

HENRY GLOBAL CONSULTING GROUP a/k/a HENRY GLOBAL GROUP, a/k/a HENRYGLOBAL CONSULTING, USA incorporated under the laws of the People's Republic of China

Supreme Court Case No. 29129

Appeal from the Circuit Court, 6th Judicial Circuit
The Hon. John Brown Judge Presiding

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The Notice of Appeal was filed on the 18th day of September, 2019.

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INTRODUCTION

In this appeal from the grant of a motion to dismiss on the pleadings, Appellees ask this Court to determine factual issues in their favor, to wit that they did not engage in commercial activities in connection with their solicitation of investment in the Project[1] (Appellees' Brief, p.7) and did not sell the securities at issue (Appellees' Brief, pp. 12-13), to wit interests in the Project. But the well-pleaded ***factual allegations*** of the AC (as well as the conclusions reasonably drawn therefrom) allege otherwise, including specific factual allegations that:

> "11. At all relevant times, South Dakota and Bollen used SDRC and GP 6 as mere instrumentalities to further the conduct alleged herein.
>
> 12. Defendants are involved in the business of soliciting and securing investments in EB5 projects in South Dakota. ***
>
> 16. Pursuant to the Consulting Contract, South Dakota was responsible (a) for approving all EB 5 Program projects; (b) for rejecting projects for lack of feasibility or financial soundness, and (c) to ensure that the Project was not marketed if not financially sound.
>
> 17. South Dakota acted in concert with the other Defendants at all

[1] Capitalized terms are used herein as defined in Appellant's Brief.

relevant times to secure investments in EB 5 Program entities, including [the Project];.

18. SDRC held itself out to the public, and more particularly to potential EB 5 Program investors, as a promoter and manager of the SD Regional Center for and on behalf of South Dakota ... .19. With the knowledge and approval of South Dakota, SDRC and Bollen solicited investments into LP6 through the Offering Memo."

AC pars. 11, 12, 16-19, AA 0011-0013. It is, of course, well settled that Appellant's factual allegations, and the reasonable conclusions drawn therefrom, must be accepted as true on a pleadings motion[2]. Thus, these allegations establish for purposes of this appeal that Appellees engaged in commercial activities in connection with their solicitation of investment in the Project, and sold securities to Appellant's members. As set forth in Appellant's Brief and below, either Appellees' sale of securities (for which activities the legislature has expressly waived sovereign immunity) or commercial activities giving rise to Appellant's claims (which is a

[2] *E.g. N. Am. Truck & Trailer, Inc. v. M.C.I. Communication Servs., Inc.*, 2008 S.D. 45, 751 N.W.2d 710*; Guthmiller v. Deloitte and Touche, LLP*, 2005 S.D. 77, 699 N.W.2d 493; *Sorensen v. Sommervold*, 2005 S.D. 33, 694 N.W.2d 266.

recognized exception to sovereign immunity), would, by itself, preclude Appellees' reliance on sovereign immunity as a bar to Appellant's claims.

POINT I

THE LEGISLATURE HAS WAIVED SOVEREIGN IMMUNITY FOR CLAIMS BASED ON THE SALE OF SECURITIES

Appellees do not dispute that by enacting the Uniform Securities Act of 2002 (the "Act") the Legislature waived sovereign immunity for claims based on the sale of securities. Nor do Appellees dispute that the sales of interests in the Project to Appellant's members were sales of securities under the Act. *See* Appellant's Brief, Point II.

Appellees try in vain to avoid the effect of this legislative waiver of sovereign immunity, asserting that "[c]laimants have not alleged State ***directly*** offered or sold LP6 securities to investors" (Appellees' Brief, p.22, emphasis added), and that "Claimants' redress under the Act, if any, ultimately lies with SDRC, Inc., not [Appellees]" (*id*, p. 23). These "defenses" ring hollow for at least two reasons. First, Appellees openly admit that they had full control over these activities. "[T]he State of South Dakota is [constitutionally] prohibited from engaging in a business venture ***unless its authority over the project is to be absolute.***" *Id*, p.16 (emphasis

added, citation, internal quotations, omitted). Second, Appellees ignore that the AC expressly alleges that SDRC was nothing more than Appellees' agent, including that:

• the other defendants acted in concert with and as agents for the State (AC pars. 17-18, AA0011);

• investments were solicited through the Offering Memo "[w]ith the knowledge and approval of South Dakota" (AC par. 19);

• Appellees' oversaw all EB5 projects in South Dakota (AC par 16, AA0012);

• Appellees were responsible for rejecting projects which were not feasible or financially sound (*id*); and

• Appellees were responsible for ensuring that investments were not solicited for projects which were not financially sound (*id*).

Appellees' argument that Appellant did not raise the sale of securities issue below and so, however compelling the claim may be, this Court should ignore it (Appellees' Brief, p. 21) is disingenuous to say the least. Appellant's securities argument responds to an argument that Appellees first made in their ***reply brief*** below, to wit that this Court's decisions in *L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 346 (S.D. 1987) and *Aune v. B-Y Water Dist.*, 464 N.W.2d 1, 2-3 (S.D.

1990) are distinguishable because they involved express legislative waivers of sovereign immunity. Appellant had no opportunity to submit a sur-reply brief to counter Appellees' attempt to distinguish *L.R. Foy* and *Aune*, or Appellees' legislative waiver argument.

Appellees have at all times been aware of the sovereign immunity issue in this case, had the opportunity to assert their legislative waiver argument, and even incorrectly represented at oral argument below that no legislative waiver applied. AA00130, Hearing Transcript, p.19. They have not been prejudiced in any way from any claimed delay in raising the legislative waiver of sovereign immunity found in the Act.

Moreover, Appellees are attempting to exalt form over substance. Appellant has at all stages of this proceeding, including in the AC, made clear that its claim against Appellees is based on misrepresentations in the Offering Memo through which Appellees solicited investment in the Project, *i.e*. the sale of securities. It is hornbook law that:

> the nature and character of a pleading are determined from the allegations, and the court is not limited to the plaintiff's theory, but instead must determine if the factual allegations of the

> complaint are adequate to state a cause of action under any legal theory. ... [A] court analyzes a complaint to determine whether it states a particular claim for relief, while the label given the claim in the complaint is not dispositive. Thus, a complaint should not be dismissed when a cause of action may be discerned, no matter how poorly stated.

61A Am. Jur. 2d *Pleading* § 83 (footnotes and citations omitted). All of the elements of a claim for violation of the Act are set forth in the AC and state a cognizable claim, even if inartfully pleaded. To the extent that a legislative waiver is required to overcome sovereign immunity it exists here, and because the case involves the sale of securities, the Act was implicated from the very outset of this case.

Regardless, it is not uncommon for this Court to consider arguments that were not raised below in the interests of justice. "Generally, this Court will not address arguments not raised below. However, this rule is procedural and we have discretion to ignore the rule when faced with a compelling case." *In re J.D.M.C.*, 2007 S.D. 97, ¶ 27, 739 N.W.2d 796, 805 (addressing issue that was not raised below). *Accord Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 79, 915 N.W.2d 707, 728 (addressing issue not raised below, holding that "the requirement to [raise an issue below] is not jurisdictional; it is procedural. As a procedural rule, waiver is not necessarily

automatic. *** Therefore, although Lagdid not file a notice of review and that failure would ordinarily result in a waiver of the right to obtain review, no such waiver exists under the circumstances of this case.") (citations omitted); *Erickson v. Dep't of Pub. Safety*, 2017 S.D. 75, 904 N.W.2d 352, 356 (hearing issue not raised below and holding that "[o]ur rules foreclosing review of issues not raised below are only prudential rules of appellate practice that are designed to ensure fair play in litigation, to narrow issues, and to generate the best possible advocacy before deciding a new issue of law.")

There could hardly be a more compelling case to hear an issue than here, where Appellees are seeking to bar a claim on the basis of a sovereign immunity defense that the Legislature has expressly waived. Even if Appellees had raised their legislative waiver argument earlier than in their reply papers and Appellant had not raised the sale of securities issue below, this Court should nevertheless consider the issue given the equities and substantive rights involved. Appellees have no substantive answer to the Act's express waiver of sovereign immunity and so are attempting to avoid its effect through a procedural argument. To allow such a ploy to succeed would hardly represent "fair play in litigation." Appellees have suffered no

prejudice from any alleged delay in raising the securities law issue, having argued the issue below and having had a full and fair opportunity to litigate the issue here. Indeed, as this matter comes to this Court on appeal from a pleadings motion, Appellees could have done no more to challenge Appellant's argument (*e.g.* submit evidence or take discovery) no matter when the issue was raised. Thus, it is only fair that Appellant be allowed its day in court on its securities claim.

POINT II

SOVEREIGN IMMUNITY DOES NOT APPLY TO CLAIMS BASED ON APPELLEES' COMMERCIAL ACTIVITIES

This Court has repeatedly followed the general American rule and held that sovereign immunity does not bar claims arising from the sovereign's engagement in commercial activities. *L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 346 (S.D. 1987); *Aune*, *supra*; *Olesen v. Town of Hurley*, 2004 S.D. 136, 25, 691 N.W.2d 324, 330 (2004) concurring). *See* Appellant's Brief, Point I. Appellees' attempts to distinguish this authority and reliance on inapposite cases is unavailing.

For example, Appellees' reliance on *High Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736 (S.D. 1980) in support of their contention that the

commercial enterprise rule does not apply to them is misplaced, as *High Grade* did not involve a commercial enterprise and never discussed the rule. Indeed, this Court expressly held in *L.R. Foy, supra*, 399 N.W.2d at 349, that "[w]e do not believe th[e] finding, that [the South Dakota] Cement Plant [Commission] may be held liable for its commercial torts ... is inconsistent with High-Grade ... ."

Appellees try unsuccessfully to distinguish this Court's holding in *Aune, supra*, 464 N.W.2d at 2-3 that "[w]here a state creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily held subject to suit, the same as any private corporation organized for the same purpose." Citations, internal quotations and brackets, omitted. Appellees' argue that *Aune's* holding is limited to "lower-level public entities, not state agencies ... ." Appellees' Brief, p.10. Appellees simply gloss over this Court's repeated statements (discussed more fully in Appellant's Brief, pp. 16-17) that what was at issue in *Aune* was "***the state's*** sovereign immunity shield." *Aune, supra,* 464 N.W.2d at 4 (emphasis added).

Appellees also argue that their solicitation of investments in the Project was not commercial activity because it had a legitimate

governmental purpose. Appellees' Brief, pp. 11-12. But having a governmental purpose does not preclude application of the commercial enterprise rule. This Court has held that commercial activity does not require that the sole purpose of the activity be commercial to the exclusion of any governmental purpose. "Although a corporation may be public, and not private, because established and controlled by the state for public purposes, it does not follow that such corporation is in effect the state and that the same immunity from liability attaches." *Aune, supra*, 464 N.W.2d at 3.

Thus, sovereign immunity did not apply to the cement plant at issue in *L.R. Foy*, *supra*, and *Arcon Const. Co. v. S. Dakota Cement Plant*, 349 N.W.2d 407 (S.D. 1984) even though it was engaged in "activity for a public purpose"[3] in addition to its commercial activities, nor to the water district in *Aune*, which was engaged in the governmental activity of providing water to South Dakota residents in addition to its commercial activities:

> The important question is how to distinguish between governmental and commercial activity. The test is not whether B-Y was organized or operated for profit. By its very nature a public corporation will seldom, if ever, be established for

[3] *Arcon, supra*, 349 N.W.2d at 410.

> the purpose of generating profits. The better approach is to assess whether the activity is something only the state can accomplish or whether it could be effectively accomplished by a private enterprise.

Aune, supra, 464 N.W.2d at 3. *Accord Wasserstein Perella Emerging Markets Finance, LP. v. The Province of Formosa,* 2000 WL 573231, *9 (S.D.N.Y. 2000) ("[T]he question is not whether the ... government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather the issue is whether the particular actions the ... state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.") There can be no legitimate question (and certainly it cannot be determined otherwise on a pleadings motion) that soliciting investment in the Project is the type of activity which "could be effectively accomplished by a private enterprise"[4], and thus is commercial activity in the truest sense.

Finally, Appellees argue that they could not have engaged in commercial activity in connection with soliciting investment in the Project

[4] Indeed, Appellees argue that no claim is stated against them because the solicitation here was done entirely by a private enterprise and that ""Claimants' redress under the Act, if any, ultimately lies with SDRC, Inc., not [Appellees]" Appellees' Brief, p.23.

because they were not authorized to engage in commercial activities over which they did not exercise complete control. Appellees' Brief, pp. 16-17. As set forth above, however, the AC alleges that Appellees did exercise complete control over the solicitation of investment in the Property. To the extent that Appellees dispute this factual allegation, such dispute cannot be determined at this stage of the proceedings. Moreover, Appellees' argument that they can be sued based on authorized commercial activities in which they engaged lawfully, but not based on unauthorized commercial activities in which they engaged unlawfully, would turn the law and common sense on their heads. The bottom line is that Appellees engaged in commercial activities giving rise to Appellant's claims, and that such claims are not barred by sovereign immunity.

CONCLUSION

For all the foregoing reasons, as well as those submitted in Appellant's Brief, it is urged that the Dismissal Order be reversed.

Respectfully submitted

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I mailed by first class United States mail, postage prepaid, two copies of the foregoing document to which this certificate is attached to:

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CERTIFICATE OF COMPLIANCE WITH SDCL 15-26A-66

I hereby certify that the foregoing brief complies with the type-volume limitation of SDCL 15-26A-66(B)(2). The brief contains a proportional-spaced typeface in 14 point Times New Roman font, and a Microsoft 2010 Word Count of 2,991 words.

CERTIFICATE OF MAILING

I hereby certify that I mailed by first class United States mail, postage prepaid, the original and 2 copies of the foregoing Reply Brief of Plaintiff-Appellant to which this certificate is attached to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501-5070 on the 18th day of February, 2020.

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