24804

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

NO. 24804



STATE OF SOUTH DAKOTA,

Plaintiff-Appellant,

v.

GRAND RIVER ENTERPRISES, INC., an alien corporation,

Defendant-Appellee,

STATE OF SOUTH DAKOTA,

Plaintiff-Appellant,

v.

GRAND RIVER ENTERPRISES, INC., a/k/a GRAND RIVER ENTERPRISES SIX NATION LTD., an alien corporation,

Defendant-Appellee,

STATE OF SOUTH DAKOTA,

Plaintiff-Appellant,

v.

GRAND RIVER ENTERPRISES, INC., a/k/a GRAND RIVER ENTERPRISES SIX NATIONS, LTD., an alien corporation,

Defendant-Appellee.

24804

ON APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE LORI S. WILBUR
PRESIDING CIRCUIT COURT JUDGE

# APPELLEE'S BRIEF

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## JURISDICTIONAL STATEMENT

On January 17, 2008, the circuit court vacated and dismissed the Plaintiff-Appellant, State of South Dakota's three default judgments against Defendant-Appellee, Grand River Enterprises, Inc. a/k/a Grand River Enterprises Six Nations, Ltd. ("Grand River"). On February 12, 2008, the State filed its notice of appeal as of right. This Court has jurisdiction pursuant to SDCL 15-26A-3 (2008).[1]

## STATEMENT OF LEGAL ISSUES

**I. Whether the circuit court correctly concluded that it lacked personal jurisdiction over Grand River.**

The circuit court determined that Grand River did not purposefully avail itself of the South Dakota market and due process precluded the exercise of jurisdiction.

*Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987)

*Frankenfeld v. Crompton Corp.*, 2005 SD 55, 697 N.W.2d 378

*Bridgeport Music, Inc. v. Still N the Water Pub'g Co.*, 327 F.3d 472 (6th Cir. 2003)

*Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994)

SDCL 15-7-2 (A25)[2]

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[1] All references to SDCL (South Dakota Codified Laws) are to the 2008 version or a substantively identical predecessor version unless otherwise noted.

[2] "A___" and "SA. __" references are, respectively, to pages in the appendices to this brief and the Appellant's Brief ("AB") "SR1:__," "SR2:__," and "SR3:__" references are to the settled record in Case Nos. 01-465 ("'01 Case"), 01-459 ("'02 Case"), and 03-308 ("'03 Case"), respectively. Duplicative references are to SR3 alone.

**II. Whether the circuit court correctly concluded that the process server's returned certificates of service were insufficient to establish proper service on Grand River.**

The circuit court found service defective because nothing in the record showed whether or how the process server determined he had served an appropriate individual.

*Volkswagenswerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988)

*White Eagle v. City of Fort Pierre*, 2000 SD 34, 606 N.W.2d 926

*Lekanidis v. Bendetti*, 2000 SD 86, 613 N.W.2d 542

*Campeau v. Campeau*, [2004] O.J. No. 4788 (O.S.C.J.) (A621-627)

SDCL 15-6-4(d)(2) (2001) and (2), (12) (2002) and (2004) (A16-A21)

SDCL 15-6-4(e) (2002) and (2004) (A22-23)

Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Convention") (A575-587)

R.R.O. 1990, Reg. 194, r.16.02(1)(c) (A588-602)

## STATEMENT OF THE CASE

On February 7, 2007, Grand River moved the Circuit Court of South Dakota, Sixth Judicial Circuit, Hughes County, to vacate three default judgments the State had obtained against it for supposed violations of SDCL chapter 10-50B. SR1:22-23 (A31-32), 35-37; SR2:58-60 (A33-35), 73-75; SR3:45-47 (A36-38), 59-61. The circuit court, the Hon. Lori S. Wilbur presiding, consolidated the three actions for purposes of considering Grand River's motions--all of which the State opposed--and heard oral argument on October 27, 2007. SR3:1105-06; 2599-2600 (A2-3).

The circuit court decided the motions in Grand River's favor on January 11, 2008 in a carefully-reasoned letter opinion. SR3:2599 (A3). That opinion was factually and legally correct and should be affirmed by this Court.

First, the circuit court agreed with Grand River that the State had failed to demonstrate how Grand River had taken any action to purposefully avail itself of the South Dakota market. SR3:2590 (A12). The court noted that the parties disagreed as to which "stream of commerce" standard for determining jurisdiction was applicable. It consulted and quoted this Court's decision in *Frankenfeld v. Crompton Corp., supra*, to resolve the issue. SR3:2594 (A8). The circuit court applied the "stream of commerce plus" analysis and concluded that Grand River's contractual commitment to produce cigarettes for importers elsewhere did not establish that Grand River purposefully availed itself of the South Dakota market. *Id.* at 2590 (A12).

Second, the circuit court held Grand River had not been properly served. *Id.* Recognizing the obvious, the court observed that merely finding and serving an adult on Grand River's premises did not mean the process server had ascertained or reasonably believed the person was among the proper individuals to receive service under the applicable service rules. *Id.* at 2588 (A14). "There is simply no evidence to determine what [the process server] believed and whether those beliefs were reasonable." *Id.*

Given its resolution of the jurisdiction and service of

process issues, the circuit court did not reach Grand River's further arguments that SDCL 15-6-60(b)(6) also provided an independent basis for vacating the three default judgments.

## STATEMENT OF FACTS

### I. The deal between the settling states and "Big Tobacco."

The *backdrop* for this case is the well-publicized deal that South Dakota and forty-five other "settling states" reached with "Big Tobacco"[3] in the late 1990s to recoup healthcare related costs incurred as a result of smoking-related illnesses. SR3:2311 (A338); *id.* at 2598 (A4). On November 23, 1998, Big Tobacco and the settling states signed the Master Settlement Agreement or "MSA," whereby Big Tobacco agreed to pay the settling states certain annual sums in return for a release of past, present, and future claims. SR3:393, 2311 (A54, 338); SDCL 10-50B-1.

Prior to signing the MSA, Big Tobacco insisted that, in exchange for the substantial sums of money that would be paid to the settling states, the agreement include provisions protecting Big Tobacco's market share. That way Big Tobacco could raise prices and pass the cost of the settlement on to consumers without suffering a competitive disadvantage. SR3:2310-11 (A338-39). As a means to this

[3] "Big Tobacco" includes the following four companies which, as of 1998, controlled up to 98% of the market for tobacco products: Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. and Lorillard Tobacco Company. SR3:2308 (A341), *id.* at 2598 (SA.B.4).

end, the MSA contains a "model Escrow Statute." SR3:190, 2310, 2598-99 (A223, 338, 3-4). This statute is identical to SDCL chapter 10-50B ("the Act"), and imposes obligations on other tobacco product manufacturers who sell cigarettes in the United States, even though they were not parties to the MSA and the underlying litigation it settled. *See* SR3: 2310 (A338); *id.* at 2598 (SA.B.4).[4]

The Act requires all "tobacco product manufacturers"[5]--which the State alleges Grand River to be--that sell cigarettes in South Dakota to either join the MSA or place in escrow a certain sum for every individual cigarette sold in the state. *See* SDCL 10-50B-6 and 7. The Act defines a "tobacco product manufacturer" as:

> . . . an entity that, on or after July 1, 1999, directly, and not exclusively through any affiliate:
>
> (1) Manufactures cigarettes anywhere which the manufacturer intends to be sold in the United States, including cigarettes intended to be sold

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[4] To use the lexicon of the MSA, Big Tobacco manufacturers were the original participating manufacturers ("OPMs") who joined the settlement. The MSA also makes reference to "NPMs" and "SPMs" who are, respectively, nonparticipating manufacturers and subsequently participating manufacturers.

[5] When the State labels Grand River and similarly situated NPMs "opportunistic" for not joining the MSA, it is grossly distorting reality. *See* AB:6. Grand River had no reason or opportunity to "settle" a controversy to which it was never a party, that was based on wrongdoing of which it was never accused. Moreover, the State does not contend anyone informed Grand River of the negotiations giving rise to the MSA, gave Grand River notice that it could join an agreement settling litigation between third parties, or invited Grand River to become an SPM. SR3:2307-09 (A340-342). Moreover, in 2006, Grand River did apply to join the MSA, subject to a reservation of its right to contest the validity of the Escrow Statutes. SR3:2415-19, (A231-235).

in the United States through an importer. SDCL 10-50B-5. The escrow obligations in SDCL 10-50B-7 apply to any NPM that is a "tobacco product manufacturer selling cigarettes to consumers within" South Dakota. These NPMs must annually certify to the state attorney general their compliance with these obligations. SDCL 10-50B-9. The penalty for a first violation may be up to 100% (300% for knowing violations) of the amount withheld from escrow. SDCL 10-50B-9(1) and (2). A second knowing violation may result in blacklisting of the NPM's products for up to two years. SDCL 10-50B-9(3). Thus, despite their exclusion from the underlying litigation and (in most cases) the settlement negotiations, the Act provides Big Tobacco with assurances that other tobacco product manufacturers may continue to participate in the market, but only on Big Tobacco's terms.[6]

In July of 2002, Grand River and five other tobacco companies commenced an action challenging the MSA's Escrow Statutes in the United States District Court for the Southern District of New York ("Federal Case"). The named defendants are the Attorneys General of thirty-one states, including South Dakota. SR3:449 (A49). The complaint seeks declaratory and injunctive relief against the obligations imposed by the Escrow Statutes on the basis that the

[6] The MSA had a dramatic effect on the tobacco market. Within the first six months of 2001, for example, Big Tobacco raised prices by 60% yet lost less than 1% of their 1999 market share and less than 5% of their 1998 market share. SR3:418 (A80).

plaintiffs, *inter alia*, were never parties to the MSA and were never sued for any alleged wrongdoing in the underlying tobacco litigation. SR3:407-08, 417, 446 (A90-91, 81, 52). The complaint also alleges violations of the Commerce Clause and the Sherman Act, noting the anticompetitive consequences described above. SR3:410, 414, 418 (A88, 84, 80); *Grand River Enterprises Six Nations Ltd. v. Pryor,* 425 F.3d 158, 164, 167-73 (2d Cir. 2005). Those claims are currently pending.

**II. Grand River's operations.**

Grand River was incorporated on April 29, 1996 under the Canada Business Organizations Act and is wholly owned by members of the Six Nations, a group of six Indian tribes sometimes called the "Iroquois Confederacy". SR3:81, 2413(A39, 237); *id.* at 2598 (SA.B.4). Grand River operates exclusively on the Six Nations reserve under the authorization of the governing councils of the Six Nations, with its principal place of business at 2176 Chiefswood Road, Ohsweken, Ontario. SR3:81, 2414 (A39, 236). It is undisputed that it does not have any offices, personnel, real estate, sales agents, or bank accounts in South Dakota. Grand River does not have a telephone listing there and does not advertise or solicit business in this state. SR3:78 (A41) . Grand River has neither shipped nor sold products in South Dakota and has not contracted to do so. *Id.*

Grand River produces tobacco products, including cigarettes. SR3:80 (A40). While it manufactures several

cigarette brands for importation to the United States for sale on Indian land, the record indicates that only the Seneca brand found its way to South Dakota. SR3:79-80, 2409-11, 2413 (A40-41, 239-241, 237).

Grand River produced the Seneca brand during the times relevant hereto for two companies, Native Tobacco Direct Company ("NTD") and Native Wholesale Supply ("NWS"). Both are separate corporate importer/distributors located on reservation land in New York. SR3:80, 2409, 2412-13 (A40, 239, 237-238). Deliveries to both have been F.O.B. Grand River's facility in Ohsweken. SR3:80, 2409, 2411, 2413, 2598(A40, 241, 239, 237, 4). A 1999 "Cigarette Manufacturing Agreement" governs the relationship between Grand River and these Indian-owned, Indian-operated companies located on reservation land. SR3: 2239 (A410).[7] The agreement licenses Grand River to use NTD's trademark to produce several brands of cigarettes, including Seneca, for export to NTD and requires Grand River to follow NTD's instructions for packaging. SR3:2236-39 (A410-413).

While the agreement alludes to importation to both native and United States territory, it is silent as to where

[7] NTD subsequently assigned this agreement to NWS. SR3:2226, 2229-30 (A423, 419-420). The State mischaracterizes this agreement as one between Grand River and Arthur Montour (no relation to Grand River shareholder Jerry Montour). AB:9-10. While Arthur Montour owned and operated both companies, SR3: 2229-30 (A419-420), nothing in the record suggests either was merely his alter ego or otherwise not a bona fide company. Indeed, the circuit court viewed this agreement as one between Grand River and NTD, SR3:2593 (A9), and that interpretation is accurate.

individual brands are to be sold. And, to the extent NTD intends to sell in the United States, the agreement does not direct NTD to sell cigarettes in any particular state. SR3:2234-39, 2593 (A410-416, 9). In fact, the State has not identified a single cigarette sale by NTD or NWS to anyone in South Dakota. To Grand River's knowledge, both entities sell the Seneca brand exclusively on native land to Indian-owned or Indian-operated buyers, with all sales F.O.B. Seneca Nation territory in New York. SR3:80, 2409 (A40, 241).

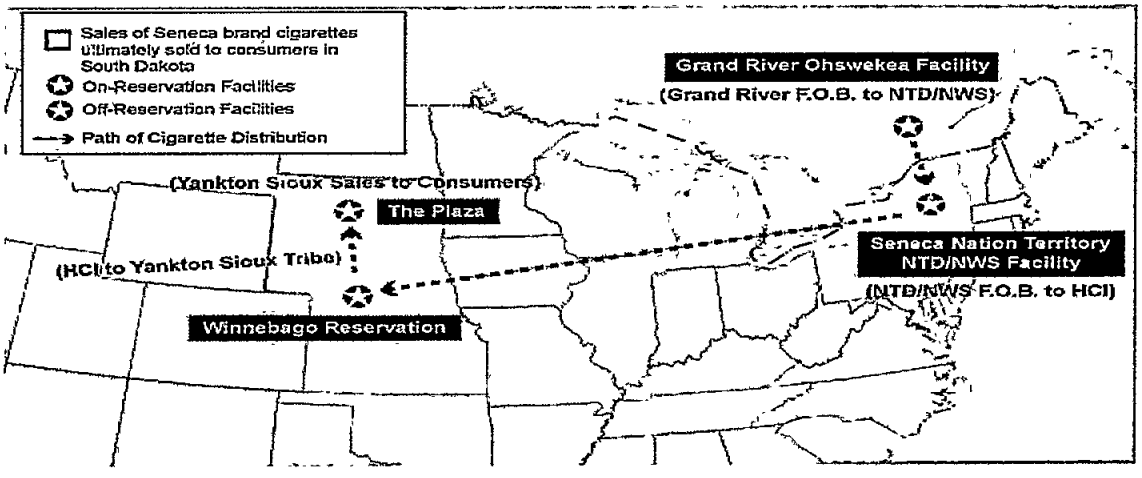
**III. The alleged path of Grand River's Seneca-brand cigarettes to South Dakota.**

The State's evidence identifies a single entity, HCI Distribution Company ("HCI"), which sold Seneca-brand cigarettes in South Dakota. HCI is a subsidiary of Ho-Chunk, Inc., a tribal development corporation for the Winnebago tribe in Nebraska. HCI is located on the Winnebago reservation in Nebraska. SR3:2122, 2124-25, 2169, 2584 (A465, 462-463, 435, 517). HCI sells cigarettes primarily to tribally-owned clients, including the Yankton Sioux Tribe in South Dakota. SR3:2086, 2095, 2121 (474, 473, 466).

The State's evidence shows that HCI sold Seneca-brand cigarettes to only two Yankton Sioux-owned locations at which that tribe sold Seneca-brand cigarettes to consumers: the Fort Randall Casino, which is located on the Yankton Sioux reservation, and the Yankton Sioux Travel Plaza across the street and a mile or less away. SR3: 2063-65, 2084,

2101, 2134, 2167-68 (A476-478, 475, 472, 453, 437-438).

HCI's semiannual reports identified only NTD and NWS as suppliers of the Seneca-brand cigarettes it sold to the Yankton Sioux tribe for resale at the Plaza. SR3:2565-73 (A526-534). Nothing in the record establishes that HCI informed either company of any off-reservation sales in South Dakota or that either company had independent knowledge of these sales. Indeed, HCI considered the Plaza part of the Yankton Sioux reservation. SR3:2107-09, 2113, 2129, 2133 (A469-471, 468, 458, 454). Grand River has no relationship whatsoever with HCI and first learned of its existence in 2003. SR3:2584 (A517).




The diagram above depicts how the Seneca-brand cigarettes that Grand River manufactured and sold in Canada came to reach consumers in South Dakota.

## IV. The State's lawsuits against Grand River.

The complaints in each of the three cases arise out of the sales of Seneca-brand cigarettes in South Dakota, presumably at the Plaza, in 2000 ("'01 Case"), 2001 ("'02 Case"), and 2002 ("'03 Case"). SR1:4-6; SR2:19-22; SR3:4-7. The '01 complaint alleged Grand River knowingly violated the escrow and certification requirements of SDCL 10-50B-7 and 9. SR1:2-5. The '02 and '03 complaints allege and seek penalties for a second knowing violation of these provisions. SR2:16-19; SR3:1-6.

In the '01 Case, the State forwarded the pleadings to Civil Action Group/APS International, Ltd. ("APS"), a process service that prepared and sent a request to the Central Authority of Ontario, the Ministry of the Attorney General ("Central Authority"), to serve the documents pursuant to the Hague Convention. SR3:1801, 1805 (A503, 499). The request allegedly included a Hague Convention request form, which listed a summons and complaint as documents to be served, a certificate of service, and a summary of documents to be served. SR3:1799-1801 (A503-505). The Central Authority forwarded these documents to John Dobson, a sheriff's officer, with instructions to serve Grand River. SR3.2597 (A5). The State followed a similar process in the '02 and '03 Cases, except in the '03 Case, the State engaged Legal Language Services ("LLS") instead of APS. *Id.*

In each of these cases, Dobson submitted a certificate of service to the Central Authority, which then returned that certificate to the State. SR1:16, 18 (A28); SR2:51, 53-56 (A29); SR3:37, 1804, 2480 (A30). The certificates attest that Dobson served Grand River on March 15, 2002, October 21, 2002, and June 9, 2004. SR1:16 (A28); SR2:51 (A29); SR3:37 (A30). These three certificates are the only documents in the record that attempt to describe Dobson's alleged service attempts on Grand River on any particular date.

The March 15, 2002 certificate states that Dobson served a "male adult" who refused to give his name. SR1:16 (A28). Dobson designates this "male adult" as a "manager." *Id.* How he came to this conclusion is a mystery--at least from the face of the certificate. The October 21, 2002 certificate avers that Dobson served "Kurt Styers" whom he labeled "Controller," SR2:51 (A29), a position that does not exist at Grand River. Similarly, the June 9, 2004 certificate states Dobson served a "female adult" who he believed to be the "person in charge." SR3:37 (A30). Again, nowhere on the certificate is there an explanation of how Dobson made this determination.

Beyond the certificates, the record is devoid of any corroborating information that suggests these alleged service attempts ever came to Grand River's attention. Grand River did not appear in any of the three actions, and the State subsequently sought and obtained default judgments

in each case. SR1:9, 21, 23 (A31); SR2:23, 44, 47 (A33); SR3:23, 43, 47 (A36).

## ARGUMENT

### I. APPLICABLE STANDARDS OF REVIEW.

South Dakota law recognizes that default judgments are disfavored and generally allows circuit courts broad discretion to grant relief from such judgments. *Estes v. Ashley*, 2004 SD 49, ¶ 4, 679 N.W.2d 469, 472. The circuit court, however, has no discretion to deny relief from a void judgment, which it must set aside. *Kromer v. Sullivan*, 88 S.D. 567, 569, 225 N.W.2d 591, 592 (1975). A party like Grand River that is aggrieved by a void default judgment may move to vacate that judgment at any time. *Id.*; *see Sazama v. State*, 2007 SD 17, ¶ 9, 729 N.W.2d 335, 340 (party may raise issue of jurisdiction at any time).

Issues of the court's jurisdiction, like those in contention here, present questions of law that this Court reviews *de novo*. *See Dairyland Ins. Co. v. Jarman*, 2007 SD 110, ¶ 6, 741 N.W.2d 731, 732. To the extent the circuit court made factual findings, however, this Court must accept them so long as they are not clearly erroneous. *Sazama*, 2007 SD 17, ¶ 9. This Court will deem a factual finding clearly erroneous only when left with a "definite and firm conviction" that a mistake has occurred. *Drapeau v. Knopp*, 2008 SD 7, ¶ 7, 744 N.W.2d 836, 838.

## II. THE CIRCUIT COURT HAD NO PERSONAL JURISDICTION OVER GRAND RIVER.

### A. This Court must apply a "stream of commerce plus" analysis to the questions of jurisdiction in this case.

The State concedes that South Dakota courts do not have general jurisdiction over Grand River. And the parties agree that jurisdiction must be proper under both the long-arm statute[8] and due process. The parties also agree these two analyses largely overlap. *Ventling v. Kraft*, 83 S.D. 465, 471, 161 N.W.2d 29, 32 (1968).[9] They disagree, however, over which "stream of commerce" analysis applies. As noted above, Grand River contends the "stream of commerce plus" analysis has been embraced by this Court. The State claims it has not.

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[8] The state long-arm statute, SDCL 15-7-2 (A25), reads in pertinent part:

> Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing *personally*, through an *employee*, through an *agent*, or through a *subsidiary*, of any of the following acts:
>
> (1) The transaction of any business within the state;
>
> . . . .
>
> (14) The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States.

SDCL 15-7-2 (emphases added)(A25).

[9] The "transacting business" part of the long-arm statute corresponds to the purposeful availment part of the due process analysis, while the requirement that the cause of action arise from activities directed at the forum state is satisfied when a party does some act enumerated in the long-arm statute. *See Ventling*, 83 S.D. at 471-72.

The State attempts to minimize the impact of *Frankenfeld*, which the circuit court correctly recognized controls this case. It pretends this Court did not clearly endorse Justice O'Connor's "plus" analysis from *Asahi Metal Industry Co. v. Superior Court of California*. While this Court acknowledged Justice Brennan's "expectation test" of jurisdiction, *see Frankenfeld*, 2005 SD 55, ¶ 9, the Court ultimately concluded that South Dakota case law is "more consistent with the ["plus"] analysis utilized by Justice O'Connor's plurality opinion in *Asahi*."[10] *See Frankenfeld*, 2005 SD 55, ¶ 19 (noting its prior decision in *Rothluebbers v. Obee*, 2003 SD 95, 668 N.W.2d 313, and that *Miller v. Weber*, 1996 SD 47, 546 N.W.2d 865 "confirms this analytical framework"). *Id.* This Court then analyzed the case before it, "applying the analysis from *Asahi*, *Rothluebbers*, and *Miller*" (as the circuit court here astutely observed). *Id.*, ¶21; SR3:2594 (A8).

This Court can, if it wishes, revise or second-guess its previous analysis of *Rothluebbers* and *Miller*.[11] But

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[10] The State incorrectly suggests otherwise, quoting out of context this Court's language to the effect that *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), implied this was the test. *See Frankenfeld*, 2005 SD 55, ¶9; AB:27-28.

[11] *Rothluebbers*, 2003 SD 95, ¶¶ 2, 29, held jurisdiction to be present over a defendant that had been involved in a bus accident *in* South Dakota, where it specifically had planned to make two stops. In *Miller*, no jurisdiction existed where the defendant "knew the ultimate buyer was from South Dakota, but he left for someone else's decision the destination of the cattle" and could not have invoked South

doing so would require an announcement of a conscious decision to change course. Indeed, it is telling that the State fails to acknowledge both cases, relying instead on decisions that are not helpful.[12]

The State not only feigns ignorance as to whether this Court endorsed Justice O'Connor's stream of commerce plus test, but it also acts as if it does not to know what might constitute a "plus" factor. Justice O'Connor gave several examples in *Asahi* that *Frankenfeld* specifically reiterated. *See id.*, ¶ 15 *Asahi*, 480 U.S. at 112-13. Such factors include designing a product for the forum state's market, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, and marketing one's product through a distributor who has agreed to serve as a sales agent in the forum. *Frankenfeld*, 2005 SD 55, ¶ 15. As demonstrated below, none of the plus

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Dakota law had the contract not been completed. *Id.* at ¶ 19.

[12] The only two South Dakota cases the State does cite do not support its position. *State v. American Bankers Insurance Co.*, 374 N.W.2d 609 (S.D. 1985), was not a stream of commerce case at all and involved no third-party intermediaries between the forum and the defendant. There, the defendant had a *direct connection* with South Dakota because, along with various other insurance contracts, it bought policies covering South Dakota insureds and continued to pay the claims of those insureds and to accept premiums. *Am. Bankers*, 374 N.W.2d at 610-11, 613. As for the other case cited by the State, *Russell v. Balcom Chemicals, Inc.*, 328 N.W.2d 476 (S.D. 1983), that case predated *Asahi*, and *Frankenfeld* noted that it involved in-forum purchases by state residents to make the point that jurisdiction was lacking even under Justice Brennan's "expectation test" *See Frankenfeld*, 2005 SD 55, ¶ 24.

factors indicate South Dakota has jurisdiction over Grand River.

### B. The circuit court properly concluded that South Dakota had no long-arm jurisdiction over Grand River.

#### 1. Grand River transacted no business in South Dakota.

Under the foregoing standards, Grand River's connection to South Dakota does not meet the "plus" test necessary to show that it transacts business in this state. Any such "connection" arises entirely from the fact that third parties with whom Grand River had no relationship unilaterally sold Seneca-brand cigarettes in the forum.

Grand River sold its products to Indian-owned importers, NTD and NWS, in New York. Consistent with Grand River's understanding that these importers sold Seneca-brand cigarettes on reservation land to other Indian-owned businesses, those importers then sold the cigarettes to another Indian-owned company, HCI, which is located on reservation land in *Nebraska*. This third party, with whom Grand River had no relationship and had never even heard of until 2003, then unilaterally sold the cigarettes to another Indian tribe, the Yankton Sioux, for sale at the Casino (Indian land), and the Plaza across the street, which HCI erroneously supposed to be on Indian land. Ultimately, it was the Yankton Sioux, that "[sold] cigarettes to *consumers* within this state" within the meaning of SDCL 10-50B-7.

None of the *Asahi/Frankenfeld* "plus" factors exist in this case. Grand River did not advertise or solicit

business in South Dakota and has not established any channels for providing regular advice to South Dakota customers. In fact, it has no offices, employees, agents, or personnel in South Dakota to serve that function or any other purpose; nor is there any record that Grand River contacted anyone in South Dakota by telephone, through the mail, or otherwise. Grand River also did not design its products to appeal specifically to the South Dakota market or to comply with laws specific to South Dakota. Finally, and most damning for the State, none of Grand River's importers agreed to market Grand River's cigarettes as sales agents for Grand River.[13]

**a. Grand River did not design any products for a South Dakota market.**

The record contains no evidence whatsoever that Grand River designed its products specifically for South Dakota consumers or to comply with South Dakota law. The State, however, attempts to use Grand River's compliance with federal law to make this argument. The theory appears to be that because compliance with federal law is presumably a *prerequisite* to legally availing oneself of the South Dakota

[13] Even if the State's "expectation test" applied--which it does not--no jurisdiction exists. The record does not even show that *NTD and NWS* expected HCI to sell Seneca-brand cigarettes in the forum, let alone that *Grand River* had any such expectation. Indeed, beginning in 2002, Tobaccoville USA, Inc. ("Tobaccoville") (discussed below) had the *exclusive* right to make off-reservation sales of Seneca-brand cigarettes in the United States, and nothing in the record establishes that NTD or NWS infringed on that license by making off-reservation sales in South Dakota or elsewhere.

market, satisfying this prerequisite also constitutes *actual* availment of that market.

The State's position essentially guarantees that Big Tobacco can suppress NPMs' sales of cigarettes anywhere in the nation. Under the State's logic, an NPM that *legally* sells cigarettes in *any* state "designs" its product for South Dakota even though such compliance is perfectly consistent with doing business in one or more states that do not include South Dakota. Whenever some third party, no matter how far downstream in the stream of commerce, introduces the cigarettes into South Dakota, jurisdiction becomes automatic. To avoid South Dakota's jurisdiction, then, NPMs must abstain from marketing their products *anywhere* in the United States. *Cf. Lesnick, v. Hollingsworth & Vose Co.*, 35 F.3d 939, 947 (4th Cir. 1994) ("Such a rule would subject defendants to judgment based on the activity of third persons . . . making it impossible for defendants to plan and structure their business contacts and risks."); *Clune v. Alimak AB*, 233 F.3d 538, 546 (8th Cir. 2000) (Bright, J., concurring) (rejecting majority's stream of commerce theory).

While Big Tobacco and the settling states may prefer such a result because it ensures Big Tobacco's market dominance, the law does not require it and due process forbids it. First, this position contradicts case law to the effect that the mere sale of a product to a national distributor does not equate to an act directed at the forum

state and does *not* mean the defendant designed its products for the forum state. *See Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992) (no jurisdiction in Maine even assuming Gar-Tec sold its defective air gun to a national distributor with nationwide mail order business because no evidence that Gar-Tec designed its product for Maine market); *Lesnick*, 35 F.3d at 947 (no jurisdiction over manufacturer that produced filter for Big Tobacco cigarette manufacturer where product not designed to comply specifically with state regulations).[14] A company that complies with federal law does so for the same reason it might choose to sell to a national distributor, namely, finding a market for its products in the United States (which does not necessarily include the forum's market).

Second, the State cannot simultaneously attempt to enforce the Act against Grand River and assert with a straight face that compliance with federal law entitles Grand River to avail itself of the benefits of South Dakota's market for tobacco products.[15]

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[14] As long as this Court continues to endorse the "stream of commerce plus" test, these cases are not distinguishable. Any attempt to distinguish *Boit* based on the small number of products that ended up in the forum state is similarly unavailing because the number of products that end up in the forum has no bearing on the "design" issue.

[15] The State also advances the bizarre proposition that mere compliance with a *sister state's* laws avails a defendant of the South Dakota market. *See* AB:30 (purporting to rely on Grand River's compliance with Nebraska law as a "plus" factor). This argument is subject to the same criticisms as above. Moreover, while it is impossible to fully respond to an argument the State never actually briefed (here or to the

Leaving aside the law, however, the record is clear that to the extent Grand River packaged its products consistent with federal regulations, it did so pursuant to its agreement with NTD, which obligated Grand River to *conform* such packaging to NTD's and NWS' instructions. As for other federal requirements, the trademark owners and importers of the products ensured such compliance, not Grand River. SR3:2238, 2385, 2534 (A411, 265).

**b. Grand River's importer/distributors never acted as sales agents for the South Dakota market.**

The State's escrow claims are based entirely upon (1) HCI's sales of Seneca-brand cigarettes to the Yankton Sioux Tribe, which, in turn, sold them at the Plaza; and (2) the semiannual reports HCI submitted identifying NTD and NWS as its suppliers. In order for this to matter, the State must establish an agency relationship between Grand River and one of the following four entities: HCI, the Yankton Sioux Tribe, NTD, or NWS. The State wisely does not try to claim Grand River had a relationship with HCI or the Yankton Sioux Tribe. With respect to NTD and NWS, the circuit court expressly found that the State presented no evidence that either importer acted in a representative capacity for Grand River, and on that basis distinguished *State ex rel.*

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circuit court), to the extent the State alludes to any agreement to maintain escrow accounts in Nebraska, Grand River specifically entered those agreements under protest and reserving its rights to challenge the Nebraska Escrow Statute. In any event, this Court need not consider undeveloped arguments. *State v. Labine*, 2007 SD 48, ¶ 11 n.2, 733 N.W.2d 265, 268 n.2.

*Attorney General v. Grand Tobacco*, 171 Ohio App. 2d 551, 2007 Ohio 418, 871 N.E.2d 1255 (Ct. App. 2007)(decision on which the State relies; jurisdiction where State presented evidence that CEO of distributor that introduced defendant's cigarettes into forum held himself out as a representative of defendant).

The circuit court's finding was reasonable and correct. The record reveals only contractual relationships between Grand River and its importers, and the State never identified any instance in which these importers acted for Grand River apart from performing their contractual duties. Moreover, the agreement between Grand River and NTD does not on its face reveal any agreement that NTD and NWS were to act as sales agents for Grand River. SR3:2233-2240 (A410-416).

This omission is dispositive under *Bridgeport Music, Inc. v. Still N the Water Pub'g Co.*, 327 F.3d 472, 480 (6th Cir. 2003). In *Bridgeport*, the Sixth Circuit explained that whether sales to a national distributor will suffice depends on the nature of the distributor's contractual obligations to the manufacturer. *Bridgeport*, 327 F.3d at 480. The requisite "plus" factor exists only when the contract *obligates* the distributor to sell in the forum state. *Id.* (no jurisdiction where contract did not *compel* sales in all fifty states). The State has never suggested NTD or NWS would have breached the agreement (or any other contract) with Grand River if they had sold Grand River's cigarettes

only in states other than South Dakota. No provision of the agreement contains language to support such a proposition.

As the Fourth Circuit recognized, the analysis does not change just because the contractual relationship goes beyond the mere sale of goods. In *Lesnick*, 35 F.3d at 940, defendant Hollingsworth manufactured a filter that defendant Lorillard (Big Tobacco) incorporated into its cigarettes. The plaintiff, who brought claims on behalf of her husband's estate, based her theory of jurisdiction over Hollingsworth on the fact that Hollingsworth's contract with Lorillard provided for 1) sharing of patent rights to the filter; 2) splitting of royalties for licensing the manufacturing process; 3) collaboration in research and development; and 4) Hollingworth's production of filter material exclusively for Lorillard for five years. *Id.* at 940, 946. The contract also required Lorillard to indemnify Hollingsworth for any liabilities the latter might incur arising out of the filter's health risks. *Id.*

The Fourth Circuit rejected the plaintiff's arguments, recognizing that even if the arrangement went beyond mere sales and injecting the filter into the stream of commerce, "it d[id] not rise to the level of establishing jurisdiction because none of the conduct is in any way *directed toward the state of Maryland.*" *Id.* at 946-47 (emphasis added). Similarly, Grand River's agreement with NTD and NWS regarding trademark and licensing matters is not "in any way directed toward the state of [*South Dakota*]."

The foregoing conclusions not only comport with general jurisdictional principles, the plain text of the South Dakota long-arm statute suggests a similar result. SDCL 15-7-2 only purports to allow jurisdiction when it finds the defendant has done one of the enumerated acts "*personally*, through an *employee*, through an *agent*, or through a *subsidiary*." (Emphases added)(A25-26). Grand River did not *personally* sell cigarettes in South Dakota. To the contrary, the cigarettes passed through three intermediaries before reaching South Dakota consumers. Moreover, no entity in the distribution chain includes any Grand River subsidiary or agent. Thus, the State's reliance on *Clune* is also misplaced. *See Clune*, 233 F.3d at 543-44 (noting directors of parent's board sat on subsidiary's board of directors); *id.* at 546-47 (Bright, J., concurring) (jurisdiction where defendant parent *managed and controlled business* of resident subsidiary). Grand River has no parent-subsidiary relationship with NTD, NWS, or any other link in the chain of distribution at issue. Additionally, the State has neither argued nor presented evidence that Grand River and its importers failed to observe proper corporate formalities or were mere alter egos of one another.[16]

[16] The State's observation that lay representatives of Grand River and its importers have at times characterized their relationship as a "co-venture" does not change the legal reality of that relationship. Again, Grand River is a distinct corporate entity from NTD and NWS, and the relationships described are all matters of contractual

### c. Grand River's relationship with Tobaccoville is irrelevant.

As the above diagram demonstrates, the link between Grand River's sales F.O.B. Ohsweken to the Yankton Sioux Tribe's ultimate sales to consumers at the Plaza in South Dakota is tenuous, at best. The State acknowledges this when it attempts to bring another player into the picture, Tobaccoville USA, Inc. ("Tobaccoville"), which is also an importer/distributor of Seneca-brand cigarettes. SR3:79, 2409, 2411-13 (A40, 241, 237-239).

The circuit court recognized this red herring for exactly what it was, noting that:

> . . . the cigarettes at issue in this case did not enter South Dakota through any agreement between Grand River and Tobaccoville . . . . Thus, that business relationship is irrelevant to this case.

*See* SR3:2591-92 (A4, 9). This finding has ample support. The record does not indicate that any brand other than Seneca *ever* reached South Dakota boundaries or that Seneca-brand cigarettes came into the state through any chain of distribution in which Tobaccoville was a link. Indeed, a closer analysis of Grand River's relationship with Tobaccoville hurts the State's case more than it helps. First, the record does not reveal any relationship existed between Grand River and Tobaccoville prior to 2002, when the

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agreement, not any failure to observe corporate formalities. The State's implicit invitation to pierce Grand River's corporate veil is therefore improper, particularly in light of the circuit court's express finding that Grand River's importers never acted in a representative capacity for Grand River.

parties entered into a Cigarette Manufacturing Agreement giving Tobaccoville the exclusive right to distribute cigarettes off-reservation in the United States. SR3:2349, 2353, 2409 (A300a, 297, 241). Thus, the relationship could not possibly have been relevant to the '01 and '02 Cases, which were based on sales of Grand River cigarettes in 2000 and 2001.

Second, with respect to the '03 Case, the State's own documentation from Tobaccoville indicates no sales occurred in South Dakota. Grand River answered the question, "[i]dentify in which of the United States you or an affiliate have sold cigarettes since 1997" by stating it believed Tobaccoville sold cigarettes in Oklahoma, the Carolinas, Arkansas, Georgia, and Tennessee. SR3:2409 (A241).[17]

[17] The State attempts to draw a connection to Tobaccoville by asserting the Seneca-brand cigarettes seized from the Plaza bore the statement, "made under the authority of Tobaccoville, USA, Inc." AB:10. The only record cites it provides are to an affidavit of Alan Morris, the official who seized the cigarettes at the Plaza, in which Morris makes no reference to any such statement. SR3:1873 (A482). Moreover, the pictures Morris identifies as showing a pack of cigarettes the Department of Revenue seized from the Plaza do not contain those words. *Id.* at 1830-36; 1873-74 (A487-493, 481-482). Even if they had, however, the exclusive license in effect at the time of the seizure explains that fact and does not establish Tobaccoville itself sold to South Dakota. In any event, the inscription would not have been relevant to the '01 and '02 cases, which relied on pre-2002 sales.

**d. Most of the State's remaining factors have no bearing on whether Grand River acted to avail itself of the forum.**

At least half of the State's remaining "plus" factors have nothing to do with acts by *Grand River*. Where HCI had licenses to sell cigarettes (fifth factor), to whom Grand River's importers sold Grand River's products (sixth), whether HCI stamped the cigarettes and how many it sold (seventh), and the fact that the *State* brought an action against Grand River (eighth), all involve the acts of third parties. To wit, the importers, HCI, and the State. To the extent the State relies on the fifth through seventh factors to support its theory of jurisdiction over Grand River that theory fails for the reasons described more fully below.

**e. Grand River's so-called "distribution network" does not make Grand River amenable to jurisdiction.**

The State's assumption that Grand River somehow headed an elaborate cigarette "distribution network" constitutes perhaps the biggest flaw in its personal jurisdiction theory. First, that Grand River has no relationship with HCI and the Yankton Sioux tribe, two critical players, bears repeating. The State's "plus" factors are based on the fact that HCI distributed and was licensed to sell cigarettes in South Dakota. That has nothing to do with Grand River.

Second, the State never actually explains what constitutes a "distribution network." The State's theory appears to be based on the *Clune* case, suggesting that a "strategic choice of distributors that could reach much of

the country" is evidence of "efforts to reach [the relevant] and other parts of the country as well," such that "the manufacturer could not plead ignorance that its products were being distributed into neighboring states." *See Clune*, 233 F.3d at 543-44. Even if *Clune* were not distinguishable as a parent-subsidiary case or one in which the importer/distributor acted as the defendant's alter ego, the *Clune* court did not purport to follow *Asahi*. *See id.* at 542. As the foregoing discussion establishes, *Boit*, *Bridgeport*, and *Lesnick* demonstrate that selling goods even to a *national* distributor with whom the defendant has close contractual relationships does not amount to purposeful availment.

The best argument the State's "distribution network" theory can muster is that a "strategic choice" of distributors allows the defendant to reasonably *expect* that third parties will ultimately choose to sell in the forum market. But mere *expectation* does not suffice. Whether or not a third party acts in a particular manner does not constitute "actions by the defendant *himself* that create a substantial connection with the forum." *See Frankenfeld*, 2005 SD 55, ¶12.[18]

[18] In fact, this Court noted that in *Miller* no jurisdiction existed, even though the defendant *knew* the ultimate buyer was from South Dakota (and would have the cattle shipped to either South Dakota or Nebraska), because he "left for someone else's decision the destination for the cattle" and *himself* only arranged for sales to Nebraska. *Id.* at ¶ 19; *Miller*, 1996 SD 47, ¶ 10. Similarly, Grand River left to

**f. Grand River's principals' prior transactions with Arthur Montour have no bearing on purposeful availment.**

Knowing that it cannot establish personal jurisdiction based on a "distribution network" theory based on Grand River's relationships with NTD and NWS, the State makes one more desperate attempt to find an alter ego. It erases all three companies from the picture and alleges that a single partnership is at stake; namely, one between Kenneth Hill and Jerry Montour (two Grand River principals) and the owner/operator of NTD and NWS, Arthur Montour. This Court, like the circuit court, should reject this baseless invitation to pierce the corporate veil for the above-described reasons.

However, even if one improperly ignored all corporate formalities and imputed the conduct of Arthur Montour to Grand River, the State still could not establish jurisdiction. Initially, nothing in the record establishes that Arthur Montour knew, from HCI or another source, that HCI sold Seneca-brand cigarettes in South Dakota. Moreover, given HCI's position that the Plaza lies within the Yankton Sioux reservation, it is highly unlikely that HCI informed Arthur Montour it sold Seneca-brand cigarettes off-reservation.

Finally, the historical relationship between Messrs. Hill, Montour, and Montour does not support jurisdiction.

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its importers the ultimate destination of the cigarettes and only *itself* sold them F.O.B. Ohsweken.

Grand River's NAFTA complaint, on which the State relies for this argument, specifically identifies connections only to certain parts of the United States, namely, Six Nations land, New York reservations, the East Coast, Virginia, and Nebraska. SR3:2312-16 (A33-337). The Nebraska connection was with the Omaha Tribe, not the Winnebago with whom HCI is affiliated. SR3:2313 (A336). The State's innuendo that sales might have occurred in South Dakota is pure speculation that cannot possibly supply a predicate for minimum contacts and/or personal jurisdiction.

**2. Grand River did not conduct any other activities in South Dakota.**

The State appears to suggest that Grand River satisfied the catchall provision for jurisdiction, based on its purported failure to comply with SDCL 10-50B-7, given that the statutory definition of "units sold" applies to sales through distributors, retailers, and other intermediaries. AB:25-26. Any argument as to how legislative definition of a substantive obligation automatically equates to long-arm jurisdiction over those that violate the obligation is entirely undeveloped, and this Court need not consider it for that reason. *See Labine*, 2007 SD 48, ¶ 11 n.2. Moreover, to the extent the State relies on the fact that "units were sold" in South Dakota, the foregoing arguments have already explained that Grand River did not sell cigarettes in South Dakota "personally, through an employee, through an agent, or through a subsidiary."

### C. The circuit court correctly concluded that no constitutional basis exists for jurisdiction over Grand River.

#### 1. No jurisdiction exists based on generally applicable principles.

Constitutional due process also precludes jurisdiction over Grand River in South Dakota. Minimum contacts are lacking for the reasons described above. Moreover, the State's arguments as to the second and third due process factors are unpersuasive. The fact that the State chose to bring a lawsuit against Grand River, without more, does not establish that Grand River directed any conduct toward South Dakota or that it has established any connection with the forum state that would make the exercise of jurisdiction reasonable. Indeed, the State's claims against Grand River are predicated on what Grand River failed to do in South Dakota--*i.e.*, failure to establish an escrow fund or to certify compliance with such requirement--rather than anything it ever did in the forum state.

In any event, even if the State could establish minimum contacts, the exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice.[19] First, even if minimum contacts exist, they are extremely attenuated. There are no less than three intermediaries between Grand River and South Dakota consumers, and Grand River has no relationship whatsoever with two of them. As for the third, NTD or NWS, it is not

[19] The State offers no argument on this point and apparently waives the issue. *See Labine*, 2007 SD 48, ¶ 11 n.2.

even clear those companies were aware of sales in South Dakota, particularly, sales on native land.

Second, South Dakota is only one of the forty-six settling states that have enacted escrow requirements. Despite the merits of Grand River's constitutional challenges to the Escrow Statutes, Grand River cannot possibly afford to litigate against all of the settling states. Fair play and substantial justice do not require bankrupting a defendant as a result of such "divide and conquer" tactics, particularly when potential claimants already have a forum in the Federal Case currently pending in New York. The State is a party to that action and can litigate the same issue there. Moreover, Grand River filed its Complaint in the Federal Case well before at least two of the State's alleged attempts to serve Grand River.

**2. Special rules applicable to Indian-to-Indian sales on a reservation make jurisdiction particularly inappropriate.**

The circuit court did not need to reach issues related to Grand River's Indian status because it correctly recognized that the foregoing arguments were enough to preclude jurisdiction. Should this Court need to consider such issues, it should be noted that the forum state's interest in adjudicating this dispute is further weakened by the fact that Grand River's sales to NTD and NWS were Indian-to-Indian sales that occurred exclusively on the Six Nations reserve. *See Dep't of Fin. & Taxation of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (upholding

state law requiring wholesalers to collect cigarette tax against challenge by non-Indian wholesalers who sold to on-reservation Indian retailers; recognizing State could impose tax only to extent retailers' customers included non-Indians).[20] If the State really believed its escrow obligations applied to on-reservation sales among Indians, it is a mystery why even now the State does not argue sales at the Casino gave rise to jurisdiction. *See* AB:36 (argument based entirely on sales at the Plaza). Also worth noting is the fact that during proceedings to revoke HCI's license to sell cigarettes, the State did not seize cigarettes from the Casino or seek to impose penalties for sales occurring there. SR3: 1867-68; 2101, 2122-34, 2167-68(A485-486, 472, 453-465, 437-438).

The State cannot show that Six Nations land is not Indian country or that Grand River is not an Indian defendant. The State makes the bare assertion that the Six Nations reserve is not Indian country under federal law without identifying any "federal law" to support its

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[20] The State attempts to make an *intra*tribal versus *inter*tribal distinction, which strikes Grand River as odd when its sales to NTD and NWS were intratribal sales among Six Nations Indian entities on Six Nations reservations. Even if the distinction were somehow relevant to Grand River's actual conduct, all of the State's cases related to commerce on reservations entirely or at least partially *within* the State's borders. None of the states in those cases purported to tax or regulate commerce, intertribal or otherwise, between Indians on reservations located in other states and/or countries. Grand River's sales to NTD and NWS occurred half a continent away from South Dakota. The intertribal transactions between NTD/NWS and HCI also involved commerce completely outside of South Dakota.

argument. Grand River cannot meaningfully respond to an argument the State never developed, either here or below, and this Court should deem it waived. *See Labine*, 2007 SD 48, ¶ 11 n.2.[21]

As for Grand River's Indian status, the State spills rivers of ink on the irrelevant propositions that Indian-owned corporations are not Indians, bands, or tribes under Canadian law and that Canadian Indian nations do not have sovereignty vis-à-vis *Canada*. But the issue is not whether Grand River is an Indian *under* Canadian law. Rather, it is whether it is an Indian defendant based on understandings between the Six Nations and the United States. The State conveniently ignores the undisputed fact that such understandings exist.

The Treaty of Canandaigua has particular relevance here. This agreement between the Six Nations and the United States expressly refers to the individual tribes comprising the Six Nations as "*nations.*" *Id.* at arts. II, III, V, and VII (A568-571). In addition, the provision requiring the United States to pay an annual annuity to Six Nations

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[21] In fact, Articles II and III of the Treaty of Canandaigua Between the United States of America and the Tribes of Indians Called the Six Nations ("Treaty of Canandaigua"), Nov. 11, 1794, 7 Stat. 44 (A568-571), are to the contrary. They are entirely devoted to demarcating territorial boundaries of Six Nations property within the United States. Article VII pledges not to interfere with these nations, tribes, or families. It is inconceivable that the United States recognized Six Nations territorial integrity and sovereignty with respect to Indians within U.S. borders but somehow viewed territory outside the United States as violable.

Indians residing within U.S. borders declares that "the United States will not interfere with nations, tribes, or families, of Indians *elsewhere resident.*" *Id.* at art. VII (A568-571).[22] The State cites no authority indicating that at the time the United States signed this treaty, it understood the treaty to allow interference with enterprises among Indian-owned, Indian-operated businesses like Grand River.

The United States (and South Dakota) must respect Six Nations sovereignty until the Six Nations--or Canada, speaking for the Six Nations--relieves them of this obligation. Nothing in the State's long-winded discussion of Canadian law includes a citation to a single Canadian authority that purports to alter the Six Nations' pre-existing understandings with *other countries*.[23]

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[22] Even if the United States no longer treats Six Nations Indians within its borders as completely sovereign, that fact does not change the nature of its understanding with *Canadian* Six Nations Indians.

[23] The very authorities on which the State relies for the proposition that provincial laws of general application apply to Indians actually support Grand River's position. The Indian Act, R.S.C., ch. I-5 § 88 (1985)(A269), states that "*subject to the terms of any treaty* . . . all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province." (Emphasis added.) The Hogg treatise the State cites also recognizes exceptions to the general rule, including an "Indianness exception" that precludes application of provincial laws that "affect aboriginal rights or treaty rights." *See* Peter W. Hogg, Constitutional Law of Canada 28-11 (5th ed. Supp. (2006)). *See also* SR3:1504 ("The provinces may not pass legislation that internationally affects Indians as Indians.").

## III. GRAND RIVER WAS NOT PROPERLY SERVED IN ANY OF THE THREE ACTIONS.

Regardless of whether the Court applies South Dakota law, the Hague Convention, or Six Nations protocol, Grand River was not properly served with process. Because the circuit court did not rely on Grand River's Indian status, the analysis below first explains why service did not comport with generally applicable service rules. The discussion then moves on to why service did not comply with rules specifically applicable to service on Indian defendants.

### A. Service did not comply with South Dakota law.

#### 1. South Dakota law did not conflict with the Hague Convention and therefore applied in all three actions.

The parties agree the Hague Convention preempts any state law that prescribes methods of service *inconsistent* with its terms. But the State improperly concludes South Dakota law is inapplicable without identifying the required inconsistency. *See Volkswagenswerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) (general presumption against preemption; courts avoid constructions overriding state law). Here, there is none. Both serve the same purpose of assuring a defendant has timely notice of all proceedings pending against him. *See Schlunk*, 486 U.S. at 698; *White Eagle v. City of Fort Pierre*, 2000 SD 34, ¶ 7, 606 N.W.2d 926, 928.

Moreover, as of July 1, 2002 South Dakota expressly

authorized service in accordance with the Hague Convention and/or pursuant to the laws of the foreign country in which service occurs (which the Hague Convention also provides). *See* Hague Convention, art. 5 (options (a) and (b))(A577-578); 2002 Sess. Laws 393 (creating SDCL 15-6-4(d)(12)).[24] While the statutes effective in the '01 Case did not provide for any international service of process, for the reasons explained below, that fact also does not give rise to any inconsistency. Again, the purpose of the Hague Convention was giving defendants proper notice, not to impose on states a *requirement* to exercise long-arm jurisdiction over international defendants. Thus, South Dakota state law applies.[25]

**2. Service was improper under SDCL 15-6-4(e) because that provision did not apply.**

The State relies primarily on the substituted service provision in SDCL 15-6-4(e) that was in effect in 2002 to 2004[26]; however, that provision does not apply here. Section

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[24] For the '02 and '03 Cases, references to SDCL 15-6-4(d) are to the version effective as of July 1, 2002. (A18-21). For the '01 Case, references are to the immediately preceding version. (*See* A16-17).

[25] Other courts have also concluded the Hague Convention does not provide the only rules for service where state law methods of service do not conflict. *See, e.g., DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir. 1981); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1288 (N.D. Ill.), *aff'd on other grounds*, 565 F.2d 1194 (7th Cir. 1977); *Conservatorship of Prom v. Sumitomo Rubber Indus., Ltd.*, 224 Wis. 2d 743, 755-56, 592 N.W.2d 412, 415 (Ct. App. 1999) (quoting *DeJames*).

[26] References to SDCL 15-6-4(e) are to the later version of the statute. (A22-23). While the State made a one-sentence

15-6-4(e) allowed service on an officer or employee of a corporation *if* "no general officer, director, managing agent or other representative mentioned in [SDCL] section 15-6-4(d) as qualified to receive service can conveniently be found." (*See A22-23*). This statute, therefore, clearly presupposes that section 15-6-4(d) otherwise applies.

The implications here are two-fold. First, the State cannot rely on this provision to escape improper personal service under section 15-6-4(d) in the '02 and '03 cases. Second, the provision was not applicable at all in the '01 Case because SDCL 15-6-4(d) did not provide for service on foreign corporations in *other countries*. While the State now tries to pretend otherwise, the Attorney General's Office argued a contrary position at a Rules Hearing before this Court on February 14, 2002, at which it urged this Court to amend section 15-6-4(d) to allow for service pursuant to foreign law or the Hague Convention. Its basis was that "the South Dakota rules currently do not provide for *any* service of process in foreign countries." SR3:2657-2658 (A543-544) (emphasis added). The Attorney General specifically referred to pending litigation in *Canada* (the

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reference to SDCL 15-6-4(c), 15-6-4(g), and 15-7-3, asserting that they supported service, it did not develop further argument as to any of them. Moreover, it never relied upon SDCL 15-6-4(d) despite the fact that Grand River relied on various versions of that provision. This Court should not allow the State to raise arguments under these provisions for the first time on appeal. Even now any argument under SDCL 15-6-4(c) and 15-6-4(d)(12) is inadequately developed, and this Court need not consider it. *See Labine*, 2007 SD 48, ¶ 11 n.2.

'01 Case perhaps), yet affected the alleged service on Grand River *after* that hearing and *before* this Court amended the rule. *See* 2002 S.D. Sess. Laws 393 (enacting 2002 version of 15-6-4(d) adding paragraph 12); SR3:2658 (A543). Indeed, it appears that the State wrongfully sought a default judgment against Grand River, *knowing full well* that service could not possibly be effective.[27]

The State also appears to argue (for the first time) that SDCL 15-7-3 allows it to pursue substituted service by virtue of the provision allowing service on parties subject to the long-arm statute "in the same manner provided for by service within this state with the same force and effect." (A27). But that position is also irreconcilable with the Attorney General's position at the Rules Hearing that no state law provided for service internationally.

The change in the statutory language in SDCL 15-6-4(d), on which proper service under SDCL 15-6-4(e) is dependent, is also instructive. The (post-hearing) 2002 version provides, in relevant part, for service as follows:

> (2) If the action is against a foreign private corporation, on the president or other head of the

[27] The State omits any mention of this hearing because it knows that the improper service in the '01 Case poisons all three judgments. The '02 and '03 Cases penalized Grand River for *subsequent* violations of the Act. Such penalties are improper in the absence of a valid judgment for a *first* violation. The inapplicability of SDCL 15-6-4(d) in the '01 Case no doubt explains why the State does not rely on that provision, which expressly allowed service pursuant to the Hague Convention in the '02 and '03 Cases, to make its Hague Convention arguments. Instead, the State argues the Hague Convention applies of its own force and hopes this Court will ignore that statute entirely.

> corporation, secretary, cashier, treasurer, a director or managing agent thereof;
>
> (12) In an action against a person or business entity *in a foreign country*, service may be made [in the manner that follows].

(A22). Particular rules for international foreign corporations exist in subsection 12, so that provision, not the generic provision in subsection 2 for service on "foreign private corporations" applies to foreign corporations outside the United States. *See Moss v. Guttormson*, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17 (legislative provisions pertaining to specific subject matter prevail over more general provisions). Subsection 2 more naturally applies to foreign private corporations *in the United States*. Subsection 2 is a carryover from a nearly identical provision in the 2001 version.[28] (A16). Thus, at the time of the '01 Case, section 15-6-4(d) provided only for service on foreign corporations *in the United States*. The State cites no authority for the proposition that substituted service is proper over a party when section 15-6-4(d) provides no means for personal service on that party.

The cases the State cites are not to the contrary: both involve out-of-state service on defendants in the United States. To Grand River's knowledge, no court has ever applied SDCL 15-7-3 to allow service, personal or

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[28] "If the action is against a foreign private corporation, on the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof [plus some limitations not pertinent to this discussion]." (A16).

substituted, on internationally located defendants.

### 3. Even if this Court applies SDCL 15-6-4(e), service was improper.

Based on the plain text of SDCL 15-6-4(e), strict compliance requires that 1) Dobson serve an *employee* over fourteen and 2) he could not conveniently find a "general officer, director, managing agent, or other representative mentioned in § 15-6-4(d)." (A22-23). *See also White Eagle*, 2000 SD 34, ¶ 11 ("a statutory list of serviceable parties is exhaustive"). Even if SDCL 15-6-4(e) were applicable, the certificates completed by Dobson do not demonstrate compliance with the statute, and the State's (irrelevant) supplemental materials do not even attempt to describe what happened on the dates of alleged service.

#### a. Strict compliance was necessary.

In South Dakota, "proper service of process is no mere technicality;" rather, the requirement that parties receive proper notice of proceedings against them is "a 'vital corollary' to due process and the right to be heard." *Spade v. Branum*, 2002 SD 43, ¶ 7, 643 N.W.2d 765, 768. Substituted service presents particular dangers that defendants will not receive proper notice and necessitates strict compliance. *See Lekanidis v. Bendetti, supra*, 2000 SD 86, ¶ 24. The danger is especially acute for service on corporations, which by their nature cannot receive service

except through agents.[29]

Here, strict compliance was necessary because the circuit court made no finding that Grand River had actual notice of the proceedings through means other than service of process. *See Wagner v. Truesdell*, 1998 SD 9, ¶¶ 6, 7, 9, 574 N.W.2d 627, 629 (substantial compliance coupled with *actual notice* suffices for effective personal service). Nothing in the record, moreover, would support such a finding. *Cf. also White Eagle*, 2000 SD 34, ¶¶ 3, 7, 11, 14 (service on city finance officer improper where statute required service on the mayor, an alderman, or a commissioner and no showing that enumerated parties could not conveniently be found; even substantial compliance not satisfied).

**b. The certificates of service do not establish proper service.**

With the exception of a bare assertion that the certificates completed by Dobson established proper service under SDCL 15-6-4(e)--a point the State never even argued below--the State practically begs the Court not to consider their actual contents. *See* AB:40 (discussing only extrinsic material; inviting the Court to look beyond certificates). As the circuit court realized, however, the certificates on their faces are woefully inadequate.

First, none of them contain any information to satisfy the first element of the statute; namely, that Dobson looked

[29] Notably, the current version of SDCL 15-6-4(e) no longer provides for substituted service on corporations. (A27).

for and could not find an officer, director, or managing agent before serving the "male adult," Curt Styers, or the "female adult." They contain no indication that Dobson looked for anyone or that enumerated parties were unavailable. SR1:16 (A28); SR2:51 (A29); SR3:37 (A30). That fact alone defeats a finding of proper service.

Second, an adult, male or female, is not necessarily an employee, as the statute requires. Both the '01 and '03 certificates on their face suggest Dobson did not have any idea whether he was serving an employee. Indeed, the notion that a male or female who would not give their name would happily volunteer their position strains credibility. And the female adult's dubious "person in charge" title is not likely one an employee would have described. Yet, nothing in the certificates or in the record below shows how Dobson concluded either was an employee of Grand River.[30]

**c. The State's "supplemental materials" cannot reliably establish service by "filling in gaps" in the certificates.**

This Court should reject the State's invitation to consider its inflammatory supplemental materials. While the State relies on *Grajczyk v. Tasca*, 2006 SD 55, ¶¶ 25-27, 717 N.W.2d 624, 631-32, for the proposition that a court may

[30] While the State does not develop any argument based on 15-6-4(g), the Court should reject it to the extent the State contends that the mere return of a certificate of service suffices to validate service. The State cites no support for the proposition, and Grand River knows of no case in which a court so found on the basis of a certificate that on its face was not only incomplete but also whose content affirmatively suggests improprieties.

look to extrinsic evidence, that case is distinguishable. There, the extrinsic evidence supplied all of the details necessary to establish that service was proper. *Id.* (certificate identified service on "girlfriend;" testimony identified her by name, confirmed the relationship, and that she lived with defendant). Here, the supplemental materials do not supply any such detail about the dates of service and suffer numerous evidentiary flaws.[31]

**i. Inadequacy of the Young Letter.**

On appeal, the State relies on two pieces of "supplemental evidence." The first is a March 7, 2007 letter from Nancy Young at the Central Authority to Cara LaForge at LLS ("Young Letter"). The Young Letter communicates essentially three pieces of information: 1) the Central Authority has on various occasions sent documents to Dobson to serve on Grand River; 2) Dobson served Grand River "on numerous occasions," and 3) the Central Authority reviewed the Certificates and deemed them compliant with the Hague Convention. SR3:2424-25; SA.E.:26-27.

This letter has no evidentiary value for many reasons.

- It is self-serving, written *years* after even the most recent of the three service attempts and only after Grand River moved to vacate the default judgments.
- The passage of time has rendered the information stale.
- The letter does not explain what Dobson did on March 15, 2002, October 21, 2002, or June 9, 2004, the only

[31] Grand River further notes the incongruity between the State's position that the certificate suffices for Hague Convention purposes but attempts to ignore the certificate for purposes of determining compliance with state law.

three dates relevant to this case.

- It constitutes hearsay: there is no evidence Young was under oath when she drafted it.
- To the extent the letter relied on the certificates
  - a double hearsay problem presents itself,
  - the letter suffers the same substantive defects as the Dobson Declaration (discussed below).

Perhaps most importantly, however, the State offers no justification for having this Court abdicate its judicial function and defer to a mere opinion letter from the Central Authority on the question of whether service of process has been properly effectuated under the statutes of South Dakota. Grand River suggests that the Justices of this Court are in a far better position to make this determination, than is the Young Letter.

**ii. Flaws in the Dobson Declaration.**

The second piece of "supplemental evidence" the State provides is Dobson's Declaration of Due Diligence ("Dobson Declaration"), dated March 15, 2007. SR3:2424-25; 2447-49 (SA.D:23-25 & E:26-27). This document suffers several infirmities as well. It too is self-serving and contains stale information, but even if the Dobson Declaration had been drafted fresh on the heels of the alleged service attempts, it contains no specific information about what occurred on March 15, 2002, October 21, 2002, or January 9, 2004. Dobson makes no mention of a male adult who refused to give his name, the mysterious "female adult," or even Kurt Styers, the one person one of his certificates actually

identified by name. It also contains no information describing on what basis he determined them to be, respectively, a "manager," a "Controller," and a "person in charge," or whether he understood those terms to mean "general officer, director, managing agent, or other individual named in SDCL section 15-6-4(d)." (A22-23). To the extent he did, he does not say why. To the extent he did not, he does not state why he could not conveniently find one of those enumerated individuals. Such detail is necessary for a finding of proper service.

Instead of providing this necessary detail, however, Dobson's Declaration talks in vague generalities about how Grand River employees responded to service attempts on "some occasions," "many occasions" or "virtually every occasion." SR3:2448 (SA.D24-25). This conscientious avoidance of specific detail is not surprising in light of what happened to another affidavit Dobson submitted in similar proceedings in Wisconsin. There, the circuit court struck Dobson's affidavit from the record as a "sham" in light of his long-after-the-fact "recollection" of material details that were missing from his certificate of service in that case. SR3:2578-80 (A520-522). The State here no doubt wishes to avoid similar consequences.

While Grand River has no argument with the State's litigation strategy, it vigorously disputes the notion that the Dobson Declaration has any probative value whatsoever. Indeed, the few "details" it supplies about Dobson's

supposed "challenges" in effectuating service at Grand River's facility are irrelevant and inflammatory. For example, Dobson alludes to his *recent* reluctance to enter Six Nations land without police escorts in light of "tensions between the Six Nations and the local community," a barricade Grand River erected around the facility in *2005*, and his difficulties getting past a security guard stationed at the gate. SR3:2447-48 (SA.D:24-25). All of these events occurred long after his service attempts here. The issue, moreover, is what occurred once he got inside the facility, not the real and imagined obstacles Dobson faced en route. The State's reason for presenting such prejudicial "evidence" is transparent enough. It wants the Court to overlook the strict compliance requirement by insinuating that Grand River attempted to evade service. The circuit court was not duped by this tactic and this Court should not be either.

If this Court chooses to give any weight to the Dobson Declaration at all, Grand River observes that Dobson admits he knew Steve Williams was a proper individual to receive service but does not state he ever bothered to look for Williams on the dates in question (or even generally). SR3:2447-48 (SA.D:24-25). Thus, Dobson's own testimony suggests he failed to follow the statutory requirement to diligently look for all enumerated individuals before serving those he somehow determined were merely adult employees. Moreover, based on Dobson's testimony, the "male

adult" evidently was not Williams.

**4. Personal service was improper under SDCL 15-6-4(d).**

**a. Service did not comply with SDCL 15-6-4(d)(2).**

For the reasons described above, neither the 2001 nor 2002 version of SDCL 15-6-4(d)(2) applied to *international* service on foreign corporations. But even if they did, service was defective nonetheless.[32] Subsection 2 required Dobson to serve "the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof." As the foregoing demonstrates, the certificates on their face cast doubt on the notion that Dobson served even an employee, let alone a director, one of the officers enumerated, or a managing agent. While Grand River will concede that Kurt Styers is verifiably at least an employee, the dubious title "Controller" does not suggest he was one of the statutorily enumerated officers or a director. Further, one cannot speculate that the term contemplates the sort of general control or discretion over the ordinary business affairs at Grand River generally, or at the Ohsweken facility specifically, that a "managing agent" would have. *See Christiernson v. Hendrie Mfg. & Supply Co.*, 26 S.D. 519, 522, 128 N.W. 603-04 (1910) (noting wide discretion and amount of general control of such agents, as distinguished from those who report to

[32] To the extent applicable, Grand River incorporates the foregoing analysis in its analysis of this provision.

superiors). Similarly, the term "manager" does not necessarily encompass such wide authority and could relate to functions as limited as supervising employees or employee discipline. "Person in charge" is similarly vague and does not show Dobson served a proper person.

Even if one looks past the certificates, credibility is stretched to the breaking point if one accepts Dobson's assertion that he ascertained the individuals he served were among the enumerated categories when they told him nobody authorized to accept service was available. The circuit court held "[t]here is no evidence to suggest Dobson served any of the Grand River employees who carried [the statutory] titles." SR3:1601 (SA.B:13). That holding was correct.

**b. Service did not comply with SDCL 15-6-4(d)(12).**

Grand River submits that this provision applied in the '02 and '03 Cases. It allows service "against a . . . business entity in a foreign country" "by an internationally agreed means reasonably calculated to give notice, such as the Hague Convention." *See* SDCL 15-6-4(d)(12)(i)(A19, 21). Neither party contests the fact that Canada and the United States are signatories to this treaty and that this internationally agreed means of service would apply in Canada. Service under this provision therefore fails for all the reasons service under the Hague Convention fails (see section below).

### B. Even if the Hague Convention applied, service did not comply with its rules.

#### 1. Service did not comply with Ontario law.

The parties agree that under the Hague Convention, the Central Authority, upon receiving a request to serve documents may do so "by a method prescribed by its [the country of service] internal law for the service of documents."[33] Hague Convention, art. 5 (option (a)). (A577-578). The parties further agree that the applicable provincial law is R.R.O. 1990, Reg. 194, r.16.02(1)(c) (providing for service on a corporation "by leaving a copy of the document with an officer, director, or agent of the corporation, or with a person at any place of business of the corporation who appears to be in charge of the place of business"). (A591). This rule does not materially differ from the South Dakota statutes, except that it allows service on someone "*apparently* in charge." Service here fails for the same reasons it failed above, and Grand River incorporates the foregoing analysis. Dobson's certificates do not show how or why Dobson reasonably believed he was serving appropriate individuals.[34]

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[33] It may also do so "by a particular method requested by the applicant," compatible with the service country's laws *see* Hague Convention, art. 5 (option (b)), but the parties apparently agree that both were the same here, as the requests were for service in accordance with internal law.

[34] Even if the process server can be mistaken, his belief must be objectively reasonable. *Van Horne Constr. Ltd. v. Ldask MBC Corp.*, 2004 A.C.W.S.J. 5947, ¶¶ 22-23 (O.S.C.J.)(A617); *Nano v. St. Clair W. Flea Mkt. Inc.*, [2002] O.J. No. 4031 (O.S.C.J.) (service on named "adult

While the State argues at one point that the Court cannot go behind the certificates, it does precisely that, relying on the Dobson Declaration. AB:46-47. Grand River, by contrast, showed why the certificates on their face were inadequate. Additionally, the State ignores Canadian case law that indicates the Court is not obligated to ignore obvious deficiencies in the certificates. *Campeau v. Campeau*, [2004] O.J. No. 4788 (O.S.C.J.) (service improper where not translated, even though individual served was fluent in English)(A621-627); *cf. Northrup King Co. v. Compania Productora Semillas Algonoderas Selectas, S.A.*, 51 F.3d 1383, 1390 (8th Cir. 1995) (defect not *obvious*; court wished to avoid considering *expert* submissions about requirements of Spanish law).[35]

**2. The certificates in the '02 and '03 Cases do not properly describe the method of service.**

Notwithstanding any evidence the record contains regarding how the Central Authority *requested* Dobson to effect service, the important issue is how he ultimately *did*

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female" defective)(A628). The State's attempt to distinguish *Van Horne* on the basis that the individual served there was a "mere bystander" is unpersuasive in the cases of the unnamed male and female adult. As Grand River noted above, it is not clear either were in fact employees. The State does not even acknowledge the *Nano* decision.

[35] The State cites only American authorities for the proposition that return of a certificate (presumably, even a blank one) ends the inquiry, and the reliance on *State v. Waters*, 472 N.W.2d 524 (S.D. 1991), is particularly misplaced. That case does not even involve service of process to commence an action. *See id.* (attorney's certificate attached to a motion for new trial is presumptive evidence of service to avoid credibility contests between *attorneys*).

so. In the '02 and '03 Cases, the certificates contain boxes with instructions to indicate which *one* of the following methods of service apply and Dobson leaves two boxes unchecked. SR2:51 (A29); SR3:37 (A30). One of these indicates service occurred by a "following particular method," but Dobson describes no such method.

**3. The certificates do not indicate service of all proper documentation.**

The Hague Convention, article 5 requires a summary to accompany the documents served. No summary is attached to the certificates, and nothing on the certificates lists the summary as one of the documents served. In the '03 Case, moreover, the certificate does not list *any* documents as accompanying the certificate. Thus, based on the face of the certificate, it is impossible to conclude whether Dobson properly served all proper documentation on Grand River.

**C. Even if service had otherwise complied with South Dakota law and the Hague Convention, service did not comply with applicable rules related to service on Indian defendants.**

While the circuit court did not have to reach this issue, service of process here failed to comply with several requirements necessary in cases involving Indian defendants (for reasons explained above, Grand River is an Indian defendant). First, the State has *never* contended it complied with Six Nations protocol. It should have done so under either paragraph of SDCL 15-6-4(d)(12). Paragraph (ii) applies where no international agreement regarding service exists and allows service "[i]n the manner

prescribed by the law of the foreign country for service." *See* SDCL 15-6-4(d)(12)(ii)(C). (A19). Here, the Six Nations and the United States have not reached any such agreement. Alternatively, under paragraph (i), given the Six Nations' treaty understandings, Six Nations law was the proper "Canadian law" to apply under the Hague Convention, not Ontario provincial law. *See Moss*, 1996 SD 76, ¶ 10.

Second, Dobson was not a proper individual to serve process under SDCL section 15-6-4(d) because he is ineligible to vote in any state. *See* SDCL 15-6-4(c) (service on Indian in Indian country must be by elector of some state)(A16); *Bradley v. Deloria*, 1998 SD 129, ¶ 8, 587 N.W.2d 591, 594 (process on reservation must comply with section 15-6-4(c)). While section 15-6-4(d) allows service by a sheriff's officer in ordinary cases, it is superseded by the more particular provision in section 15-6-4(c) specifically applicable to Indians.

Finally, the Certificates contained no statement to the effect that service was consistent with section 89 of the Indian Act. *See* Canadian Indian Act, R.S.C., ch. C-5 § 89 (1985); *Cardinal v. Corrigan*, No. Q.B. 401397, 94 A.C.W.S. (3d) 822 (Sask Q.B. Dec. 7, 1998)(available at 1998 A.C.W.S. Lexis 31229, ¶ 3); *Bellegarde v. Qu'Appelle Indian Residential Sch. Council Inc.*, [1991] 92 Sask. R. 285, ¶ 5 (Sask. Ct. App.); and *Potts v. Potts*, [1991] 78 Alta. L.R.2d 240, ¶ 19 (Alb. Ct. App.). The question is not, as the State posits, whether section 89 applies. Rather, it is

whether, when service of process is made on an Indian, the certificate contains some statement *showing* section 89 is not offended, consistent with the *judicially* crafted rule in the above-cited cases. Also, the fact that these cases involved garnishment proceedings in no way implies that this requirement is inapplicable to other proceedings.

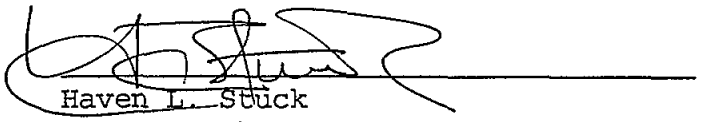
## CONCLUSION

Based on the foregoing, Grand River believes that this Court must affirm the circuit court's order vacating all three default judgments.

**ORAL ARGUMENT IS HEREBY REQUESTED.**

Dated this 15th day of May, 2008.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) true and correct copies of the Brief of Appellee, in the above-entitled action, were duly served by overnight delivery, on the 15th day of May, 2008, to the following named persons at their last known post office addresses as follows:

Jeffrey P. Hallem
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

The undersigned further certifies that the original and fourteen (14) copies of the Brief of Appellee in the above-entitled action were sent to Ms. Shirley A Jameson-Fergel, Clerk of the Supreme Court, state Capitol, 500 East Capitol, Pierre, SD 57501, by overnight delivery, on the 15th day of May, 2008.

Amy L. Vandamme