

STATE OF SOUTH DAKOTA )  
 )SS:  
SUPREME COURT )

ORIGINAL

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

JUL 28 2017

*Mig A. Johnson-Ley*  
Clerk

LP6 CLAIMANTS, LLC,

Plaintiff-Petitioner

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,

Civ. No. 15-312

#28339

PETITION FOR  
LEAVE TO APPEAL  
INTERMEDIATE  
ORDER

Defendants-Respondents

and

SDRC, INC., SD INVESTMENT FUND LLC6, and JOOP BOLLEN,

Defendants.

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COMES NOW LP6 Claimants, LLC ("Claimants"), by its attorneys Steven D. Sandven Law Office PC, and petitions this Court for an Order, pursuant to SDCL Section 15-26A-3(6), granting Claimants the right to appeal to this Court from the intermediate Memorandum Decision and Order of the Sixth Circuit Court, both dated July 18, 2017 (the "Decision", collectively annexed as Exhibit A), which granted the motion of respondents 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 referred to herein as the "State") to dismiss Claimants' amended complaint (the "Complaint", annexed as Exhibit B) as against them on the grounds of sovereign immunity.

In support of its request, Claimants states as follows:

1. This case involves the defendants' fraudulent inducement of Claimants' members to invest in the Northern Beef Packers project of the EB5 program. EB5 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, including the area of South Dakota where a beef processing plant was located. As set forth in the Complaint, Claimants' members were fraudulently induced to invest over \$500,000 each (collectively over \$18 million) in this foredoomed project, which was overseen by and had the imprimatur of the State. *See* Complaint.

2. As reported in the Dakota Free Press on May 21, 2017:

One of the advantages South Dakota's EB-5 visa investment recruitment efforts enjoyed was that recruiters could tell investors in projects like Northern Beef Packers and the Iberdrola Buffalo Ridge II wind farm that our EB-5 Regional Center could claim the imprimatur of South Dakota state government. South Dakota's EB-5 program wasn't just another private profiteer; it was a reliable public agency, using the official state logo in its offering memoranda. Our EB-5 projects enjoyed loans and guarantees from the state. Foreign investors could be assured that the state government would actively monitor the EB-5 program and keep everything on the up and up. Our EB-5 recruiters could entice investors into Northern Beef Packers by touting the backing of Governor M. Michael Rounds via his overhyped and ill-fated South Dakota Certified Beef program. Governor M. Michael Rounds himself signed a letter to investors on his official stationery, under the state seal, inviting foreigners to invest in our EB-5 projects.<sup>1</sup>

3. Together, the State and defendants Joop Bollen and the entities he controlled, defendants SDRC, Inc. and SDRC Investment Fund LLC<sup>6</sup> (collectively referred to herein as "Bollen"), were in the business of soliciting investments in EB5 projects in South Dakota, and together they induced Claimants' members to invest in the Project through misrepresentations.

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<sup>1</sup> Heidelberg, Cory Allan, "Taking Notes from South Dakota, Chinese Recruiter Uses Trump to Recruit EB-5 Investors".

Thus, at the time Claimants' 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 Claimants' members, but defendants' Offering Memorandum contained numerous affirmative misrepresentations. *See e.g.* Complaint, pars. 22-25. Accordingly, Claimants commenced this action against the State and Bollen.

4. The Decision dismisses Claimants' claims against the State but does not affect Claimants' claims against Bollen. It is therefore intermediate and not appealable as of right. SDCL Section 15-26A-3(6), however, authorizes this Court to allow appeals from any intermediate order "when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action ... ." These criteria are met here. The Decision not only involves a critical question of law (whether the State is shielded by sovereign immunity when sued in connection with its operation of a commercial enterprise), but also effectively determines the action.

5. As a practical fact, defendant Joop Bollen, who pleaded guilty to a felony in connection with his role in EB5 projects (in exchange for the State dropping four other felony counts against him), is likely unable to respond to any judgment against him, as are his companies. Thus, if this Court should deny Claimants the right to appeal the Decision, Claimants will be engaged with Bollen in what are likely to be lengthy proceedings below, with no opportunity to pursue its claims against the State, and thus no opportunity to recover its damages, until a final judgment is ultimately rendered against Bollen. Claimants would then appeal the dismissal of its claims against the State. Should such an appeal succeed, the State would then be back in the case, and engaging in discovery and other proceedings duplicating what Claimants had already completed with Bollen. Principles of judicial economy, and plain common sense,

thus dictate that Claimants' appeal be heard now, and not at the end of what may be lengthy proceedings with Bollen.

6. Claimants submit that its appeal is likely to succeed. The Complaint alleges the State's liability based on its actions in connection with its supervision, promotion, and solicitation of investors for, the EB5 beef processing plant. *E.g.* Complaint, pars. 1, 4-7, 12, 15-17. The Decision dismissing Claimants' claims against the State turns on the critical question of whether the State of South Dakota waives sovereign immunity when it engages in such a commercial enterprise. As this Court held, "[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. Co. v. S. Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 346 (S.D. 1987)(sovereign immunity did not shield the South Dakota Cement Plant Commission). This Court went on to hold that "[t]he mere fact that such a corporation is an agency of the state does not in and of itself render it immune from suit. It has been held as a matter of policy that such corporations should be subject to suit, especially when embarking upon commercial ventures. \*\*\* 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." 399 N.W.2d at 347 (citations, internal quotations, omitted).

7. The Complaint clearly alleges that the State was engaged in a commercial enterprise, allegations which the Circuit Court was required to accept as true. “For the purposes of deciding a motion to dismiss, this court must treat as true all facts properly pleaded in the complaint.” *L.B. Foy, supra*, 399 N.Y.2d at 342 (citation omitted). Nevertheless, the Circuit Court determined, on a pleadings motion, that “[t]here 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 *L.R. Foy* and similar cases where this Court found sovereign immunity did not bar the claims].” Decision, p.7 (emphasis added). The Circuit Court erred by determining what Claimants had *shown*, rather than what they had pleaded, and not accepting the allegations of the Complaint as true. This is particularly egregious since it was the State’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). Moreover, the Circuit Court’s factual determination is incorrect. The Complaint alleges that the State engaged with Bollen in soliciting investments in commercial projects and overseeing those projects, clearly a commercial enterprise. The Circuit Court’s holding that sovereign immunity can only be waived by an *explicit* legislative enactment would render meaningless this Court’s discussion in *L.R. Foy*, and other cases, of the waiver of sovereign immunity when the State engages in a commercial enterprise.

8. For all the foregoing reasons, Claimants’ application for leave to appeal from the Decision should be granted.

Dated: July 28, 2017

Steven D. Sandven Law Office PC  
Attorney for Claimants

By: /s/ Steven D. Sandven  
Steven D. Sandven, Esq.  
116 East Main St.  
Beresford, SD 57004-1819

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of July, 2017, a true and correct copy of the foregoing Petition for Leave to Appeal Intermediate Order was served by first-class mail, postage prepaid, to the following:

Paul Bachand  
Moreno, Lee & Bachand, P.C.  
206 W. Missouri Avenue  
Pierre SD 57501-1174

Robert L. Morris  
Special Assistant Attorney General  
P.O. Box 370  
Belle Fourche SD 57717

Edward Hruska  
Moreno, Lee & Bachand, P.C.  
206 W. Missouri Avenue  
Pierre SD 57501-1174

Nichole J. Mohning  
Cutler & Donahoe  
100 North Phillips Avenue  
9<sup>th</sup> Floor  
Sioux Falls SD 57104

Julie Dvorak  
Siegel Barnett & Schutz LLP  
400 Capitol Building  
415 South Main Street  
Aberdeen SD 57401

Reed Rasmussen  
Siegel Barnett & Schutz LLP  
400 Capitol Building  
415 South Main Street  
Aberdeen SD 57401

Jeffrey Sveen  
Siegel Barnett & Schutz LLP  
400 Capitol Building  
415 South Main Street  
Aberdeen SD 57401

July 28, 2017

STEVEN D. SANDVEN, Law Office PC

By: /s/ Steven D. Sandven

Steven D. Sandven  
116 East Main Street  
Beresford SD 57004-1819  
(605) 763-2015  
[ssandvenlaw@aol.com](mailto:ssandvenlaw@aol.com)

## **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 12 point Times New Roman font, and a Microsoft 2010 Word Count of 1758 words.

## **CERTIFICATE OF MAILING**

I hereby certify that I mailed by first class United States mail, postage prepaid, the original and 5 copies of the foregoing Petition for Leave to Appeal Intermediate Order to which this certificate is attached, to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota, 57501-5070, on the 28<sup>th</sup> of July, 2017.

July 28, 2017

By:           /s/ Steven D. Sandven            
Steven D. Sandven  
116 East Main Street  
Beresford SD 57004-1819  
(605) 763-2015  
ssandvenlaw@aol.com