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,

24804

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,

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.

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

THE HONORABLE LORI S. WILBUR
PRESIDING CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed February 12, 2008

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PRELIMINARY STATEMENT

Appellant State of South Dakota is referred to herein as "State." Appellee Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations, Limited, is referred to as "Grand River." References to the settled record are

noted as follows: State of South Dakota v. Grand River Enterprises, Inc., ("Grand River 1") Civ. No. 01-465, by the initials "GR1 SR"; State of South Dakota v. Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations Limited, ("Grand River 2") Civ. No. 02-459, by the initials "GR2 SR"; and State of South Dakota v. Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations Limited, ("Grand River 3") Civ. No. 03-308, by the initials "GR3 SR." References are limited to GR3 SR where duplicative filings were made. References to the attached Appendix are noted by the initials "APP." References to the October 22, 2007, motion hearing transcript are noted by the initials "MH." All references are followed by the appropriate page number(s). On March 11, 2008, the Court entered an Order Granting Appellant's Motion to Exceed Page Brief Limitation allowing the filing of a brief not to exceed 55 pages in length.

JURISDICTIONAL STATEMENT

This is an appeal of right taken pursuant to SDCL 15-26A-3 from an Order and Judgment of Dismissal dated January 17, 2008, entered by the Honorable Lori S. Wilbur, vacating and dismissing with prejudice three default

judgments. The State's Notice of Appeal was filed on February 12, 2008.

STATEMENT OF LEGAL ISSUES

I

WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THAT ASSERTION OF PERSONAL JURISDICTION OVER DEFENDANT IN EACH OF THE THREE ACTIONS EXCEEDED THE LIMITS OF DUE PROCESS?

The circuit court concluded that the exercise of personal jurisdiction exceeded the limits of due process.

State v American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985)

Clune v. Alimak AB, 233 F.3d 538 (8th Cir. 2000)

Frankenfeld v. Crompton Corp., 2005 S.D. 55, 697 N.W.2d 378

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SDCL 15-7-2

II

WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THAT EACH OF THE SERVICES OF PROCESS UPON DEFENDANT WAS INEFFECTIVE?

The circuit court concluded that service of process in Canada for each of the three actions was ineffective under state law and the Hague Convention.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988)

Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, SA, 51 F.3d 1383 (8th Cir. 1995)

Grajczyk v. Tasca, 2006 S.D. 55, 717 N.W.2d 624

SDCL 15-7-3

SDCL 15-6-4(e) (2004)

SDCL 15-6-4(d)(12) (2004)

STATEMENT OF THE CASE

Grand River on February 7, 2007, filed motions to vacate default judgments that were obtained by the State in three separate enforcement actions brought in 2001, 2002, and 2003, under the South Dakota Escrow Statutes. GR1 SR 36-37; GR2 SR 74-75; GR3 SR 60-61. An order was entered consolidating the three actions for the purpose of considering the motions to vacate. GR3 SR 1105-1106. The State resisted these motions by filing Plaintiff's Verified Factual Submission in Opposition to Defendant's Motions to Vacate Judgments (GR3 SR 1607-2549) and Plaintiff's Legal Submissions in Opposition to Defendant's Motions to Vacate Judgments and Notice of Foreign Law Issues. GR3 SR 1358-1606.

Argument was held on October 22, 2007. MH. During the motions hearing, the circuit court granted the parties' request to take judicial notice of foreign law. MH 31. On

January 11, 2008, the circuit court entered its letter opinion. GR3 SR 2588-2599; APP 3-14. Therein the court concluded it lacked personal jurisdiction over Grand River because its assertion would exceed the limits of due process, and the services of process that were undertaken in Canada under the Hague Convention were insufficient. An Order and Judgment of Dismissal was entered on January 17, 2008. GR3 SR 2602-2603; APP 1-2. The State filed a Notice of Appeal on February 12, 2008. GR3 SR 2607-2608.

STATEMENT OF THE FACTS

A. South Dakota's Escrow Statutes.

In February 1998, South Dakota sued several tobacco manufacturers and trade organizations. State of South Dakota, et al. v. Phillip Morris, Inc., et al., Civ. 98-65, Sixth Circuit, Hughes County. The action was settled with the State joining the Master Settlement Agreement ("MSA") dated November 23, 1998, between the major U.S. tobacco product manufacturers and forty-six states, the District of Columbia, the Commonwealth of Puerto Rico, and four U.S. Territories (the "Settling States"). GR3 SR 186-402; SDCL 10-50B-1.

The MSA places major restrictions on advertising and marketing by signatory tobacco companies ("Participating

Manufacturers" or "PMs"). MSA §§ III, VI. Through the MSA, PMs make substantial cash payments in perpetuity. MSA § IX. These payments are in part to compensate for state expenditures for tobacco-related public health measures, and to reimburse states for health-care costs incurred as providers of last resort for their citizens. SDCL 10-50B-1. Under the MSA, the State receives approximately 0.35 percent of the estimated 206 billion dollars due the settling states through 2025. MSA Ex. A.[1]

The MSA parties recognized that some companies, the Non-Participating Manufacturers ("NPMs"), might decline to participate. NPMs have no obligations under the MSA. NPM tobacco products present serious public health and financial concerns to the State. SDCL 10-50B-1. These concerns, shared by all settling states, were that opportunistic NPMs could escape future liability to the states by managing their finances such that they would be judgment proof or otherwise unable to satisfy future judgments for harm caused by their products. SDCL 10-50B-2. Further, as NPMs are not

[1] All sums payable under the MSA are subject to adjustments during the life of the Agreement based on various factors, such as inflation and sales volume. The estimated $206 billion is the unadjusted total taken from the formulas in the Agreement. See MSA § IV.

making settlement payments and are not required to comply with the MSA's public health and promotion restrictions, they could expand their markets due to their lower costs and commercial freedom. SDCL 10-50B-2.

In order to ensure that NPMs are held accountable for future liabilities and to encourage NPMs to participate in the MSA's public health measures, the South Dakota Legislature enacted SDCL ch. 10-50B ("Escrow Statutes"). The Escrow Statutes are patterned after MSA Exhibit T. GR3 SR 186, 190-193. The Escrow Statutes apply to any NPM which manufactures cigarettes intended to be sold in the United States. SDCL 10-50B-5(1).

The Escrow Statutes require NPMs to establish and fund an escrow account for the benefit of the State based on "cigarette" "units sold" in a calendar year. SDCL 10-50B-7. SDCL 10-50B-6 defines "unit sold" as the

> number of individual cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question, as measured by excise taxes collected by the state on packs bearing the excise tax stamp or imprint of the state, or on roll-your-own tobacco.

SDCL 10-50B-6 and ARSD ch. 64:44:03 initially provided a mechanism by which the Department of Revenue and Regulation

("Department") obtained units sold information. Following enactment of complementary legislation in 2003, SDCL 10-50-80 and -81 now provide that mechanism.

To enforce the Escrow Statutes, the Legislature authorized the Attorney General to bring civil actions against noncomplying NPMs. SDCL 10-50B-9 authorizes a court to order a noncomplying NPM to make its escrow deposits, to impose civil penalties, and to enter injunctive relief prohibiting the sale of the NPM's cigarettes within the State, whether directly or through a distributor, retailer, or similar intermediary, for up to two years.

B. Grand River Enterprises Six Nations, Ltd.

Grand River is a federal corporation organized under the Canada Business Corporations Act on April 29, 1996. GR3 SR 2309, 2405-2406, 2515, 2537. Grand River operates a cigarette manufacturing business licensed under the laws of Canada, at its place of business located at 2176 Chiefswood Road, Ohsweken, Ontario, on the Six Nations Reserve. GR3 SR 2393, 2827-2528; APP 17. Grand River manufactures various brands of cigarettes for export and sale in the United States, including the Seneca brand. GR3 SR 2400-2406, 2409-2410.

The Seneca brand was originally manufactured exclusively for sale in the United States through a co-venture between Grand River and Arthur Montour, Jr., ("Montour"). GR3 SR 2303-2309, 2526, 2533-2534; APP 15-22. Montour does business through Native Wholesale Supply Company and Native Tobacco Direct Company, which he owns and operates. The co-venture relationship which began among Montour and major owners and officers of Grand River is longstanding, beginning approximately in 1992. GR3 SR 2308; APP 18-22.

In 1999, the co-venture relationship was formalized through the execution of a Cigarette Manufacturing Agreement between Grand River and Native Tobacco [Direct] Company. GR3 SR 2304-2305, 2225-2231; APP 21-22. Native Tobacco [Direct] Company is identified therein as a native business enterprise which distributes cigarettes to native wholesalers and retailers in native territories; and to other wholesalers and retailers off native territories in and outside the United States. This agreement was assigned to Native Wholesale Supply Company in June of 2000. GR3 SR 2215-2223. Under the Cigarette Manufacturing Agreement, Seneca cigarettes are manufactured by Grand River for export to the United States for distribution by Montour.

Grand River and Montour have been operating under the Cigarette Manufacturing Agreement since its execution. GR3 SR 2405, 2533-2534; APP 21-22. This co-venture relationship is publicly displayed on Native Wholesale Supply Company's website. GR3 SR 2208-2213.

Grand River has entered into similar manufacturing agreements with other distribution companies. GR3 SR 2400-2404. As it concerns the Seneca brand, Grand River entered into a Cigarette Manufacturing Agreement with Tobaccoville USA, Inc. to sell Seneca cigarettes in localities where the Montour distribution companies were not selling. GR3 SR 2401, 2338-2345. Packages of Seneca brand cigarettes bearing the statement "made under the authority of Tobaccoville USA, Inc." were purchased in the state at the Yankton Sioux Travel Plaza. GR3 SR 1831-1836, 1874.

Since Seneca brand cigarettes are manufactured exclusively for export and sale in the United States, Grand River is required to comply with certain federal laws. 19 U.S.C. § 1681(a) requires the original manufacturer of cigarettes imported into the United States to comply with provisions of the Federal Cigarette Labeling and Advertising Act regarding submission of cigarette ingredients lists (15 U.S.C. § 1335(a)), and compliance with warning rotation plan

requirements, including imprinting the required warning statements on cigarette packaging (15 U.S.C. § 1333). Grand River has been complying with these requirements. Ingredients lists have been submitted by Grand River, rotation plans by its importers, and Grand River has included on the packages of Seneca brand cigarettes the U.S. Surgeon General's warning statements. GR3 SR 1835, 2187-2206, 2374-2378, 2401-2402.

Through the joint venture with Montour and contractual relationships with other cigarette distributors, Grand River has manufactured billions of cigarettes for export and sale in the United States. The following chart sets forth the total volume of cigarettes (in millions) by brand that were manufactured and shipped to the United States from 1999-2004. GR3 SR 2402.

Brand	1999	2000	2001	2002	2003	2004
CAPITOL	5	6.88	50.82	77.2	19.12	0
CATALINA	0	0	0	6.62	0	.02
CIGS	0	0	2.4	2.28	5.53	0
MVP	0	0	0	53.376	.924	0
OPAL	0	0	0	29.232	42.762	41.58
OPTIVA	0	0	0	265.62	37.56	0
SCENIC 101	0	0	51.996	254.484	215.28	50.304

SENECA	73.35	228.4	523.304	960.924	1,456.944	2,143.962
WESTPORT	0	0	0	175.272	105,048	43.776
TOTALS	**78.35**	**235.28**	**628.52**	**1,825.008**	**1,883.168**	**2,279.642**

Although Grand River is not in compliance with South Dakota's Escrow Statutes, Grand River has been in compliance with similar laws in Nebraska and other states, where its cigarettes could legally be sold. GR3 SR 2347-2372, 2401.

C. Sale of Seneca Brand Cigarettes in South Dakota.

From 2000 through 2002, the Department received reports from HCI Distribution Company (HCI), then a licensed tobacco distributor, that Seneca brand cigarettes were stamped and shipped to South Dakota for sale. GR3 SR 1950-1992, 2176-2180, 2183-2184. HCI is a subsidiary of Ho-Chunk, Inc., a tribal development corporation owned by the Winnebago Tribe of Nebraska. GR3 SR 2089, 2162. HCI primarily sells tobacco products to tribally owned entities. HCI also had South Dakota customers that resided outside of Indian country. GR3 SR 2076-2077, 2087-2088, 2107-2108, 2162.

These reports establish that in calendar year 2000, there were 1,097,760 units sold of Seneca brand cigarettes in South Dakota. In calendar year 2001, there were 1,650,800 units sold of Seneca brand cigarettes. Finally,

in calendar year 2002, there were 440,000 units sold of Seneca brand cigarettes. GR3 SR 2183-2184. HCI acquired these cigarettes from Native Tobacco Direct Company and Native Wholesale Supply Company.

Although HCI did not report any cigarette units sold in 2003, that was due to HCI not affixing South Dakota excise stamps on cigarettes beginning in May of 2002. GR3 SR 2107, 2060-2071, 2160-2161. Unstamped Seneca brand cigarettes were shipped by HCI to the Yankton Sioux Travel Plaza and Fort Randall Casino for sale. GR3 SR 2060-2063, 2084-2085, 2094. The Yankton Sioux Travel Plaza is owned and operated by the Yankton Sioux Tribe, and is located on non-Indian country. GR3 SR 2154, 2160. The sale of unstamped cigarettes is best evidenced by the Department's seizure of 42,800 unstamped Seneca brand cigarettes on January 22, 2004, at the Yankton Sioux Travel Plaza. GR3 SR 1838-1840, 1873-1874. The illegal shipping of unstamped cigarettes resulted in the Department's revocation of HCI's distributor's license. GR3 SR 2148-2163.

D. Grand River 1.

The State commenced Grand River 1 on November 5, 2001. GR1 SR 1-7. This action arose out of Grand River's violation of the Escrow Statutes for failing to establish

and fund an escrow account for sales of Seneca brand cigarettes during calendar year 2000. To serve the pleadings, the State sought the assistance of Civil Action Group/APS International, Ltd. (APS). The decision was made to serve Grand River in accordance with the Hague Convention since Canada and the United States are parties of the Hague Convention. GR3 SR 1806. Service was effectuated consistent with Article V of the Hague Convention, which provides for service through a central authority located in the receiving jurisdiction pursuant to the laws of the receiving jurisdiction.

APS prepared the paperwork and sent the Hague Convention request to the central authority for the province of Ontario, the Ministry of the Attorney General, on November 8, 2001. GR3 SR 1800-1802, 1806. The request included two sets of documents comprised of the Summons, Complaint, "Request," "Certificate," and "Summary." The Ontario Central Authority reviewed the documents and found them to be in compliance with the Convention. GR3 SR 1805-1806, 2417; APP 26-27. The Hague Request was then forwarded to Sheriff's Officer John Dobson, who was instructed to serve the documents upon Grand River on behalf of the Central Authority. GR3 SR 2417, 2440-2441; APP 23-24.

Sheriff's Officer Dobson is the person responsible for effectuating service of process in the Ontario counties of Brant, Haldimand, and Norfolk. GR3 SR 2441; APP 23. Dobson has been serving process since 1979 and has routinely performed service on the Six Nations Reserve. GR3 SR 2441; APP 23. Since 2002, Dobson has been repeatedly instructed by the Ontario Central Authority to serve Grand River pursuant to the Hague Convention on behalf of various state attorneys general. GR3 SR 2440-2441.

Sheriff's Officer Dobson stated that effectuating service on Grand River is not an easy matter and has become increasingly difficult over time. GR3 SR 2439-2440; APP 24-25. Dobson has obtained escorts from the Six Nation's police force or the Ontario Provincial police when making service attempts on the Six Nations Reserve.

Each time that Sheriff's Officer Dobson attempted to effectuate service upon Grand River he asked to meet with an officer of the corporation authorized to accept service. GR3 SR 2440; APP 24. On nearly every occasion Dobson was informed by Grand River employees that there was no such officer present. GR3 SR 2440; APP 24. Due to the difficulties inherent in effectuating service on any defendant located on the Six Nations Reserve, Dobson

effectuated service upon Grand River employees whom he, to the best of his ability, determined to be in charge of the premises at the time of his visit. GR3 SR 2440; APP 24. Some of these individuals refused to provide Dobson with their names at the time of service. GR3 SR 2440; APP 24.

In Grand River 1, Sheriff's Officer Dobson received a set of request documents from the Ontario Central Authority and effectuated service upon Grand River by serving a "male adult" employee at Grand River's place of business, 2176 Chiefswood Road, on March 15, 2002, whom Dobson determined was the acting "manager." GR3 SR 1793.

Dobson completed the Certificate, which was returned with the other set of request documents to the Ontario Central Authority. GR3 SR 1793, 2440; APP 24. The Central Authority found the documents in order and forwarded them to APS, who provided the Certificate to the State which was filed in the court record. GR1 SR 8; GR3 SR 1794, 1805, 2416-2417; APP 26-27. The Central Authority has stated that Sheriff's Officer Dobson's services upon Grand River were in compliance with Ontario Rules of Civil Procedure R.R.O. 1990, Reg. 194 Rule 16.02(1)(c) that govern service upon a corporation. GR3 SR 2416-2417; APP 26-27.

On June 5, 2002, approximately two and a half months after service, the State filed a Motion for Default Judgment, Affidavit in Support of Motion for Default Judgment and proposed Orders. GR1 SR 9-20. The Affidavit in Support of Motion for Default Judgment included a copy of the Certificate, registered letter dated August 8, 2001, notifying Grand River of its escrow obligations, and receipt of registered letter dated August 20, 2001. On June 5, 2002, the Court entered an Order of Default and Judgment By Default. GR1 SR 21-23.

The State subsequently initiated collection efforts in South Carolina where it believed Grand River had assets. The State filed a Notice of Filing Foreign Judgment on April 22, 2004, in the Court of Common Pleas, Richmond County, South Carolina, Civ. 04-CP-40-2058, pursuant to South Carolina's "Uniform Enforcement of Foreign Judgment Act" to domesticate the judgment. GR3 SR 1787. Service of the Notice of Filing Foreign Judgment was effectuated on Grand River in accordance with the Hague Convention on August 10, 2004. GR3 SR 2420-2421, 2471. Grand River failed to plead or appear in the South Carolina domestication action, and the South Dakota Judgment was enrolled in Richmond County on February 1, 2005. GR3

SR 1787. The Judgment was transcribed to Darlington County, South Carolina, and enrolled on February 10, 2005. GR3 SR 1786-1787.

Following domestication of the judgment the State proceeded with discovery and supplemental proceedings to locate assets that could be used to satisfy the judgment. GR3 SR 1785-1786. Grand River and Tobaccoville USA, Inc. appeared to oppose such activities beginning in March of 2006.

E. Grand River 2.

The State commenced Grand River 2 on August 20, 2002, arising out of Grand River's violation of the Escrow Statutes for failing to establish and fund an escrow account for sales of Seneca brand cigarettes during calendar year 2001. GR2 SR 1-8. An Amended Complaint adding "a/k/a (also known as) Grand River Enterprises Six Nations, Ltd." was filed on August 21, 2002. GR2 SR 9-15. With the assistance of APS, two sets of Hague Convention request documents were prepared and sent to the Ontario Central Authority. GR3 SR 1796-1798, 1806. The request was received by the Central Authority and forwarded to Sheriff's Officer Dobson for service. GR3 SR 2417, 1805-1806; APP 26.

Sheriff's Officer Dobson served a set of request documents upon Grand River at Grand River's place of business, on October 23, 2002, by serving "Kurt Styers" whom Dobson determined was the "controller" and person in charge at the time. GR3 SR 1790. According to an Affidavit of Grand River's President Steve Williams filed in a similar Wisconsin escrow statute action, Mr. Styers is Grand River's plant operator. GR3 SR 1616. Dobson completed the Certificate and returned it with the other set of documents to the Ontario Central Authority. After determining service was proper, the documents were forwarded to APS who then forwarded the Certificate to the State, which was filed in the court record. GR2 SR 31; GR3 SR 1791, 1805, 2416-2417, 2440; APP 24, 26-27.

On February 25, 2003, four months following service, the State filed a Motion for Default Judgment, Affidavit in Support of Motion for Default Judgment and proposed orders. GR2 SR 32-56. The Affidavit in Support of Motion for Default Judgment included a copy of the Certificate and copies of the unreturned letters, dated January 28, 2002, and March 28, 2002, that the State had mailed to Grand River informing it of its escrow obligations for calendar year

2001 sales. On February 27, 2003, the Court entered Order of Default and Judgment by Default. GR2 SR 57-60.

As with Grand River 1, the State domesticated the judgment in South Carolina. GR3 SR 1787. The State's post-judgment collection efforts have been identical to those for Grand River 1.

F. Grand River 3.

The State commenced Grand River 3 for Grand River's violation of the Escrow Statutes by failing to establish and fund an Escrow Account for sales of Seneca brand cigarettes in calendar year 2002, with the filing of a Summons and Complaint on August 12, 2003. GR3 SR 1-8. To serve the pleadings, the State sought the assistance of Legal Language Services (LLS). GR3 SR 2478. LLS routinely effects service of process worldwide and was retained by the National Association of Attorneys General to assist states in effecting service on foreign tobacco product manufacturers. GR3 SR 2478. With LLS's assistance two sets of the Hague Convention Request were prepared and sent to the Ontario Central Authority. GR3 SR 2444, 2474.

The Hague Request was received and approved by the Central Authority on August 22, 2003, and forwarded to Sheriff's Officer Dobson for service. GR3 SR 2417, 2473;

APP 26. Dobson served a set of documents on Grand River on January 9, 2004, at Grand River's place of business by service on a "female adult" employee whom he determined was the "person in charge" at that time. GR3 SR 2422. Dobson completed the Certificate and returned it with the other set of documents to the Central Authority. GR3 SR 2440; APP 24. On February 24, 2004, after determining service was proper, the Central Authority forwarded the completed Certificate and set of request documents to the Attorney General's Office, which was filed in the court record. GR3 SR 9-21, 2416-2417; APP 26-27.

On April 9, 2004, three months after service, the State filed a Motion for Default Judgment, Affidavit in Support of Motion for Default Judgment and proposed orders. GR3 SR 23-43. The Affidavit included a copy of the Certificate, request, and copies of unreturned letters dated January 30, 2003, and March 27, 2003, which the State had mailed to Grand River notifying it of its escrow obligations. On April 14, 2004, the Court entered an Order of Default and Judgment By Default. GR3 SR 44-47.

The State domesticated this judgment in South Carolina similar to the prior two Grand River judgments. GR3 SR 1787. Service of the Notice of Filing Foreign

Judgment was accomplished on November 12, 2004, in accordance with the Hague Convention. GR3 SR 2419. Subsequent proceedings are similar to Grand River 1 and 2.

ARGUMENT

I

THE EXERCISE OF PERSONAL JURISDICTION OVER DEFENDANT DOES NOT EXCEED THE LIMITS OF DUE PROCESS.

A. Standard of review and Introduction.

The circuit court decided Defendant's motions to vacate under SDCL 15-6-60(b)(4). Generally, review of the grant or denial of a motion under 15-6-60(b) is under the abuse of discretion standard. Glover v. Krambeck, 2007 S.D. 11, ¶ 9, 727 N.W.2d 801, 803-804. The circuit court's granting of the motion on personal jurisdictional grounds involves questions of law that are reviewed de novo. Dairyland Ins. Co. v. Jarman, 2007 S.D. 110, ¶ 6, 741 N.W.2d 731, 732; Grajczyk v. Tasca, 2006 S.D. 55, ¶ 8, 717 N.W.2d 624, 627. Errors of law can constitute an abuse of discretion. Brendtro v. Nelson, 2006 S.D. 71, ¶ 38 n.11, 720 N.W.2d 670, 683. The State acknowledges that unlike other provisions of SDCL 15-6-60(b), there is no time limitation to bring a claim that the judgment is void for lack of personal jurisdiction. Kromer v. Sullivan, 88 S.D. 567, 225 N.W.2d 591, 592 (1975).

The circuit court erred as a matter of law in concluding that the exercise of personal jurisdiction over Grand River violated the Due Process Clause. This error constitutes an abuse of discretion requiring reversal. Specific jurisdiction occurs when a court asserts jurisdiction over a defendant in relation to a cause of action arising out of specific activity or acts. Marschke v. Wratislaw, 2007 S.D. 125, ¶ 12, 743 N.W.2d 402, 406. Here, the undisputed facts provide a sufficient basis to establish specific jurisdiction over Grand River which does not exceed the limits of due process.

B. South Dakota's Long Arm Statute Provides the Court With Jurisdiction.

The circuit court properly concluded that the issue of personal jurisdiction was whether the exercise of such jurisdiction comports with federal due process requirements. GR3 SR 2595. This Court has established a twofold inquiry as to whether a court may assert personal jurisdiction over a nonresident defendant:

> First, the court must determine whether the legislature granted the state court jurisdiction over defendants who do not meet the traditional bases for personal jurisdiction. In South Dakota, this legislative approval is found in the state's Long Arm Statute. Next, the court must determine whether the purported assertion of jurisdiction comports with federal due process requirements.

Frankenfeld v. Crompton Corporation, 2005 S.D. 55, ¶ 9, 697 N.W.2d 378, 381.

However, given Ventling v. Kraft, 83 S.D. 465, 161 N.W.2d 29, 33-34 (1968), personal jurisdiction analysis actually folds into the second inquiry. In Ventling the Court articulated that the Legislature intended the State's long arm statute (SDCL 15-7-2) to be as broad as the Due Process Clause. This is the exact conclusion reached in Dakota Industries, Inc. v. Ever Best Ltd., 28 F.3d 910, 915 (8th Cir. 1994): "South Dakota construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause." This is also why defendants routinely concede personal jurisdiction is appropriate under the long-arm statute but contest whether personal jurisdiction satisfies federal due process requirements. See, e.g., Marschke, 2007 S.D. 125, ¶ 13, 743 N.W.2d at 406; and Frankenfeld, 2005 S.D. 55, ¶ 9, 697 N.W.2d at 381.

The applicable portions of SDCL 15-7-2 are as follows:

> 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 any 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.

Even if the Court reviews the applicability of the long-arm statute, the actions the State sets forth to establish "purposeful availment plus" factors clearly satisfy SDCL 15-7-2(1) and (14). See infra pp. 29-30.

This conclusion is confirmed by a reading of the Escrow Statutes themselves. SDCL 10-50B-5(1) defines "tobacco product manufacturer" as an entity that "[m]anufactures cigarettes anywhere which the manufacturer intends to be sold in the United States . . . ." SDCL 10-50B-9 authorizes an action by the Attorney General against a foreign tobacco product manufacturer for noncompliance with SDCL 10-50B-7. Section 10-50B-7, and the "units sold" definition in SDCL 10-50B-6, apply against any tobacco product manufacturer for sales "whether directly or through a distributor, retailer, or other intermediary or intermediaries." (Emphasis added.) The Legislature clearly intended that suit may be brought against a foreign tobacco product manufacturer even though it was not physically present in the state, where its

distribution network caused cigarettes to be sold within the state.

C. Jurisdiction Over Grand River Comports With Federal Due Process Requirements.

The Due Process Clause affords protection from binding judgments of a forum with which a person has no meaningful contacts, ties, or relations. Frankenfeld, 2005 S.D. 55, ¶ 10, 697 N.W.2d at 281-82.

> In International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the Court held that states could exercise jurisdiction if the nonresidents had such "minimum contacts" with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Due process requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Due process also requires that the defendant's conduct and connection with the forum state be such that he should reasonably anticipate being haled into court there.

State v. American Bankers Insurance Co., 374 N.W.2d 609, 612 (S.D. 1985) (citations omitted). The Court has established a three-step test to determine whether due process is satisfied: 1) the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws; 2) the cause of action must arise from the

defendant's activities directed at the forum state; and 3) the acts of the defendant must have substantial connection with the forum state to make the exercise of jurisdiction over the defendant a reasonable one. Marschke, 2007 S.D. 55, ¶ 15, 743 N.W.2d at 407; Frankenfeld, 2005 S.D. 55, ¶ 17, 697 N.W.2d at 384. Contrary to the circuit court's conclusions, all three steps are satisfied.

The "purposeful availment" step is designed to prevent a nonresident from being haled into a jurisdiction "solely as a result of 'random,' 'fortuitous,' or attenuated' contacts." American Bankers Insurance Co., 374 N.W.2d at 612-13 (citations omitted). However, it is "only necessary that the nonresident defendant's contacts with the forum state proximately result from its actions." Id.

This case concerns the "stream of commerce" theory. As the Court in Frankenfeld, 2005 S.D. 55, ¶ 9, 697 N.W.2d at 683 recognized:

> In [World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)], the United States Supreme Court stated that due process is satisfied when a forum state "asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state," thereby implying that placing a product in the stream of commerce establishes "purposeful availment." Id. at 298, 100 S.Ct. 559.

In Frankenfeld the Court discussed Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the most recent Supreme Court case where the stream of commerce theory was addressed. In Asahi Justice O'Connor articulated what has become known as the "stream of commerce plus standard" that requires conduct in addition to placing the product in the stream of commerce. See Frankenfeld, 2005 S.D. 55, ¶ 15, 697 N.W.2d at 383.

As the Eighth Circuit has stated, however, the assistance Asahi provides is limited:

> In its most recent discourse on the stream of commerce theory, the Court in Asahi debated whether a foreign manufacturer that places a product in the stream of commerce purposely avails itself of the privilege of conducting business in a state where the product ultimately is found. Although a majority of the Asahi Court agreed with Justice O'Connor that jurisdiction was not proper in that case, five Justices refused to adopt her articulation of a stream of commerce "plus" theory. See 480 U.S. at 116-22, 107 S.Ct. 1026. See also Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994) ("In short, Asahi stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant.").

Clune v. Alimak AB, 233 F.3d 538, 542 (8th Cir. 2000).

In concluding its jurisdiction exceeded the limits of due process, the trial court applied the "stream of commerce plus" standard. GR3 SR 2594; APP 8. The circuit court erred as a matter of law in applying this standard, and further erred by failing to conclude that the standard was satisfied.

It is at best unclear whether the Court in Frankenfeld adopted Justice O'Connor's "stream of commerce plus" standard for the "purposeful availment step." Even if adopted, Frankenfeld provides little guidance as to what a "plus" factor is. As such, contrary to the circuit court's conclusions, the State asserts that the "stream of commerce plus" standard has not been adopted and, even if it has, the facts of this case clearly satisfy any "plus" that is necessary to establish the "purposeful availment."

In each of the three actions, the following undisputed facts establish purposeful availment "plus" factors: 1) Grand River's long-standing joint venture with Arthur Montour to distribute the Seneca brand cigarettes it manufactured within the United States; 2) the Cigarette Manufacturing Agreement with Tobaccoville USA, Inc. to distribute Seneca brand cigarettes in areas of the United States where the Montour distribution companies were not

selling; 3) Grand River compliance with United States law in the manufacturing and packaging of these cigarettes for sale in the United States; 4) Grand River satisfied Nebraska state law to allow the sale of its cigarettes to occur in that state; 5) HCI Distribution Co., a tobacco product distributor located in Nebraska, was licensed and distributed cigarettes not only in Nebraska, but also in surrounding states, including the State of South Dakota; 6) Montour's companies, Native Wholesale Supply Co. and Native Tobacco Direct Co., supplied cigarettes manufactured by Grand River to HCI for resale; 7) HCI stamped and shipped large quantities of Seneca brand cigarettes into the State of South Dakota for sale to consumers in each of the three years the state pursued litigation; and 8) the State's action against Grand River specifically relate to those sales of cigarettes within the State of South Dakota.

The circuit court erred in failing to give proper weight to the stated "plus" factors, especially the joint venture with Montour, Grand River's compliance with federal law in order to sell its cigarettes in the United States and the continuous sale of large quantities of Seneca brand cigarettes in the state. Once Grand River established Montour and Tobaccoville, USA, Inc. as its United States

marketing distribution arms for Seneca brand cigarettes, it could not hide behind the assertion that its involvement was limited to manufacture and dropping off the cigarettes at the U.S. border.

None of the stated "plus" factors were present in Frankenfeld. Indeed, the lack of actual product purchases in the state was the basis on which the Frankenfeld Court distinguished its prior decision in Russell v. Balcom Chemicals, Inc., 328 N.W.2d 476 (S.D. 1983). In Russell, 328 N.W.2d at 479, the Court found personal jurisdiction over two foreign corporations, one of which neither had physical presence nor directly did business in the state, based upon the fact that the product that was the subject matter of the suit was purchased in South Dakota by a South Dakota resident.

Consistent with Russell, the purposeful availment step has been satisfied. Concluding that the stated "plus" factors satisfy the purposeful availment step is also consistent with the Court's decision in American Bankers Insurance Co., 374 N.W.2d at 612-613. There the Court found purposeful availment for purposes of a state premium tax action based upon the collection of premiums and payment of

claims on contracts the defendant purchased in bulk from another company.

Such a conclusion is also consistent with Eighth Circuit stream of commerce decisions which rejected the "stream of commerce plus" standard. The Eighth Circuit concluded that purposeful availment is met where a manufacturer did more than simply set a product adrift in the international stream of commerce. This "more" is satisfied by heading a distribution network to sell its products throughout the country. Once establishing such a network and reaping its benefits, the manufacturer cannot plead ignorance that its products were being distributed into neighboring states. See Clune, 233 F.3d at 543-545; Barone v Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613-615 (8th Cir. 1994). In this case the joint venture with Montour and his business entities and the agreement with Tobaccoville USA, Inc. satisfies the conscious establishment of a distribution network. Further, Grand River's compliance with required federal law for the sale of its cigarettes throughout the United States constitutes something "more."

Concluding the purposeful availment step is satisfied is supported by two recent Ohio Court of Appeals decisions

interpreting Ohio's version of the Escrow Statutes. In State ex rel. Atty. Gen. v. Grand Tobacco, 871 N.E.2d 1255 (Ohio App. 2007), the Ohio Court of Appeals found personal jurisdiction under Ohio's long arm statute consistent with due process based upon the close business relationship between Grand Tobacco and its affiliate, and the amount of cigarettes sold in Ohio. Grand Tobacco, 871 N.E.2d at 1261-1264. The Ohio Court of Appeals concluded that such a relationship precluded any finding of unilateral activity through third parties, or that Grand Tobacco merely sold its product in the market with no direction in mind. Grand Tobacco, 871 N.E.2d at 1263. In State ex rel. Dann v. Bulgartabac Holding Group, 2007 WL 4395514 (Ohio App. 10 Dist.), the Court of Appeals found personal jurisdiction based upon the volume of sales, the tobacco products manufacturer's relationship with a distributor, and compliance with required federal law for sale of cigarettes in the United States.

The federal cases relied upon by the trial court below do not support its conclusions. Bridgeport Music, Inc. v. Still N the Water Pub'g., 327 F.3d 472 (6th Cir. 2003) and Boit v. Gar-Tec, Products, Inc., 967 F.2d 671 (1st Cir. 1992), apply the stream of commerce "plus" test. The

Bridgeport Music Court acknowledged that its decision would be different under other standards. Bridgeport Music, 327 F.3d at 480. Further, that court distinguished its earlier decision in Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528 (6th Cir. 1993) where it found purposeful availment based on the existence of a nationwide distribution agreement. Bridgeport Music, 327 F.3d at 480. Here, unlike Bridgeport Music, and like Tobin, Grand River entered into nationwide distribution agreements.

The First Circuit opinion in Boit is factually distinguishable. The sole factual support for jurisdiction was the purchase of a single hot air gun from a catalog of a national mail retailer. Boit, 967 F.2d at 679.

The Fourth Circuit decision in Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (6th Cir. 1994) is likewise factually distinguishable as it involved a suit against a component manufacturer (filter) of a product (cigarettes) ultimately sold in the forum state. This decision is akin to this Court's decision in Frankenfeld which distinguished Russell where the actual product was purchased in South Dakota by a South Dakota resident.

Though not addressed by the circuit court, the remaining steps of the due process analysis are clearly

satisfied. The second step, that the cause of action must arise from Defendant's activities directed at the forum state, is satisfied since the State's actions against Grand River are directly related to the sale of cigarettes to consumers within this state. This litigation is intended to ensure that Grand River is financially responsible for liabilities incurred as a result of smoking-related illnesses that arise from consumption of its cigarettes by State residents. See SDCL 50-10B-1.

The undisputed facts also satisfy the third step: that the acts of defendant must have a substantial connection with the forum state to make the exercise of jurisdiction over defendant a reasonable one. The Escrow Statutes are intended to hold Grand River accountable for the sale of patently dangerous products that are consumed by residents within the state. There can be no dispute that Grand River's connection with South Dakota is such that it should have reasonably anticipated being haled into court here. As such, personal jurisdiction over Grand River satisfies all due process steps.

Finally, Grand River below asserted that traditional minimum contacts analysis is inapplicable to it, since it is an Indian defendant operating exclusively on a reservation.

Grand River's attempt to apply United States federal Indian law to Canada is not supportable. Under Canada law, Grand River, as a Canadian corporation, is entitled to no particular rights or benefits, notwithstanding the fact that it is owned by Indians operating on the Six Nations Indian Reserve. See infra pp. 48-53.

Jurisdiction over Grand River is based upon cigarettes that were stamped with the South Dakota excise stamp and sold in South Dakota. Whether the ultimate sale took place in Indian country is irrelevant. The State has provided conclusive evidence that substantial sales occured at the Yankton Sioux Travel Plaza, which did not constitute sales on a reservation or in Indian country, and was subject to State regulation. Further, given the tax agreements with five of the Tribes located in the State that address collection and distribution of the cigarette tax within the reservations and Indian country of those tribes, Grand River's legal assertions are rendered factually meaningless. GR3 SR 1878-1949. Finally, the Cigarette Manufacturing Agreement with Tobaccoville USA, Inc. belies the entire argument. Grand River Seneca brand cigarettes can be sold anywhere.

Even under United States law, South Dakota can legally require cigarette excise tax to be paid on sales in Indian country to nonmembers and can impose collection and reporting requirements upon tribal retailers. See Washington v. Confederated Tribes of Coville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (only members of reservation's governing tribe are exempt from the payment of a tobacco excise tax); Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe of Oaklahoma, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Tribal retailers are required to collect state taxes imposed on nonmember sales); and Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) (the Indian Trader Statutes did not preempt New Yorks's requirements that wholesalers, who sold cigarettes to tribal retailers, pre-collect cigarette tax where the legal incidents fell on the ultimate consumer). In Omaha Tribe of Nebraska v. Miller, 311 F.Supp.2d 816 (S.D. Iowa 2004), the district court held that a state's escrow statutes applied to the Omaha Tribe that was manufacturing cigarettes on its reservation. If a corporation owned by a tribe operating on its reservation is

subject to state regulation, clearly Grand River is subject to the same regulation.

II

SERVICES OF PROCESS WERE EFFECTIVE.

A. Introduction.

If the Court concludes personal jurisdiction over Grand River did not violate the Due Process Clause, the second issue must be addressed. The circuit court erred as a matter of law in concluding that service in the three actions was ineffective and such error constitutes an abuse of discretion requiring reversal. In reaching its decision, the circuit court erred in failing to consider SDCL 15-6-4(e) and SDCL 15-7-3 as independent state statutory bases for service. Further, in reviewing service under the Hague Convention the circuit court erred in failing to apply the presumption of proper service that should be afforded under the treaty. Finally, contrary to the circuit court's conclusions, the State satisfied all applicable service requirements.

B. Service Was Proper Under State Law.

It is the State's position the Hague Convention preempted state law for service in Grand River 1 and SDCL

15-6-4(d)(12)[2] authorized such service in Grand River 2 and 3. However, had the circuit court considered SDCL §§ 15-6-4(e)[3] and 15-7-3 in its review of service solely as a question of state law, there would be no question regarding the validity of each service of process. As demonstrated by the Certificates and Dobson's Declaration, valid substituted service was accomplished under versions of SDCL §§ 15-7-3, 15-6-4(e), 15-6-4(c) and 15-6-4(g) in effect at the time of service.

SDCL 15-7-3 addresses service of process outside of the state for persons that are subject to South Dakota's long arm statutes. This statute provides:

> Service of process upon persons subject to § 15-7-2 may be made by service outside this state in the same manner provided for service within this state with the same force and effect as though service had been made within this state.

Through this statute, all of the State's service of process provisions, including substituted service, apply to out-of-state service. See United National Bank v. Searles, 331 N.W.2d 288 (S.D. 1983) and Sieg v. Karnes, 693 F.2d 803 (8th

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[2] 15-6-4(d) was amended in 2005 by Supreme Court Rule 05-01.
[3] 15-6-4(e) was amended in 2005 by Supreme Court Rule 05-02.

Cir 1982). SDCL 15-6-4(e) (2004) provided in pertinent part:

> Service in the following matter shall also constitute personal service. . . . If the defendant is a private corporation and no general officer, director, managing agent, or other representative mentioned in § 15-6-4(d) as qualified to receive service can conveniently be found, service may be made on such corporation by leaving a copy at the business of such qualified person with any officer or employee over fourteen years of age.

On its face, this provision is applicable to all corporations, domestic and foreign.

A determination on substituted service may be made by considering matters outside of the certificate. Grajczyk, 2006 S.D. 55, ¶¶ 25-27, 717 N.W.2d at 631-32. Here, Sheriff's Officer Dobson's Declaration establishes that in each instance service was effectuated upon an adult employee of Grand River at what is undisputedly Grand River's principal place of business. Dobson went to the 2176 Chiefswood Road address and, after determining that a requisite officer or otherwise authorized person was unavailable, served the applicable pleading on "the Grand River employees whom I determined, to the best of my ability, to be in charge of the premises at the time . . . ." GR3 SR 2440; APP 24.

Further, none of the Indian law arguments Grand River made below are valid since application of federal law regarding Indians and Indian country is totally irrelevant to a service of a Canadian corporation in Canada on an Indian reserve. See infra pp. 48-53. The exception for sheriff service under SDCL 15-6-4(c) was not applicable since service was not on a tribal member, on the tribal member's reservation or "Indian country," as these terms are used under federal law. As a constable for the county, Sheriff's Officer Dobson clearly had authority to make the service. Bradley v. Deloria, 1998 S.D. 129, 587 N.W.2d 591 and similar cases are simply irrelevant to the Court's analysis. State law was clearly satisfied and effective service was made upon Grand River in each action.

C. Service Was Proper Under the Hague Convention.

The circuit court also erred as a matter of law in not applying the presumption of effective service of process which was performed under the Hague Convention and going behind the certificates to conclude service was ineffective under Ontario law.

The Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention") is a multilateral treaty that is

"intended to provide a simple way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). See 20 U.S.T. 361; GR3 SR 1589-1601. The United States and Canada have ratified or acceded to the Hague Convention Treaty. By its terms, the Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Convention, Art. 1.

The Hague Convention preempts inconsistent methods of service by state law in all cases where it applies, by virtue of the Supremacy Clause, U.S. Constitution, Art. VI., Volkswagenwerk, 486 U.S. at 699. The Hague Convention applies "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad." Volkswagenwerk, 486 U.S. at 700.

In this case, the version of SDCL 15-6-4(d)(12) in effect clearly authorized service through the Hague Convention for Grand River 2 and Grand River 3. Further,

even prior to the Court's adoption of this provision, because SDCL §§ 15-6-4(d) and 15-6-4(e) contemplate personal service upon a foreign corporation, service on Defendant (a Canadian corporation located in Canada) required compliance with the Hague Convention.

As recognized in Volkswagenwerk, the Hague Convention involved a new innovation.

> The primary innovation of the Convention is that it requires each state to establish a central authority to receive requests for service of documents from other countries. 20 U.S.T. 362, T.I.A.S. 6638, Art. 2. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. Art. 5. The central authority must then provide a certificate of service that conforms to a specified model. Art. 6.

486 U.S. at 698-99.

The Ministry of the Attorney General is the Central Authority for the Province of Ontario, Canada. The applicable service laws of the receiving state are Ontario Rules of Civil Procedure, Rule 16 Service of Documents, R.R.O. 1990 Reg. 194, s. 16. GR3 SR 1573-1587.

The Hague Convention requires that the request to the Central Authority include the documents to be served, accompanied by certain forms, that include a:

> "Request for Service Abroad of Judicial or Extrajudicial Documents," a "Certificate" of Service, and a "Summary of the Document to be Served," ("Summary"). Id. at art. 3. If the Central Authority finds that the request does not comply with the provisions of the Convention, the Convention requires the Central Authority to "promptly inform the applicant and specify its objections to the request." Id. at art. 4. However, once it is determined that a request conforms to the Convention, the Central Authority either serves the document or arranges for it to be served by an appropriate agency in accordance with its own law. Id. at art. 4. When service is completed, the Central Authority returns a completed Certificate of Service to the party that requested service. Id. at art. 6.

Resource Trade Finance, Inc. v. PMI Alloys, LLC, 2002 WL 1836818, at *4 (S.D.N.Y.). The Eighth Circuit in Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1390 (8th Cir. 1995), held that a central authority's return of a completed certificate constitutes prima facie evidence that the authority's service was made in compliance with the Hague Convention. In reaching its holding, the court stated:

> The Convention requires that the Central Authority serve the documents by a method specified by its own law or by the sender that complies with local law and reserves to the Central Authority the right to object to documents if they do not comply with the Convention. By not objecting to the documents and by certifying service the Central Authority indicated that the documents complied with the Convention and that it had served them in compliance with the Convention, i.e., that it had made service as Spanish law required. We decline

> to look behind the certificate of service to adjudicate the issues of Spanish procedural law that the parties have raised through their submission of conflicting expert statements on this issue.

Id. (emphasis added). Other courts have followed the Eighth Circuit's holding. See, e.g., In re S1 Corporation Securities Litigation, 173 F.Supp.2d 1334, 1344 (N.D. Ga. 2001); Resource Trade Finance, Inc., 2002 WL 1836818, at *4. Further, this Court has held that a presumption of the sufficiency of service arises from a certificate of service. See State v. Waters, 472 N.W.2d 524 (S.D. 1991) (presumption of service when attorney files certificate of service under SDCL 15-6-59(b)).

In this case, not only do the three certificates from the Central Authority demonstrate compliance with Ontario service laws, there is also a letter from the Central Authority verifying that Sheriff's Officer Dobson's services upon Grand River had been reviewed and found in compliance. APP 26-27. This evidence is dispositive of the issue of effective service.

However, even if the Court determines to look behind each service, only one conclusion can result, that effective service was made in each case.

1. Service on Grand River is Proper Pursuant to Ontario Rules of Procedure 16.02(1)(c).

Contrary to the circuit court's conclusions, service was effectuated in accordance with the Ontario Rules of Civil Procedure. Ontario Rule of Civil Procedure R.R.O. s.16.02(1)(c) provides:

> Where a document is to be served personally, service may be made, ...
> (c) Corporation - on any other 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 control or management of the place of business;

(Emphasis added.) GR3 SR 1584. Sheriff's Officer Dobson effectuated service on Grand River consistent with this rule.

Each time Sheriff's Officer Dobson attempted to serve Grand River, he asked to meet with officers of the corporation whom were authorized to accept service. The record establishes that when Grand River's President, Steve Williams, was present, Dobson served him. Three Certificates Dobson prepared state service upon Mr. Williams. See GR3 SR 2419-2421, 2440. However, as reflected in Dobson's Declaration, the employees of Grand River typically responded that no such officer was present. Dobson therefore effectuated service upon Grand River

employees whom he determined to the best of his ability "to be in charge of the premises at the time of my visit." GR3 SR 2440. Sometimes, as happened in the services for Grand River 1 and 3, these individuals refused to provide Dobson with their names at the time of service. GR3 SR 1793, 2422, 2440; APP 24.

Dobson, as the sheriff's officer charged with effectuating service in his geographical area since 1979, has served Grand River on behalf of various state attorneys general since 2002. GR3 SR 2441; APP 24. Clearly, based upon these interactions, Dobson had sufficient reasonable belief that the persons whom he served for Grand River 1, 2, and 3 appeared at the time to be "in control or management of the place of business."

Whether service was made upon the unnamed male or female employees who refused to identify themselves or upon Mr. Styers, each service is proper. Service was not made on a mere bystander or somebody not associated with Grand River. Any reliance on Van Horne Construction, Ltd. v. Ldask MBC Corp., 2004 WL 885868, CarswellOnt 1690 (Ont. S. C. J.) is misplaced. GR3 SR 1367-1376. In Van Horne Construction, Ltd., the record clearly reflects that the person upon whom service was made had no affiliation with

the corporation itself. This is clearly not the record here.

2. The Hague Convention and Ontario Rules of Civil Procedure Apply to Grand River.

Grand River asserted below that the Hague Convention is not applicable to service upon it since the Six Nations Band is not a member to the treaty. Grand River provided absolutely no Canadian authority to support this proposition. Indeed, this assertion is contrary to well-established Canadian law.

In Canada, international treaties are entered into by the executive branch of the federal government and are binding on the nation as a whole. Peter W. Hogg, Constitutional Law of Canada, Fifth Edition Supplemented 11-2, 11-5, 11-11 (2006) ("Hogg") GR3 SR 1562-1571. In Regina v. Daniels, 56 W.W.R. 234, 1996 CarswellMan 25 (Man. C.A. 1966), GR3 SR 1537-1542, the court held the Migratory Birds Convention Act between the United States and Canada applied to Indians on the Chemahawin Indian Reserve. "But surely a matter within the legislative responsibility of the federal parliament, governed by an international treaty entered into by Canada with its neighbors in all its solemn form, deserves uniformity of application throughout the country

unless specifically provided otherwise." Regina, ¶ 32. There is simply no authority that an international treaty such as the Hague Convention entered into by the United States and Canada is somehow not applicable in this case.

3. United States Law Regarding Indian Tribes, Reservations, and Indian Country Are Irrelevant.

Grand River below attempted to apply federal law regarding Indian tribes and reservations to Canada. There is no support for such a proposition. Canadian Indian reserves are not independent sovereign enclaves, nor do Indian nations or bands have separate sovereignty. As one Canadian treatise provides:

> [T]he Supreme Court of Canada has said that the provinces may legislate (within their spheres) over Indians. Indian reserves are not "enclaves" immune from provincial jurisdiction. Provincial legislation of all types validly enacted within the provincial sphere of legislative competence is applicable of its own force and effect to Indians, both on- and off-reserve, subject to a number of exclusionary rules. . . . The example favored by the court decisions is provincial highway traffic laws which "obviously" apply to Indians and non-Indians alike without any help from federal legislation. It has been said that a history of legal recognition of Indian sovereignty has not existed in Canada as it has in the United States.
>
> . . . .
>
> The basic rule is that provincial laws apply to Indians and Indian lands unless they are prevented from doing so by one of the exceptions to the rule which exclude provincial laws. This is true both

> on and off reserve, as Indian reserves are not enclaves which exclude provincial legislation.

J. Woodward, Native Law 120, 127-128 (2006) ("Woodward") (emphasis added). GR3 SR 1464-1535.

4. Canada Indian Law Is Not Applicable.

Grand River further asserted below that the Ontario Rules of Civil Procedure do not apply because of the provisions of the Indian Act, R.S.C., ch. I-5 (1985) ("Indian Act") are totally lacking of any legal support.[4] The Indian Act does not provide any exception to the applicability of provincial law regarding service on Grand River. Section 91(24) of the Canadian Constitution, 1867 confers upon the federal parliament the power to make laws in relation to "Indians, and lands reserved for Indians." See Hogg, at 28-2. Pursuant to this constitutional grant of authority, Parliament enacted the statute governing Indian affairs in Canada known as the Indian Act. Section 88 of the Indian Act specifically provides that provincial laws of general application are applicable to Canadian Indians:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the

[4] The full text of the Indian Act can be found on the Canadian Department of Justice's website at http://laws.justice.gc.ca/en/.

> province, except to the extent that those laws are inconsistent with this Act or The First Nations Fiscal and Statistical Management Act, or with any order, rule, regulation, or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which the provision is made under those Acts.

Indian Act, section 88, GR3 SR 1447.

The Indian Act defines "reserve," as "a tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for use and benefit of the band, . . ." Indian Act, section 2(1). GR3 SR 1449. Therefore, "aboriginal title exists within Canadian sovereignty." Ro:ri:wi:io: v. (Attorney General), 2007 WL 481821, 2007 CarswellOnt 743 (Ont. C.A. 2007); Ro:ri:wi:io v. Canada (Attorney General), 2006 WL 4061926, 2006 CarswellOnt 8694 (Ont. S.C.J. 2006); GR3 SR 1437-1444. The Six Nations Indian Reserve is not separate sovereign territory and general Ontario provincial law is applicable.

Additionally, there is no Canadian law that holds a provincial county sheriff's officer cannot serve pleadings on an Indian reserve. R. v. Pinay, (Sask. Q.B. 1990) 84 Sask. R. 287, 4 C.N.L.R. 71, 1990 CarswellSask 261, GR3 SR 1424-1435, held a provincial sheriff's officer did not commit a trespass under the Indian Act, when the officer

entered a reserve with lawful justification. Sheriff's Officer Dobson clearly had lawful justification to enter the Six Nations Reserve to serve Grand River. This justification came from the Central Authority, who requested Dobson serve Grand River, and from the Ontario Rules of Civil Procedure that provide for a personal service through a sheriff's officer. See R.R.O. 1990 Reg. 194 s.16.09, GR3 SR 1574.

The argument that service was improper for not complying with Section 89 of the Indian Act is likewise without merit. Section 89 of the Indian Act reads, in pertinent part: "(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress, or execution in favour or at the instance of any person other than an Indian or band." See GR3 SR 1446-1447. Section 89 was not applicable to Grand River and as such, the notice requirements do not apply. First, s.89 only applies to post-judgment activities. Nothing in s.89 or elsewhere in the Indian Act "prevents a suit against an Indian." Woodward, at 295.

Further, as a Canadian federal corporation, Grand River does not constitute an "Indian" or a "band" for purposes of

s.89 Indian Act. Woodward, at 290, 296.1. Section 2(1) of the Indian Act defines Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." Applying this definition, the Canadian courts have held that a corporation cannot be considered to be an Indian within the meaning of the Indian Act. GR3 SR 1450; Woodward, at 11.

Grand River is also not a "band." Section 2(1) of the Indian Act defines "band" as:

> a body of Indians (a) for whose use and benefit in common, lands, legal title of which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for purpose of this Act.

GR3 SR 1451; Woodard, at 18. "A corporation cannot be considered a band. Even if the corporation has its registered office on an Indian reserve and is owned by shareholders, all of whom are registered Indians and band members residing on the Indian reserve, the corporation is not a band." Woodward, at 20-21.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities the State respectfully requests that this Court reverse the circuit court's Order and Judgment of Dismissal

and remand the matter to the circuit court to enter orders consistent with the Court's decision.

Dated this 26th day of March, 2008.

Respectfully submitted,

LAWRENCE E. LONG
ATTORNEY GENERAL

Jeffrey P. Hallem
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellee's Brief in the matter of State of South Dakota v. Grand River Enterprises, and State of South Dakota v. Grand River Enterprises, Inc., a/k/a Grand river Enterprises Six Nations, LTD., and State of South Dakota v. Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations, LTD., were served by United States mail, first class, postage prepaid, upon the following:

Paul E. Benson
Amy Vandamme Kossoris
Michael Best & Friedrich LLP
100 E. Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202

Gene N. Lebrun
Haven L. Stuck
P.O. Box 8250
Rapid City, SD 57709-8250

this 26th day of March, 2008.

Jeffrey P. Hallem
Assistant Attorney General

APPENDIX

Table of Contents

APPENDIX A

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

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

GRAND RIVER ENTERPRISES, INC., an alien Corporation,

Defendant.

Civil No. 01-465

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

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

Defendant.

Civil No. 02-459

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

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

Defendant.

Civil No. 03-308

ORDER AND JUDGMENTS OF DISMISSAL

This matter came before the Court on October 22, 2007, for hearing on Defendant Grand River Enterprises, Inc. a/k/a Grand River Enterprises Six Nations, Ltd.'s Motions to Vacate Default Judgment entered in the above-captioned cases. Plaintiff State of South Dakota appeared by Assistant Attorney General Jeffrey P. Hallem. Defendant Grand River Enterprises, Inc. a/k/a Grand River Enterprises Six Nations, Ltd. appeared by Amy L. Vandamme of Michael Best & Friedrich, LLP and Haven L. Stuck of Lynn, Jackson, Shultz & Lebrun, P.C.

After considering the motions, briefs, affidavits and other supporting documents filed by the parties and the arguments presented at the hearing, and for the reasons stated by the Court in its letter opinion dated January 11, 2008, it is hereby **ORDERED** that:

1. Defendant Grand River Enterprises, Inc. a/k/a Grand River Enterprises Six Nations, Ltd.'s Motions to Vacate Default Judgment entered in the above-captioned cases are **GRANTED** and the Plaintiff's Complaints in each of the above-captioned cases are **DISMISSED WITH PREJUDICE.**

2. Pursuant to SDCL 15-16-18, the clerk is directed to note this Order and Judgments of Dismissal on the appropriate docket entry for each of the three (3) Default Judgments entered in the above-captioned cases, and each of the three (3) Default Judgments shall be canceled accordingly.

SO ORDERED, ADJUDGED AND DECREED this 17 day of January, 2008

2008.

BY THE COURT:

Lori S. Wilbur

Honorable Lori S. Wilbur
Hughes County Circuit Judge

ATTEST:
Judy Feddersen, Clerk
By Sarah Pavlicek, deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
JAN 18 2008
Judy Feddersen Clerk
By SP Deputy

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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January 11, 2008

Mr. Jeffrey P. Hallem
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Ms. Amy K. Vandamme, admitted *pro hac vice*
Paul E. Benson, admitted *pro hac vice*
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202

Re: State of South Dakota v. Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations, Ltd. (Hughes Co. Civ. 01-465;02-459;03-308)

Dear Counsel:

[¶1.] Hearing on Defendant's, Grand River Enterprises, Inc., a/k/a Grand River Enterprises Six Nations, Ltd. ("Grand River") Motion to Vacate Default Judgments obtained by the State of South Dakota ("State") regarding violations of SDCL 10-50B was held at the Hughes County Courthouse on October 22, 2007. Appearing for the Plaintiff was Assistant Attorney General Jeffrey P. Hallem, and appearing for Defendant, Attorney Amy L. Vandamme, Milwaukee, Wisconsin, and Attorney Haven L. Stuck, Rapid City, South Dakota. Having heard argument and reviewed briefs submitted, this Court grants the motion to vacate judgment.

I. FACTS

[¶2.] This case relates to the State's efforts to enforce compliance with SDCL 10-50B ("Act"). The Act was adopted as part of the disposition of the State's litigation

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against "Big Tobacco"[1] in the late 1990s. The legislation requires, among other things, a "tobacco product manufacturer" that is selling cigarettes in South Dakota, to either become a party to the "Master Settlement Agreement" ("MSA") dated November 23, 1998, between State and Big Tobacco, or pay certain sums of money into a qualified escrow fund. SDCL 10-50B-7. The Act is identical in form to the model "Escrow Statute" that was included in the MSA. The Act, and its model Escrow Statute counterparts, have been enacted in each of the forty-six states that entered in the MSA. A "tobacco product manufacturer" is defined in the Act as:

> ...an entity that after July 1, 1999, directly, and not exclusively through any affiliate:
>
> a. Manufactures cigarettes anywhere *which the manufacturer intends to be sold in the United States*, including cigarettes intended to be sold in the United States through an importer. However, any entity that manufacturers cigarettes that it intends to be sold in the United States is not a tobacco product manufacturer under this subdivision if the cigarettes are sold in the United States exclusively through an importer that is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and *if* the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States;

SDCL 10-50B-5(1) (emphasis added). The Act further modifies the definition of "tobacco manufacturer" by requiring a "tobacco product manufacturer selling cigarettes to consumers *within the state*" to make the escrow deposits required by the statute. SDCL 10-50B-7 (emphasis added).

[¶3.] Grand River is a company, incorporated under the Canada Business Corporation's Act, that manufactures cigarettes on an Indian reservation in Ontario, Canada. Grand River sold the tobacco products at issue on a F.O.B. basis in Ontario, to importers who, in turn, imported and sold them in the United States. Cigarettes manufactured by Grand River were eventually sold at the Yankton Sioux Travel Plaza in southeast South Dakota.

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[1] The companies that comprise "Big Tobacco" are Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. and Lorillard Tobacco Company. Grand River is not a part of "Big Tobacco," and was never a party to the State's lawsuit against members of the tobacco industry.

[¶4.] The case before this court concerns three default judgments rendered against Grand River by the State. Each action arose out of Grand River's alleged violations of the Act. The State commenced State of South Dakota v. Grand River Enterprises., Civ. No. 01-465 (Grand River I) with the filing of a Summons and Complaint on November 5, 2001 for Grand River's alleged violations of the Act during calendar year 2000. To serve the pleadings, the State sought the assistance of Civil Action Group/APS International, Ltd. (APS). The State made service upon Grand River in accordance with the Hague Convention since Canada and the United States are parties of the Hague Convention. Sherriff's Officer John Dobson, an employee of the Brant County Sheriff's office in Ontario, Canada, was charged with affecting service and served a "male adult" employee on March 15, 2002 at Grand River's place of business, 3176 Chiefswood Road, whom Dobson determined was acting "manager". The person served refused to give his name. On June 5, 2002, approximately two and a half months after service, the State filed a Motion for Default Judgment which was granted by the court.

[¶5.] The State commenced State of South Dakota v. Grand River Enterprises, Inc., Civ. No. 02-459 (Grand River II) with the filing of a Summons and Complaint on August 20, 2002 for Grand River's alleged violations of the Act during calendar year 2001. An Amended Complaint adding "a/k/a Grand River Enterprises Six Nations, Ltd.", was subsequently filed on August 21, 2002. The State again sought the assistance of APS to serve the Summons, Complaint, and Amended Complaint upon Grand River consistent with the Hague Convention. The documents were again forwarded to Sherriff's Officer John Dobson for service. On October 23, 2002, Dobson traveled to Grand River's place of business, Chiefswood Road address, and served "Kurt Styers" whom Dobson determined was the "controller" and person in charge at the time. On February 25, 2003, four months following service, the State filed a Motion for Default Judgment which was granted by the court on February 27, 2003.

[¶6.] The State commenced State of South Dakota v. Grand River Enterprises, Inc., Civ. No. 03-308 (Grand River III) with the filing of a Summons and Complaint on August 12, 2003 for Grand River's alleged violations of the Act during calendar year 2002. To serve the pleadings on Grand River in compliance with the Hague Convention, the State sought the assistance of Legal Language Services (LLS). The documents were again forwarded to Sherriff's Officer John Dobson for service. Dobson served a set of documents on Grand River on January 9, 2004, at Grand River's place of business, Chiefswood Road address, and served a "female adult" employee whom he determined was the "person in charge" at that time. On April 8, 2004, three months after service, the State filed a Motion for Default Judgment which was granted by the court on April 14, 2004.

[¶7.] In July of 2002, Grand River and five other entities brought suit against the Attorneys General of thirty-one different states, including South Dakota, in the United States District Court for the Southern District of New York (hereafter, the

"Federal Case"). The Complaint in the Federal Case, which is captioned Grand River Enterprises Six Nations Ltd. v. Pryor, SDNY Case No 02-CIV.5068 (JFK), challenges the constitutionality of the Escrow Statutes, including the Act, on several grounds. The Complaint seeks declaratory and injunctive relief, asking the District Court to invalidate these alleged obligations inasmuch as the plaintiffs like Grand River, *inter alia* were never a party to the MSA nor were they ever sued in any of the underlying tobacco litigation.

[¶8.] This court granted a Motion to Consolidate the three actions and also granted Grand River's Motion for Stay of Execution (without bond) until resolution of the federal lawsuit; or, in the alternative, until the resolution of Defendant's Motion to Vacate the Default Judgments.

[¶9.] Grand River brought a Motion to Vacate Default Judgments on three grounds:

1) The default judgment are void, pursuant to SDCL § 15-6-60(b)(4), because the State does not have personal jurisdiction over Grand River;
2) The default judgments are void, pursuant to SDCL § 15-6-60(b)(4), because the State did not properly serve Grand River;
3) Given the totality of the circumstances, relief from default judgment should be granted in the interests of justice pursuant to SDCL 15-6-60(b)(6).

II. ANALYSIS

Whether the State has personal jurisdiction over Grand River.

[¶10.] The State argues that Grand River's continuous sale of its cigarettes within South Dakota from 2000 through 2004 via Grand River's distribution network supply the underpinnings for this court's personal jurisdiction over Grand River.

[¶11.]

> The venerable United States Supreme Court cases, *International Shoe Co. v. State of Wash., Office of Unemployment,* 326 US 310, 66 SCt 154, 90 LEd 95 (1945); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 US 408, 104 SCt 1868, 80 LEd2d 404 (1984); and *Burger King Corp. v. Rudzewicz,* 471 US 462, 105 SCt 2174, 85 LEd2d 528 (1985), can be read together to construe two types of personal jurisdiction-general and specific. A court asserts general jurisdiction over a nonresident defendant when he has continuous activities in the forum and the activities are substantial enough to make reasonable the court's jurisdiction over him for a cause of action unrelated to those activities. Where the nonresident defendant does not have continuous contact with the forum, but only

> sporadic activity or an isolated act, a court is said to assert specific jurisdiction over him when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act.

Marschke v. Wratislaw, 2007 SD 125,¶12, 2007 WL 4277436, 2 (citations omitted). In this case the Court must determine whether it can assert specific jurisdiction over Grand River.

[¶12.] The South Dakota Supreme Court has established a two-fold inquiry into whether a court may assert personal jurisdiction over a nonresident defendant. First, the court must determine whether the legislature granted the state court jurisdiction over defendants who do not meet the traditional bases for personal jurisdiction. *Marschke*, 2007 SD at ¶13, (citing Denver Truck and Trailer Sales, Inc. v. Design and Bldg. Service, Inc., 2002 SD 127, ¶9, 653 NW2d 88, 91). In South Dakota, this legislative approval is found in the state's Long Arm Statute[2]. Next, the court must determine whether the proposed assertion of jurisdiction comports with federal due process requirements. *Id.* And since "South Dakota construes its Long Arm Statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause," Dakota Industry, Inc. v. Ever Best Ltd., 28 F3d 910, 915 (Eighth Cir. 1994), the essential inquiry is whether jurisdiction is consistent with federal due process.

[¶13.] The South Dakota Supreme Court applies a three step test to determine whether federal due process is satisfied to allow the exercise of personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from defendant's activities directed at the forum state. Finally, the acts of defendant must have a substantial connection with the forum state to make the exercise of jurisdiction over defendant a reasonable one.

Marschke, 2007 SD at ¶15 (citations omitted).

[¶14.] The fact that Grand River's product was sold in South Dakota is not dispositive of the issue. However, in World-Wide Volkswagen v. Woodson, 444 US 286 (1980), the United States Supreme Court stated that due process is satisfied when a forum state "asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state," thereby implying that placing a product in the stream of commerce establishes "purposeful availment." *Marschke*, 2007 SD at ¶13. This is commonly referred to as the "stream of commerce" theory and under this theory if

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[2] SDCL 15-7-2 ("Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing ... of any of the following acts: (2) 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.").

7.

Grand River had an expectation that consumers in South Dakota would purchase its cigarettes when it delivered the cigarettes to its United States importer then this Court could properly assert jurisdiction. The parties, however, dispute whether South Dakota has adopted Justice O'Connor's "stream of commerce *plus*" standard from Asahi Metal Industry, Co. v. Superior Court of California, 480 US 102, 112 (1987) which provides that:

> The placement of a product into the stream of commerce, ***without more***, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state. (emphasis added).

[¶15.] The South Dakota Supreme Court remarked that although no South Dakota case had specifically adopted Justice O'Connor's "stream of commerce plus" analysis from Asahi, its own decision in Rothlueberrs v. Obee, 2003 SD 95, 668 NW2d 313, was "more consistent with the 'stream of commerce plus' analysis." Frankenfeld v. Crompton Corp., 2005 SD 55, ¶19, 697 NW2d 378, 385. The *Frankenfeld* court then stated, "In fact, one of our earlier cases, Miller v. Miller, 1996 SD 47, 546 NW2d at 385, confirms this analytical framework." *Frankenfeld*, 2005 SD 55, ¶20. The court then determined that "applying the analysis from Asahi, Rothluebbers, and Miller," the facts established a lack of purposeful availment. *Frankenfeld*, 2005 SD 55, ¶21. Thus, merely injecting goods into the stream of commerce with the awareness that the items would end up in South Dakota does not suffice to confer jurisdiction on the South Dakota courts. *Id.* at ¶19. Grand River must make "calculated decisions" to avail themselves of the privilege of conducting business activities in South Dakota. *Id.*

[¶16.] The State argues that in each of the three actions, the following facts establish that Grand River has purposefully availed itself under either the stream of commerce *or* stream of commerce plus standard:

1) Grand River's long-standing joint venture with Arthur Montour to distribute the Seneca brand cigarettes it manufactured within the United States;
2) The Cigarette Manufacturing Agreement with Tobaccoville USA, Inc. to distribute Seneca brand cigarettes in areas of the United States where the Montour distribution companies were not selling;

3) Grand River complied with United States law in the manufacturing and packaging of these cigarettes for sale in the United States;
4) Grand River satisfied Nebraska state law to allow the sale of its cigarettes to occur in that state;
5) HCI Distribution Co., a tobacco product distributor located in Nebraska, was licensed and distributed cigarettes not only in Nebraska, but also in surrounding states, including the State of South Dakota;
6) Montour's companies Native Wholesale Supply Co. and Native Tobacco Direct Co. supplied cigarettes manufactured by Grand River to HCI for resale;
7) HCI stamped and shipped large quantities of Seneca brand cigarettes into the State of South Dakota for sale to consumers in each of the three years the state pursued litigation; and
8) The State's action against Grand River specifically relate to those sales of cigarettes within the State of South Dakota.

[¶17.] Grand River has offered the following points to rebut the State's assertions:

1) Although its products have been sold within the State, Grand River itself has never sold a single cigarette in the State;
2) Grand River does not ship or sell products within the State of South Dakota, nor has it contracted to do so;
3) Grand River does not maintain any place of business in South Dakota, it has no personnel, office, real estate, sales agents or bank account in South Dakota;
4) Grand River does not advertise or solicit business in South Dakota, nor does it have a telephone listing in South Dakota.

[¶18.] Furthermore, Grand River's cigarettes that were eventually sold in South Dakota presumably entered the United States through Grand River's Cigarette Manufacturing Agreement with Native Tobacco Company (NTC). This agreement created a business relationship whereby Grand River would manufacture and deliver cigarettes to NTC so that NTC could distribute the cigarettes in the United States. While Grand River was responsible for paying the taxes, charges, fees, duties, and tariffs arising out of export of the cigarettes from Canada, NTC was responsible for all applicable taxes and duties arising from importation into the United States and/or other Native Territory. The agreement is silent as to where the cigarettes would be distributed within the United States. There is no mention of distribution of the cigarettes in South Dakota in this document or any other Grand River document.

[¶19.] Grand River summarizes and dismisses the State's theory for purposeful availment by stating:

> "The fact that independent third parties to whom Grand River supplied cigarettes ultimately sold those products to another independent third

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> party who then, on its own and without Grand River's input or knowledge, sold those products in South Dakota does not supply a basis on which to exercise personal jurisdiction over Grand River." Def. Reply Br. at 25.

This court agrees. "A defendant's contacts must proximately result from actions by the ***defendant himself*** that create a substantial connection with the forum State. Thus, the unilateral activity of a third party with some relationship to a nonresident defendant will not suffice to establish personal jurisdiction." *Frankenfield*, 2005 SD at ¶19. (emphasis added). Grand River exported the cigarettes from Canada to NTC. NTC sold these cigarettes through their subsidiaries NTD and NWS to a distributor: HCI. HCI then sold the cigarettes to the Yankton Sioux Tribe who sold the cigarettes at the Yankton Sioux Travel Plaza. The unilateral activity of HCI, who has no relationship with Grand River whatsoever, is insufficient to establish personal jurisdiction over Grand River.

[¶20.] Grand River was not incorporated, headquartered or licensed to do business in South Dakota. *See Marschke*, 2007 SD at ¶25 (stating that the same factors were absent in a case where minimum contacts were lacking). Grand River did not maintain an office or employees in South Dakota, nor did it own real estate or maintain bank accounts here. *See Id.* Grand River also did not manufacture, distribute, sell, or advertise any products within this state nor did it contract to do such things within this state. *See Id.* Grand River simply had no presence in South Dakota, other than its products being sold by a third party at one gas station in the state. Analysis of the alleged contacts between Grand River and South Dakota "do not alone or taken together support any contention of the existence of sufficient minimum contacts to support personal jurisdiction." *Id.* at ¶26.

[¶21.] However, the State has asserted an alternative theory to support its contention that minimum contacts exist. The State offers two Eighth Circuit cases for the proposition that purposeful availment is met where a manufacturer does ***more*** than simply set a product adrift in the international stream of commerce by heading a "distribution network" to sell its products throughout the country. *See* Clune v. Alimak AB, 233 F3d 538, 543-545 (8thCir 2001); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F3d 610, 613-615 (8thCir 1994). Once establishing such a network and reaping its benefits, the manufacturer can not plead ignorance that its products were being distributed into neighboring states. *Id.* The State asserts that Grand River's "joint venture with Arthur Montour and his business entities and the agreement with Tobaccoville USA, Inc. satisfies the conscious establishment of a distribution network." State's Br. at 54. The court finds this theory unpersuasive as applied to the facts of this case.

[¶22.] First, the cigarettes at issue in this case did not enter South Dakota through any agreement between Grand River and Tobaccoville USA, Inc. Thus, that

business relationship is irrelevant to this case. Second, the State characterizes Grand River's business relationships with companies for whom it manufacturers cigarettes that are subsequently sold within the boundaries of the United States as a "distribution network." However the existence of such relationships – even with a *national distributor* – do not by themselves have any legal significance in jurisdictions that, like South Dakota, have adopted the "stream of commerce plus" test. *See* Brideport Music, Inc. v. Still N the Water Pub'g Co., 327 F3d 472, 480 (6thCir 2003) (holding no jurisdiction where defendant dealt with a national distributor because the contract did not compel the distributor to sell products in the forum state, even though defendant knew distributor sold in all fifty states and did not object to sales in the forum state); Boit v. Gar-Tec., Inc., 967 F2d 671 (1stCir 1992) (holding that Maine had no jurisdiction over Gar-Tec in a personal injury action resulting from a defective air gun, even though Gar-Tec sold the gun to a "national retailer with a national mail order business," because there was no evidence that Gar-Tec designed its product specifically for the Maine market; noting that the distributor had not agreed to serve as a sales agent to Maine).

[¶23.] Finally, the State relies on State ex rel. Attorney Gen. v. Grand Tobacco, 171 Ohio App 2d 551, 2007 Ohio 418, 871 NE2d 1255 (CtApp 2007), for support of its distribution network theory. In *Grand Tobacco*, the State submitted evidence that the CEO of the distributor at various times acted on behalf of the foreign manufacturer as its representative and the Court of Appeals of Ohio found the relationship "went beyond that of a typical manufacturer and import/distributor" relationship. *Id.*, 171 OhioApp 2d at 558. The State in this case has not provided evidence of any occasion on which representatives of NTD, NWS or Tobaccoville acted on behalf of Grand River such that exercising personal jurisdiction over Grand River on that basis would fall within the federal due process requirements.

[¶24.] In regards to the distribution network theory, Grand River directs the court to Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4thCir 1994). In *Lesnick*, defendant Hollingsworth manufactured the filter that defendant Lorillard (one of the four original manufacturers to the MSA) incorporated in its cigarettes, and the plaintiff sued, alleging that these filters caused her husband's lung cancer and resulting death. *Lesnick*, 35 F3d at 940. The plaintiff based her theory of jurisdiction over Hollingsworth on the fact that Hollingsworth had an agreement with Lorillard to, among other things: 1) share the patent rights to the filter; 2) collaborate with respect to research and development; 3) split royalties for licensing the manufacturing process; and 4) produce the filter material exclusively for Lorillard for five years. *Id.* at 946. Moreover, the agreement required Lorillard to indemnify Hollingsworth for any liabilities the latter incurred arising out of the filter's health risks. The Fourth Circuit Court of Appeals recognized that even if this arrangement represented conduct beyond mere sales, "it d[id] not rise to the level of establishing jurisdiction because none of the conduct [was] in any way directed toward the State of Maryland." *Id.* at 946-947. Rather, something more was required – such as designing the product to

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comply with Maryland regulations or setting up a customer relations network in Maryland – and the record did not reveal any such conduct. Similarly, in this case, there is a lack of evidence[3] that Grand River did "something more" to direct its activities at South Dakota. Thus, Grand River's contractual commitments to produce cigarettes for importers is insufficient to satisfy the "stream of commerce plus" standard.

[¶25.] The State has not demonstrated any action by Grand River to purposefully avail itself of the South Dakota market. Exertion of personal jurisdiction over Grand River by this court would exceed the limits of due process.

Whether the State properly served Grand River.

[¶26.] Assuming, *arguendo*, that Grand River had purposefully availed itself to this forum, the State nonetheless, did not provide proper service of process upon Grand River.

[¶27.] The party on whose behalf service has been made has the burden of establishing its validity. Grajczyk v. Tasca, 2006 SD 55, ¶22, 717 NW2d 624, 631. "However, this initial burden only requires that the party establish a prima facie case: when a defendant moves to dismiss for insufficient service of process, the burden is on the plaintiff to establish a prima facie case that the service was proper." *Id.* (citations omitted).

[¶28.] Initially, there exists a dispute between the parties as to what service of process rules apply: South Dakota state law or the Hague Convention. The Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention") is a multilateral treaty that is "intended to provide a simple way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." Volkswagenwerk Aktinengensellschaft v. Schlunk, 486 US 694, 698, 108 SCt 2104, 2107 (1988). The United States and Canada have ratified or acceded to the Hague Convention Treaty. By its terms, the Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Convention, Art. 1., 20 UST 361.

[¶29.] The Hague Convention preempts inconsistent methods of service by state law in all cases where it applies, by virtue of the Supremacy Clause, U.S. Constitution, Art. VI. *Volkswagenwerk*, 486 US at 699. Thus, the Court's initial inquiry is whether any inconsistency exists between South Dakota law and the Hague Convention.

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[3] Discussed *supra* ¶s 15-19.

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[¶30.] In 2001, the relevant section of the South Dakota Codified Laws governing personal service on a business entity was SDCL 15-6-4(d)(2) which provided:

> If the action be against a foreign private corporation, on the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made as to a foreign corporation only when it has property in this state, or the cause of action arose therein, or when such service shall be made within this state personally upon the president, treasurer, secretary, or authorized agent for the service of process.

[¶31.] The Hague Convention allows for service by a method prescribed by the internal law of the country where service is to be affected for service of documents in domestic actions. Hague Convention, Art. 5., 20 UST 361. The parties agree that the applicable Ontario statute is RRO 1990, Reg. 194, r.16.02(1)(c) which states that service is affected:

> ...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 control or management of the place of business.

[¶32.] The Court need not determine whether these two laws are consistent and which rule applies in this case. The State has failed to make a prima facie case that service upon Grand River was sufficient under either rule.

[¶33.] To affect service of process in Grand River I, the State ultimately employed Sherriff's Officer John Dobson to serve process. Dobson served a "male adult" employee at Grand River's place of business, 3176 Chiefswood Road on March 15, 2002, whom Dobson determined was acting "manager". The person served refused to give his name.

[¶34.] Under SDCL 15-6-4(d)(2) Dobson would have had to serve the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent. There is no evidence to suggest Dobson served any of the Grand River employees who carried those titles at the time.

[¶35.] Under RRO 16.02(1)(c) Dobson would have had to serve an officer, director or agent of the corporation, or "a person at any place of business of the corporation who appears to be in control or management of the place of business." Again, Dobson did not serve an officer, director or agent of the corporation. Thus the State's service hinges on whether the person Dobson served was someone "who appear[ed] to be in control." RRO 16.02(1)(c). This standard requires an objectively reasonable belief. *See* Van Horne Constr. Ltd. v. Ldask MBC Corp., 2004 ACWSL

5947, ¶¶22-23 (Ont SupCt of Justice 2004); Nano v. St. Clair W. Flea Mkt. Inc., [2002] O.J. No. 4031 (Ont SupCt of Justice) (service on named adult female insufficient). Nothing in the record show's how Dobson's belief that he served a person "in control or management of the place of business" was objectively reasonable. The fact that Dobson allegedly found an adult male or female on the premises does not mean it was reasonable for him to assume either was an employee, or in control or management of Grand River's place of business.

[¶36.] "Proper service of process is no mere technicality: that parties be notified of proceedings against them affecting their legal interests is a "vital corollary" to the process and the right to be heard." Spade v. Branum, 2003 SD 43, ¶7, 643 NW2d 765, 768 (citations omitted). In Grand River I, the State's compliance with either the Ontario or the South Dakota rule was neither strict nor substantial; service was not proper.

[¶37.] Furthermore, the methods undertaken by Dobson to affect service[4] in Grand River II and Grand River III are equally deficient. In Grand River II, Dobson again traveled to Grand River's place of business, Chiefswood Road address, and served "Kurt Styers" whom Dobson determined was the "controller" and person in charge at the time. Again, "controller" is not a proper person to serve under SDCL 15-6-12(i)(C) or RRO 16.02(1)(c). There is also no evidence to suggest that Dobson had a reasonable belief that he served a person "in control or management of the place of business."

[¶38.] In Grand River III, Dobson served a set of documents on Grand River on January 9, 2004, at Grand River's place of business, Chiefswood Road address, and served a "female adult" employee whom he determined was the "person in charge" at that time. There is no evidence as to how Dobson determined this female adult was an employee, or how he determined she was in charge and whether "in charge" means "in control" or managing the place of business. There is simply no evidence to determine what Dobson believed and whether these beliefs were reasonable.

[¶39.] For the foregoing reasons, the Motion to Vacate Judgments is granted. Counsel for Defendant should prepare an appropriate order.

Sincerely,

Lori S. Wilbur
Presiding Circuit Judge

[4] During Grand River II and Grand River III, SDCL 15-6-12(i)(C) was the relevant statutory provision that allowed service "...upon a corporation...by delivery to an officer, or a managing or general agent."

14.

UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

**GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR MONTOUR, JR.**

Claimants / Investors

- AND -

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

PARTICULARIZED STATEMENT OF CLAIM

A. NAMES AND ADDRESSES OF THE PARTIES

Claimants/ Investors	Grand River Enterprises Six Nations, Ltd. 2176 Chiefswood Road Ohsweken, Ontario, Canada Jerry Montour & Kenneth Hill c/o Grand River Enterprises Six Nations, Ltd. 2176 Chiefswood Road Ohsweken, Canada Arthur Montour, Jr. c/o Native Wholesale Supply 11037 Old Logan Drive Seneca Nation Territory Perrysburg, New York 14129
Respondent/ Party	Government of the of the United States of America Executive Director Office of the Legal Advisor United States Department of State Room 5519 2201 C. Street NW. Washington, D.C. 20520

B. REFERENCE TO THE ARBITRATION CLAUSE OR THE SEPARATE ARBITRATION AGREEMENT THAT IS INVOKED

The Claimants invoke Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1117, 1120 and 1122 of the NAFTA, as authority for the arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions agreed concerning the settlement of disputes between a Party and an investor of another Party.

C. REFERENCE TO THE CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

The dispute arises from measures adopted by over 46 States and territories of the United States of America ("USA"), which relate to the Claimants and their investment in the United States and for which they have suffered loss and damage, and continue to suffer loss and damage, as a result of their imposition upon them, contrary to the obligations owed by the USA under Section A of Chapter 11 of the NAFTA.

D. FACTS

Identity of the Investors and their Investment

1. Grand River Enterprises Six Nations, Ltd. ("Grand River") is a Canadian corporation organized under the laws of Canada on April 29, 1996.[1] Grand River has at all relevant times since its incorporation maintained a principal office and tobacco products production facility located on the Grand River Reserve, in Ohsweken, Ontario, Canada. Ohsweken comprises part of the territory of the Six Nations of North America (also known as the Iroquois Confederacy), whose land spans both sides of the border between Canada and the USA.

2. Grand River currently provides for the employment and income of over two hundred native Canadians and their families, in addition to numerous other non-native Canadian individuals in its employ. It is the largest employer on the Grand River reserve, and one of the largest native employers in Canada.

3. Jerry Montour and Kenneth Hill are aboriginal nationals of Canada, currently residing in Ontario, Canada.[2] Arthur Montour, Jr. is an aboriginal national of Canada,[3] who currently resides on the Seneca Nation Territory, in Northern New York, USA. Messrs. Montour, Hill and Montour are all members of First Nations tribes within the Six Nations Iroquois Confederacy.

4. Jerry Montour and Kenneth Hill are controlling shareholders of Grand River. Jerry Montour, who serves as Chief Executive Officer of the corporation and owns 30% of Grand River's common shares and Kenneth Hill, who serves as the

[1] See Exhibit 1.
[2] See Exhibit 2 and Exhibit 3, respectively.
[3] See Exhibit 4.

Senior Officer in charge of marketing and supply for Grand River Enterprises' non-domestic sales, owns 10% of Grand River's common shares.[4] Jerry Montour and Kenneth Hill previously did business as, and are also former partners in, the business ventures and associations described in further detail below.

5. Arthur Montour, Jr. is the sole named shareholder, and President, of both Native Tobacco Direct Company and Native Wholesale Supply Company, operating under charters granted by the Sac and Fox Nation of Oklahoma on January 13, 1999, and February 25, 2000, respectively.[5] Native Tobacco Direct and Native Wholesale Supply have at all times maintained a principal office and place of business on Six Nations land in Northern New York. Prior to owning Native Tobacco Direct Company and Native Wholesale Supply Company, Arthur Montour, Jr. did business individually and under the proprietorship name Native American Wholesale.

Description of Investors' Business and Investments

6. Jerry Montour, Kenneth Hill and Arthur Montour, Jr. ("Investors"), individually and as co-venturers in the businesses and enterprise described herein, have been engaged in the licensing, manufacture, packaging, production, importation and or sale of tobacco products sold in Canada and the United States, continuously since 1992.

7. Jerry Montour and Kenneth Hill began their business relationship in 1992, initially as partners in a co-venture that was engaged in the sale and distribution of premium brand tobacco products in the United States and Canada, principally on Six Nations territory claimed by these two countries.

8. In or about 1992, with their business expanding, Jerry Montour and Kenneth Hill recognized a particular need to associate with and engage other individuals to assist in the management and operation of their rapidly growing tobacco business: Thus, in 1992, Jerry Montour and Kenneth Hill invited Arthur Montour, Jr. to be a co-venturer in their tobacco distribution operation, with the specific purpose of serving the USA market. Arthur Montour, Jr. accepted the invitation and proceeded to work in association with Jerry Montour and Arthur Montour in the distribution of tobacco products, principally in the East Coast region of the USA. Jerry Montour and Kenneth Hill brought to this relationship access to capital and general business and managerial skills, while Arthur Montour, Jr. brought business contacts and distribution expertise, particularly throughout Six Nations land.

9. As their business and relationships progressed, Jerry Montour and Kenneth Hill became known in the industry both individually and as partners in unincorporated enterprises known as "Traditional Trading" and "Grand River Enterprises."

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[4] See Exhibit 5
[5] See Exhibit 6

Similarly, Arthur Montour, Jr. operated professionally in the USA both individually and under the trade name "Native American Wholesale." Resolutions adopted by the Brotherhood of Six Nations Council recognizing the Grand River Enterprises partnership are annexed as Exhibit 7.

10. Through an association and business arrangement perhaps more common to Native American social norms than the formalistic rituals of European ("Western") business practice, Messrs. Montour, Hill and Montour formed a business relationship focused initially on the distribution of tobacco products in North America. Which provided for the delegation of responsible territories based on seniority and capital investment. Jerry Montour and Kenneth Hill were the principal and senior parties to this venture, whose return on investment would be based on distribution in the USA and Canada, while Arthur Montour, Jr.'s return on investment would be derived from distribution activities in the USA.

11. As it did since its inception, the Investors' business continued to prosper subsequent to the participation of Arthur Montour, Jr., in part because they were able to utilize specific treaty rights granted to them by both the Canadian and the American Governments, which permitted them to freely engage in commerce throughout what would eventually become the North American Free Trade Area.[6] The Investors relied upon the solemn promise made to the Tribes of the Iroquois Confederacy by the USA that their members would be forever entitled to engage in commerce without interference and to cross the border between what would eventually become known as Canada and the USA "unmolested." These treaty rights allowed the Investors, operating individually and under the Traditional Trading, Grand River Enterprises, and Native American Wholesale trade names, to also enter into and service a niche market for affordably priced tobacco products in the discount segment of the market, upon which, as described below, these Investors were poised to capitalize, having dedicated many years of time and capital to it.

12. Jerry Montour, Kenneth Hill, and Arthur Montour, Jr.'s immediate and sustained success in their distribution business permitted these Investors to quickly move from a enterprise that was focused on sales, transportation and distribution of premium tobacco products manufactured by the four largest USA tobacco product manufacturers, to one that included the trademark, manufacture and brand-licensing of their own cigarette brands. Their success in these endeavors as well was not coincidental but, rather, the result of applied business acumen and networking with and among other members of the Six Nations. Thus, Jerry Montour and Kenneth Hill entered into a joint venture in 1992 with another member of the Six Nations Confederacy named Larry Skidders. Together with Skidders, these Investors financed the construction of a manufacturing facility on Six Nations territory, near Racket Point on the Akwesasne Reserve (which straddles land claimed by the Provinces of Ontario and Quebec, as well as the State of New York). Racket Point is located south of the Border between Canada

[6] See Exhibits 8-10.

and the USA.

13. The goal of constructing a manufacturing facility near Racket Point was to create a manufacturing facility for the production of the Investors' own brands. This prospect presented an opportunity for the Investors to expand, diversify and fully integrate their operations, while providing a source of job creation for the people of the Six Nations. Along with their other partners, the Investors understood that if they began production of cigarettes, rather than merely concentrating on sales and distribution of premium brands made by the major USA tobacco manufacturers ("the Majors"), they could provide a large number of jobs to their people, while also realizing a substantial return on their collective investment. In addition, it became apparent that the Investors could and would capitalize on Arthur Montour, Jr.'s distribution skills and contacts to distribute products that the Investors would manufacture in their own right.

14. The success of the manufacturing facility near Racket Point, and the ongoing success in the sale and distribution of the Majors' premium brands throughout Six Nations territory, led the Investors to undertake a production agreement with Star Tobacco, a non-Native company located in Virginia, to produce a much greater volumes of the Investors' own brands. These brands initially included: "DK's" and "Putters," both of which were sold on Six Nations territory, throughout the North American Free Trade Area.

15. Between 1991 and 1993, the Investors continued to expand their business and develop their brand and distribution strategies, relying on the production from both Star Tobacco and the facility near Racket Point. Business was so good that the Investors also started planning for the construction of a much larger production facility in 1992, which would be located on the Grand River Reserve, in Ohsweken, Ontario, Canada. Construction commenced on this flagship facility in 1993. This manufacturing arm would come to be called "Grand River Enterprises" by the Investors, and was formally accepted and approved by the Six Nations Band Council in 1994. See Resolution annexed as Exhibit "11".

16. Ohsweken is situated north of the border between Canada and the USA, strategically located on the Western side of Six Nations territory, relative to the Racket Point facility at Racket Point, which was located in the East. One of the primary reasons for choosing this particular location, apart from the availability of land on the Six Nations Reserve, was a recognition that the aboriginal people of this region were in particular need of economic development, given the high rates of unemployment and the lack of any other major employer on-Reserve.

17. The Grand River facility became operational towards the end of 1993 and into 1994. The addition of this capacity would make it possible for the Investors to complete the transition of their business to a wholly-integrated enterprise of tobacco manufacturing, sales and distribution which would provide a livelihood to hundreds of inhabitants of the Six Nations Territories.

18. With their fully integrated tobacco business growing quickly, the Investors were approached with another opportunity to expand their investments in 1996. Introduced by a lawyer who was familiar with both parties, the Investors struck a partnership with the Omaha Tribe, whose reserve is located within the State of Nebraska. In exchange for a promised royalty percentage from the Omaha Tribe, the Investors would invest their capital, managerial and technical expertise with the Omaha Tribe, and provide managerial and technical labor to the partnership in order to establish another cigarette manufacturing facility and build market share utilizing both the pre-existing DK brand and the new "Omaha" brand.

19. Along with other investors, Jerry Montour and Ken Hill established a company that they called Turtle Island, through which they would participate in their partnership with the Omaha Tribe. Turtle Island was to be entitled to 50% of the income from the Omaha venture. In honoring the obligations undertaken by Turtle Island in the partnership, Jerry Montour first visited the Omaha Tribe in late 1996 and moved there to live and work for most of 1997 and 1998.

20. The launch and production in Omaha played an important interim role for the Investors and in their plans to integrate and expand their tobacco operations. Initially, the Investors intended the Racket Point facility and the flagship factory in Ohsweken to satisfy their production needs. However, in or about 1993, after the death of Larry Skidders, the Investors' relationship with the Skidders' estate was deteriorating, and the Investors looked to the Omaha plant to fulfill, in part, their short and long term production needs.. After successfully launching production in Omaha, the Investors realized that the most efficient and practical application of their resources required that they direct and satisfy all of their production needs for the USA and Canadian markets out of the flagship facility in Ohsweken, with distribution centrally coordinated under Arthur Montour, Jr.'s direction in their facility located on-Reserve in Northern New York.

21. Thus, the Grand River facility ultimately became, and to this day remains, the Investors' exclusive production facility for market in both the USA and Canada, in addition to other markets worldwide.

22. The process of consolidating their investments and centrally locating production and distribution was ultimately completed in January 1999, when the Investors began to manufacture their brands exclusively at Grand River. They also agreed at that time to the incorporation of Native Tobacco Direct, and later Native Wholesale Supply, for the purpose of importing and selling those brands on Indian land in the USA. Through these enterprises, the Investors would continue to operate as they had for years, with Jerry Montour and Ken Hill handling the capital and manufacturing components of their business and Arthur Montour Jr. handling the distribution component.

23. As part of the consolidation process, the Investors agreed through a cross-

licensing relationship that Native Tobacco Direct (and, later, Native Wholesale Supply) would hold and beneficially own the intellectual property and distribution rights to, and Grand River Enterprises Six Nations, Ltd. would hold the exclusive right to manufacture, the Investors' American market brands, including the Seneca brand, which is and has been used in the USA continuously since 1999, by Native Tobacco Direct and Native Wholesale Supply Company.

24. Working through Native Tobacco Direct, Arthur Montour Jr. thus applied for, and subsequently received, federal registration for the Seneca trademark in the USA.[7] Ownership of the marks was later assigned to Native Wholesale Supply, a current importer and licensor of the marks. Since September 2002, a South Carolina-based company, Tobaccoville USA, Inc., has operated under a license agreed to by and among the Investors, as the exclusive licensee of the Investors' marks for off-reserve sales in the USA. Native Wholesale Supply has retained unto itself the exclusive rights to import and sell the Investors' products on Indian land in the USA.

25. In connection with the consolidation and integration described above, the Investors also caused an exclusive manufacturing agreement to be entered into between Grand River and Native Tobacco Direct on March 15, 1999, and subsequently Native Wholesale Supply, to memorialize this relationship. A separate licensing and manufacturing arrangement was entered into by and between the Investors and Tobaccoville USA, which remains in effect to the present day.

26. Products manufactured by Grand River, thus, have been and continue to be brought into the USA by Native Wholesale Supply and Tobaccoville USA. These products are then sold on Indian land in the USA by Native Wholesale Supply and on non-Indian land by Tobaccoville USA.

27. Having discontinued their relationship in the Turtle Island partnership and with the Skidders' estate, the Investors now derive their income solely from the enterprise relationship between, and the operations of, Grand River and Native Wholesale Supply. The income and profits from this partnership are shared among the Investors through an informal allocation process that essentially distributes profits to Jerry Montour and Kenneth Hill through Grand River, and to Arthur Montour, Jr. through Native Wholesale Supply. As the accompanying record makes clear, until the measures at issue in this arbitration were adopted and enforced, the Investors had profited, and were poised to continue profiting, from a successful enterprise and business plan that had been created, launched and implemented years before the measures were created.

28. As further explained below, however, the measures at issue have substantially interfered with the Investors' investments and have also discriminated against them to a crippling extent, for which the Investors seek and are entitled to

[7] See: Exhibit 12.

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS.		
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)	CIV. 03-308
Plaintiff,	)	
v.	)	DECLARATION OF JOHN DOBSON
GRAND RIVER ENTERPRISES, INC. a/k/a GRAND RIVER ENTERPRISES SIX NATIONS, LTD. an alien Corporation,	)	
Defendant.	)	

John D. Dobson, being duly sworn, deposes and makes the following statements upon personal knowledge and belief:

1. I am the sheriff's officer solely responsible for effecting service requested by the plaintiffs through the Ontario courts in civil actions in the counties of Brant, Haldimand and Norfolk in Canada.

2. I am experienced in effecting service of process pursuant to Ontario rules. I have been serving process in my current position since 1979.

3. The Six Nations of the Grand River (hereinafter "Six Nations") is an Indian reserve ("the Reserve") located within my jurisdiction. I routinely serve process in Canadian domestic actions upon defendants located on the Reserve at the instruction of the Ontario courts. I am familiar with the procedures for effecting proper service on reserves and as a judicial officer for the Ontario court system am within my authority to do so.

4. Grand River Enterprises Six Nations, Ltd. (hereinafter "Grand River" or "Defendant") is a corporation with addresses at 1001 Highway No. 6 South, Oshweken, Ontario, N0A 1M0 and at Rural Route 1, Oshweken, Ontario N0A 1M0, also known as 2176 Chiefswood Road, Oshweken. When I visited the first address, I determined that the main operations for the company had moved onto the Reserve and there was no one there to accept service. I then proceeded to the Rural Route 1 address, which is located within the Reserve, and it was there that I attempted service.

5. Since 2002, I have been repeatedly instructed by the Ontario courts to effect service of US process upon Grand River pursuant to the Hague Service Convention of 1965 on behalf of

various States Attorneys General for the United States. As a result, I have made numerous service attempts upon Grand River over a period of many years.

6. I was instructed to serve the US court documents on all of these occasions by the Ontario Central Authority. On each occasion, the Central Authority forwarded two complete sets of pleadings to me, consisting of a Hague Request, Certificate, Summary, Notice and the US state court pleadings. The US court pleadings were generally summonses and complaints of judgments. In conformity with the instructions of the Ontario Central Authority, I served one complete set of these documents upon the Defendant, and returned the second set with the completed Certificate as evidence that all documents were properly served. At no time did I ever remove any Hague paperwork or US court pleadings prior to effecting service.

7. I wish to provide this declaration of due diligence so that the US courts will understand the difficulties inherent in effecting service upon Grand River.

8. Effecting service upon any defendant located within the Reserve is not an easy matter and one that I approach with great caution. Effecting service upon Grand River, in particular, has been challenging and has become increasingly difficult, if not dangerous over time.

9. My service attempts have been hampered by the growing tensions between the Six Nations and the local community and the federal and provincial governments. Recently, I have been reluctant to travel to the Reserve to continue to make further service attempts without an escort from the Six Nation's police force or the Ontario Provincial Police. These police forces typically send two cruisers to accompany me at the time I attempt service upon defendants located within the Reserve. This backup is sometimes difficult for me to arrange, as the police are occupied elsewhere with their primary duties.

10. This has lead to obstacles in my ability to effect service promptly. There have been periods in which the local community situation became so volatile that I felt unable to safely enter the Reserve.

11. On each of the many occasions in which I traveled to Grand River to effect service, I asked to meet with an officer of the corporation duly authorized to accept service. However, during these repeated visits, I was told by Grand River employees on virtually every occasion that there was no such officer present at Grand River who could accept service. Because of this, and because of the difficulties inherent in effecting service upon any defendant located on the Reserve, I was compelled to effect service upon those Grand River employees whom I determined, to the best of my ability, to be in charge of the premises at the time of my visit. This form of service is permitted under Ontario rules.

12. On some occasions, the Grand River employees that I served on behalf of the defendant reported to me that they were managers of the corporation; on other occasions, assistants to managers. On several occasions, the individuals I served on behalf of the defendant refused to provide me with their names at the time of service.

13. In spite of many visits to the Grand River facility, I believe I have only twice been able to serve Steve Williams, president of Grand River.

14. In the fall of 2005, Grand River barricaded the entrance to its facility with a gate and eventually built a fence around its facility. The gate is manned by a security guard. Since 2005, when I attempt to enter the company grounds, I am blocked by the security guard at the gate, who tells me no corporate officer is present to accept service and that I may not enter the company compound. I have therefore twice served the security guard on behalf of Grand River, after determining (from the guard's badge) that he was an employee of Grand River.

15. Since the fence and gate were erected, I have on at least one occasion telephoned Mr. Williams and attempted to fix an appointment with him to effect service. Mr. Williams told me at that time that he would be present to accept service from me at Grand River if I came the same day. However, when I subsequently traveled to the Grand River facility that day, the security guard at the gate again refused me entry into the company compound and told me that Mr. Williams had instructed him instead to take the papers on Mr. Williams' behalf.

16. I feel that the actions on the part of Grand River employees have precluded me from personally serving process upon an officer of the corporation.

FURTHER AFFIANT SAYETH NAUGHT

Sheriff's Officer John D. Dobson

SWORN BEFORE ME
At the City of Brantford
Province of Ontario, Canada
This 15 day of March 2007

Barbara Joan Dawson, a Commissioner, etc.,
County of Brant, for the Government of Ontario,
Ministry of the Attorney General.
Expires November 3, 2009

APPENDIX E

Ministry of the Attorney General

Ontario Court of Justice

P.O. Box 1208
393 Main Street
Haileybury ON POJ 1K0

Tel: (705) 672-3395
Fax: (705) 672-3380

Ministère du Procureur général

Cour de Justice de l'Ontario

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Téléc.: (705) 672-3380

March 7, 2007

Ms. Cara LaForge
Legal Language Services
National Service Center
8014 State Line Road, Suite 110
Leawood, Kansas
66208

Dear Madam,

Re: Service on Grand River Enterprises Six Nations Ltd. under the Hague Service Convention

I am writing with respect to the service of documents by the Ontario Central Authority upon Grand River Enterprises, a corporation located in Ontario and a defendant in American court proceedings.

In response to requests for service from various U.S. states, we instructed a sheriff's officer to serve Grand River Enterprises in accordance with Ontario domestic law, namely, the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. We so instructed the officer pursuant to Article 5 of the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters*, which permits service of documents in a manner prescribed by the internal law of the receiving state.

The sheriff's officer served Grand River Enterprises on numerous occasions pursuant to the *Ontario Rules of Civil Procedure*, including Rule 16.02(1)(c), which states that documents shall be served on a corporation by leaving a copy of the documents 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 control or management of the place of business. Upon being satisfied as to the propriety of service, the sheriff's officer completed the Hague Certificates of Service, which the Ontario Central Authority then reviewed and forwarded to the various U.S. states as required by the *Hague Service Convention*.

In sum, we are satisfied that Grand River Enterprises was served in accordance with Ontario domestic law and, consequently, Article 5 of the *Hague Service Convention*.

Yours very truly,

Nancy Young

Ontario Central Authority

Per: Nancy Young
Supervisor of Court Operations