

State of South Dakota

South Dakota Department of Revenue and Regulation

South Dakota Division of Banking

Petition for Declaratory Ruling

Pursuant to the provisions of SDCL 1-26-15, Northern Beef Packers Limited Partnership (“NBP”), 38749 135th Street, Aberdeen, SD 5740, by its Chief Executive Officer, David Palmer, and Epoch Star Limited, a British Virgin Islands Company (“Epoch”), by its South Dakota counsel, Cadwell Sanford Deibert & Garry LLP, do hereby petition the South Dakota Division of Banking by its South Dakota Banking Commission for its declaratory ruling that Epoch is not required to be licensed under SDCL Chapter 54-4 and 54-14 to make a secured loan to NBP as described below. In support of this Petition, NBP and Epoch respectfully state as follows:

1. The statutes upon which Petition is seeking a declaratory ruling are:

54-4-40. Installment loan licenses - Application for license - Forms - Fee - Promulgation of rules - Information.

Any person who engages in the business of lending money shall apply for a license as prescribed by this chapter. The applicant shall apply for a license under oath on forms supplied by the division. The application shall contain the name of the applicant's business, proof of surety bond, address of the business, the names and addresses of the partners, members, officers, directors, or trustees, and other information the director may consider necessary. The applicant shall pay an original license fee as set by rules of the commission promulgated pursuant to chapter 1-26 not to exceed one thousand dollars. If the application of an existing licensee is for an additional location, the application need only include the location and identity of the location manager, plus any changes from the existing license, or such other information the director may consider necessary. The State of South Dakota, any political subdivision of the state, and any quasi-governmental organization created by an executive order of the State of South Dakota and any subsidiary of such organization; any nonprofit corporation formed pursuant to chapter 47-22; any nonprofit United States Treasury Community Development Financial Institution, Small Business Administration Certified Development Company, or Regional Revolving Loan Fund; or any commercial club, chamber of commerce, or industrial development corporation formed pursuant to § 9-12-11 or 9-27-37 is subject to this chapter but exempt from initial license fees, renewal fees, and surety bond requirements under this chapter.

SDCL 54-4-42: License Required.

No person may engage in the business of lending money without a license. A violation of this section is a Class 1 misdemeanor.

SDCL 54-14-1:

....

(8) "Mortgage lender," any person, who for valuable consideration, originates, sells or services mortgages or holds himself, herself, or itself out as a person who, for valuable consideration, originates, sells, or services mortgages, other than those exempt pursuant to §54-14-21;

....

(11) "Mortgage lending activities," for compensation, either directly or indirectly, accepting or offering to accept applications for making mortgage loans;

SDCL 54-14-13. License Required for Mortgage Lenders, Mortgage Brokerage, Mortgage Brokers, and Mortgage Loan Originators— Identification Through Nationwide Mortgage Licensing System and Registry.

No person may act as a mortgage lender, mortgage brokerage, mortgage broker or mortgage loan originator in this state or use the title, mortgage lender, mortgage brokerage, mortgage broker, or mortgage loan originator with respect to any property located in South Dakota without first obtaining and maintaining a license according to the requirements of this chapter. Each person shall be licensed or registered, and maintain a unique identifier through the nationwide mortgage licensing system and registry.

2. The facts and circumstances which give rise to the issue to be answered by the Commission's declaratory ruling are:

The State of South Dakota has been actively promoting economic development through use of the EB-5 program, which is more specifically known as the Immigration and Nationality Act (INA), Section 203(B) 5 et seq. This program promotes economic development through job creation in certain qualifying areas of the United States. Most of South Dakota meets that requirement. By the terms of this Act, foreign nationals can become citizens of the United States if they invest a minimum of \$500,000 in a business enterprise for a minimum period of time, where that investment produces a minimum number of jobs for the benefit of the qualifying area. South Dakota Department of

Tourism and State Development obtained a Regional Center Designation pursuant to Section 610 of the Appropriations Act (1993) in April 2004, to administer this program, and is one of the promoting entities involved in the program. Attached hereto as Exhibit 1 is a copy of the description of the program contained in the website of the SDRC Inc., the management company which operates and manages the regional center on behalf of the Department of Tourism and State Development.

One of the numerous EB-5 projects in the State of South Dakota, known as Northern Beef Packers Limited Partnership ("NBP"), participated in the EB-5 program to build and complete the first beef processing and packing facility located in Aberdeen, South Dakota. Due to unforeseen financial difficulties in the banking industry and the loss of previously committed financing, the project was halted thereby jeopardizing the current EB-5 investors' (69) immigration status, and threatening the continuing credibility of South Dakota's EB-5 program. Also of considerable concern is the potential of losing this beef processing facility as an important economic development vehicle for the City of Aberdeen, Brown County and the northeast region of South Dakota.

NBP has now obtained a solution to save the plant, subject to resolution of the issues described in this Petition. Epoch has agreed to provide a short-term, single-maturity mortgage loan of approximately \$30 million, an amount NBP believes to be sufficient to complete construction of the plant and get it to operational status, assuming the issues described in this Petition are resolved favorably. Epoch is an ad hoc consortium of foreign investors formed for the sole purpose of making this one loan to NBP. Epoch has not done and will not do any other business in South Dakota. Epoch has no office in South Dakota. It has not made any other loans and will not make any other loans. It has no other business and will have no other business. None of Epoch's owners does business in South Dakota. Neither Epoch nor any of its owners is in the business of lending money in South Dakota.

Epoch is wholly-owned by Pine Street Special Opportunity Fund 1 ("PSSOF1"), a fund incorporated in the Cayman Islands. PSSOF1 consists of various organizations and high net worth individuals from the United States and Asia. None of those persons is a financial institution or otherwise engaged in lending business. Epoch and PSSOF1 are both managed by Anvil Asia Partners ("AAP").

Neither Epoch nor any of its owners, directors or managers is in the business of making loans in South Dakota. An equity or venture capital investment in NBP is not appropriate for these investors as neither Epoch nor its owners, directors or managers is familiar with the business of beef processing. Accordingly, Epoch is making a loan instead of an investment that essentially will bail-out the EB-5 investors and prevent harm to the credibility of South Dakota's important EB-5 program. It is an extraordinarily high-risk loan. The proceeds will be used to complete a half-constructed, failed project of enormous size. If there is a default either before or after completion of the construction project, the mortgage property as a single-purpose facility will be extraordinarily difficult to remarket. Furthermore, time is of the essence.

3. The precise issues to be answered by the Division's declaratory ruling are:

(a) Under the circumstances set forth above, is Epoch required to obtain a license under Chapter 54-4?

(b) Under the circumstances set forth above, is Epoch required to obtain a license under Chapter 54-14?

Both questions should be answered in the negative.

4. The reasoning supporting the Petition is as follows:

Chapter 54-4 contemplates an established ongoing business of lending money. It does not contemplate that an out-of-state or foreign entity formed to make just one loan in South Dakota will be subject to the licensing requirement. In fact, a single loan transaction should not itself be considered the "business of lending money." Indeed, SDCL 54-4-44 states:

After procuring such license from the Division of Banking, the licensee may engage in the business of making loans

SDCL 54-4-47 provides in part: "Each licensee's business location shall be licensed."

If a single loan transaction by a person not otherwise in the business of making loans would expose a person to the licensing requirement and possible criminal penalties, the result would be absurd. An uncle making a loan to a nephew, a shareholder lending money to a corporation, a friend lending money to another friend, a hospital making a loan to a recruited doctor, an employer loaning money to an employee, all would be criminals under such an interpretation.

Likewise, Chapter 54-14 is clear in its contemplation of multiple lending transactions. SDCL 54-14-12(8) defines a "mortgage lender" as a person who originates, sells, or services *mortgages* Likewise, §54-14-12(11) defines "mortgage lending activities," as the making of "mortgage *loans*" SDCL 54-14-22 states in part:

Any person shall complete the equivalent of two years of service under the supervision and direction of a licensed mortgage broker, mortgage brokerage or mortgage lender, or another jurisdiction's equivalent thereof, before that person is eligible to apply for a mortgage broker, mortgage brokerage's or mortgage lender's license.

SDCL 54-14-15 requires an extraordinary criminal background check, authorization to the nationwide mortgage licensing system and registry.

Certainly the rigors of the licensing process, and the inherent two-year delay, were not intended to apply to the making of one loan secured by a mortgage. Accordingly, Epoch's contemplated one-time mortgage loan to NBP should not subject it to the licensing requirements under either statute.

5. Interested parties:

Epoch and NBP are the only persons or firms directly interested in this issue. Because the availability of financing hinges on resolution of this issue and because of the severe adverse consequences to economic development in the Aberdeen area and to the EB-5 program in South Dakota, there are a good number of persons and firms not directly involved in this matter, but whose interests are directly affected.

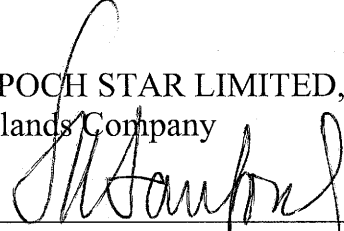
Dated at Aberdeen, South Dakota, this 9th day of June, 2010.

NORTHERN BEEF PACKERS LP



By: Rory King
Its: Attorney

EPOCH STAR LIMITED, a British Virgin
Islands Company



By: Steven W. Sanford
Its: Attorney