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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT FOR CALIFORNIA

10
11 Darley International, LLC, a Delaware
corporation,

12 Petitioner,

13 vs.

14 South Dakota Board of Regents, dba
15 South Dakota International Business
Institute,

16 Respondent.
17

CASE NO.: CV08-05034 DDP PLAx

**RESPONDENT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO VACATE ORDER
[FRCP Rule 60(b)]**

Date: April 13, 2009
Time: 10:00 a.m.
Ctrm.: 3
Judge: Hon. Dean D. Pregerson

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INTRODUCTION

By this motion, the South Dakota Board of Regents seeks to be relieved from the effects of this Court's October 7, 2008, order compelling the South Dakota International Business Institute ("SDIBI") to participate in an arbitration in which it faces millions of dollars of potential liability.

The highly unusual circumstances through which this Court's Order was procured included:

- 1) The SDIBI is an entity of the Board of Regents and, therefore, an arm or alter ego of the State of South Dakota, meaning that it is not a "citizen" for purposes of creating diversity jurisdiction and is immune from suit under the Eleventh Amendment, yet the SDIBI was falsely portrayed to this Court as a private entity;
- 2) Service of process was never made on the only persons authorized to accept such service for allegations against the SDIBI;
- 3) The persons claiming to represent the SDIBI had no legal authority to do so and willfully kept the existence of this action from the persons with such legal authority until the end of January 2009;
- 4) Service of process was not made upon anyone in accordance with the Federal Rules of Civil Procedure;
- 5) A non-attorney filed a "pro per" opposition to the Petition for the SDIBI, even though such act may only be performed by a licensed attorney.

These circumstances require that the Court vacate its Order because it had no jurisdiction over the SDIBI and, consequently, no authority to issue the Order.

STATEMENT OF FACTS

The South Dakota Board of Regents ("Board of Regents") manages and controls the State university system for the State of South Dakota. *S.D. Const.*, Art. 14, § 3; *Perry Dec.*, pg. 1, ¶ 3. The Board of Regents, while a State agency, also exists as a corporation, with the delegated power to sue and be sued and to hold, lease, and manage its properties. *SDCL* § 13-49-11.

Northern State University ("NSU") is one of the public institutions of higher education

1 under the Board of Regents' jurisdiction. *SDCL* § 13-59-1. The Board of Regents operates and
 2 determines the mission of NSU. Perry Dec., pg. 1, ¶ 5; Ex. 2.

3 The SDIBI was created by official act of the Board of Regents in 1994, to replace the
 4 existing International Business Center at NSU. Perry Dec., pg. 1, ¶ 4; Ex. 1. The SDIBI is
 5 funded by the Board of Regents but also receives substantial funding from the South Dakota
 6 Governor's Office of Economic Development, another State agency. Perry Dec., pp. 2-3, lines
 7 21-1, ¶ 9; Bollen Dec., pg. 1, ¶ 2. Any money judgment or arbitration award against the SDIBI,
 8 for this or any other matter, would be paid out of the general fund of the State of South Dakota.
 9 Perry Dec., pg. 3, ¶ 10. Conversely, any funds earned by the SDIBI are placed in an account
 10 controlled by NSU. Perry Dec., pg. 3, lines 1-4, ¶ 9. Employees of both the SDIBI and NSU
 11 receive their paychecks on the account of the State of South Dakota. Brick Dec., pg. 1, ¶ 5;
 12 Meyer Dec., pg. 2, ¶ 7; Bollen Dec., pg. 3, ¶ 11.

13 The SDIBI's Director at all times relevant to this action has been Joop Bollen. Mr.
 14 Bollen, who is not an attorney, is an employee of NSU and is listed in the staff directory for
 15 NSU. Meyer Dec., pg. 1, ¶ 3; Ex. 5; Bollen Dec., pg. 1, ¶¶ 2-3. The SDIBI is a constituent part
 16 of NSU and the Board of Regents and has no independent legal capacity to sue or be sued. Perry
 17 Dec., pg. 2, lines 5-6, ¶ 7; Long Dec., pg. 1, ¶ 4; Shekleton Dec., pg. 1, ¶ 4.¹ Mr. Bollen did not
 18 have authority to retain attorneys to perform legal services for the SDIBI or to provide
 19 representation in the instant case, nor has he ever been authorized to accept service of process on
 20 behalf of the State of South Dakota or the Board of Regents. Similarly, Mr. Bollen's assistant,
 21 Cherri Brick was not authorized to accept service of process. Long Dec., pg. 2, ¶ 6; Perry Dec.,
 22 pg. 2, lines 6-11, ¶ 7; Shekleton Dec., pg. 1, lines 26-27, ¶ 6; Brick Dec., pg. 1, lines 16-19, ¶ 4.

23 The State of South Dakota prohibits the performance of legal services for the State except
 24 where performed by assistant or deputy attorneys general employed by the State, pursuant to a
 25 contract with a State agency that has been filed with the South Dakota Attorney General, or by
 26 special written appointment from the State Attorney General. *SDCL* §§ 1-11-15, 1-11-5. Long
 27

28 ¹ The SDIBI's and the Board of Regents' capacity to be sued is determined by South Dakota law. Fed. R. Civ. P.
 17(b)(3); *SDCL* § 13-49-11.

1 Dec., pg. 1, ¶ 5.

2 Austin Su Ki Kim, an attorney with Hanul, briefly appeared as an attorney for SDIBI in
 3 this action in October 2008. However, neither Mr. Kim, Hanul, nor any attorney working for
 4 Hanul had authorization or appointment from the Board of Regents or the South Dakota State
 5 Attorney General's office to represent SDIBI or the Board of Regents. Mr. Bollen did not have
 6 such authorization or appointment, either. No contract authorizing Mr. Kim to represent the
 7 State of South Dakota or any of its agencies is on file with the South Dakota Attorney General.
 8 Neither Hanul nor any of its attorneys were authorized to accept service of process on behalf of
 9 the Board of Regents or the State of South Dakota. Long Dec., pg. 2, ¶ 6, lines 5-9, ¶ 7; Perry
 10 Dec., pg. 2, ¶ 8.

11 In contrast, James Lynch, who now represents the Board of Regents and its constituent
 12 part, the SDIBI, has entered into a legal services contract with the Board of Regents and has
 13 received a special appointment from the State Attorney General's office for this purpose. Long
 14 Dec., pg. 2, ¶ 8; Ex. 4.

15 In order to commence an action against the SDIBI or the Board of Regents, Petitioner
 16 Darley International, LLC ("Darley") was required by South Dakota law to serve both South
 17 Dakota's Governor and Attorney General.² There is no evidence on record that either has ever
 18 been served with process in this action; in fact, the South Dakota Attorney General has no record
 19 of such service. Long Dec., pg. 1, ¶ 3; Perry Dec., pg. 2, ¶ 6; Shekleton Dec., pp. 1-2, ¶¶ 6-7.

20 In July 2008, Darley petitioned this Court to compel the SDIBI to participate in binding
 21 arbitration pursuant to a contract arbitration clause between Darley and Hanul. Darley
 22 incorrectly pleaded that the SDIBI was a non-profit organization "affiliated" with NSU. As the
 23 undisputable evidence supporting this motion makes clear, the SDIBI is actually part of the State
 24 of South Dakota. Further, Darley has not filed any documents with this Court indicating that a
 25 Summons was served on any person or that service was effected in compliance with the

26 _____
 27 ² "If the action is against the state or any of its institutions, departments, or agencies, by service upon such officer or
 28 employee as may be designated by the statute authorizing such action, and upon the attorney general. ... In all
 matters other than those involving title to such lands, if no officer or employee is designated, then upon the
 Governor and the attorney general." *SDCL* § 15-6-4(d)(5). There is no State statute designating another person to
 accept service of process for the Board of Regents.

1 requirements of Rule 4 of the Federal Rules of Civil Procedure.

2 Through its own inquiries, the Board of Regents has learned that a deputy sheriff in
3 Brown County (South Dakota) delivered a copy of some documents to Ms. Brick in August
4 2008, but without a Summons. Brick Dec., pg. 1, lines 13-16, ¶ 4; Bollen Dec., pp. 2-3, ¶¶ 7, 10.
5 In August 2008, Hanul, which was not then a counsel of record, filed a “pro per” opposition to
6 the Petition by the SDIBI bearing Mr. Bollen’s signature. In September 2008, Mr. Kim filed a
7 request to substitute into the action as the SDIBI’s attorney, which this Court approved. Mr.
8 Kim subsequently “represented” the SDIBI before this Court at the hearing on Darley’s Petition
9 on October 6, 2008.

10 On October 7, 2008, this Court ordered the SDIBI to participate in the arbitration
11 between Darley and Hanul (the “Order”), thereby exposing the SDIBI and, unbeknownst to the
12 Court, the Board of Regents to liability under Hanul’s contract with Darley. The SDIBI, again
13 “represented” by Mr. Kim, subsequently participated in an unsuccessful mediation in December
14 2008. Bollen Dec., pg. 2, ¶ 6; Ex. 3.

15 Throughout the time of the foregoing events, Mr. Bollen purposefully avoided informing
16 attorneys for NSU, the Board of Regents, or the State of South Dakota that these events were
17 taking place, and he continued to withhold this information from them until January 23, 2009,
18 when he concluded that he could not make the matter go away with just the assistance of Hanul.
19 On that date, he contacted John Meyer, the University attorney for NSU, about the problem and,
20 while he forwarded some documents relating to the arbitration, did not mention a lawsuit. On
21 January 27, 2009, Mr. Meyer, having reviewed the documents and become suspicious that a
22 lawsuit might be involved, instructed Mr. Bollen to bring him more documents related to the
23 dispute, which revealed to Mr. Meyer the instant action but not this Court’s Order. Notably
24 absent from Mr. Bollen’s documents was a Summons. Meyer Dec., pp. 1-2, ¶¶ 4-5; Bollen Dec.,
25 pp. 1-3, ¶¶ 4-10; Brick Dec., pg. 1, lines 13-16, ¶ 4.

26 Neither the South Dakota Attorney General’s office nor the Board of Regents had any
27 knowledge of the existence of this action until January 27, 2009, and then only after Mr. Bollen
28 spoke to Mr. Meyer. Having spoken to Mr. Bollen and seen some of the court documents, Mr.

1 Meyer immediately notified James Shekleton, the General Counsel for the Board of Regents, of
2 what Mr. Bollen had told him. Bollen Dec., pg. 2, ¶ 8; Shekleton Dec., pg. 1, lines 18-23, ¶ 5;
3 Meyer Dec., pg. 2, ¶ 6; Perry Dec., pg. 2, ¶ 6. This Court's Order was discovered shortly
4 thereafter. Meyer Dec., pg. 2, lines 1-3, ¶ 5.

5 Mr. Shekleton thereafter searched for and retained California counsel to defend this
6 matter, leading to the filing of this Motion. Shekleton Dec., pg. 1, lines 21-25, ¶ 5.

7 ARGUMENT

8 I.

9 28 U.S.C. SECTION 1332(a) CONFERS NO JURISDICTION OVER CONTRACT OR 10 TORT CLAIMS BROUGHT AGAINST THE SOUTH DAKOTA BOARD OF REGENTS, 11 THE INSTITUTIONS THAT IT CONTROLS, OR THE ORGANIZATIONAL 12 SUBUNITS OF THE INSTITUTION.

13 This Court's jurisdiction over the Plaintiff's underlying contract and tort claims exists
14 only pursuant to 28 U.S.C. § 1332(a)(1), which authorizes federal jurisdiction over matters
15 involving "citizens of different States."

16 The burden of proving all jurisdictional facts rests on the party seeking jurisdiction.
17 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. 2001); *Befitel v. Global*
18 *Horizons, Incorporated*, 461 F.Supp.2d 1218, 1221 (D.Haw. 2006). Diversity jurisdiction is to
19 be strictly construed. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377, 98 S.Ct.
20 2396, 57 L.Ed.2d 274 (1978) ("The policy of the statute conferring diversity jurisdiction upon
21 the district courts calls for its strict construction.") *Thomson v. Gaskill*, 315 U.S. 442, 446, 62
22 S.Ct. 673, 86 L.Ed. 951 (1942); *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248
23 (1934); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 723 (9th Cir. 2008).

24 Although a state, or its alter ego, may waive its Eleventh Amendment privilege, neither
25 state nor alter ego can create diversity jurisdiction. *Fifty Associates v. Prudential Insurance*
26 *Company of America*, 446 F.2d 1187, 1192 (9th Cir. 1970). "It matters not that the propriety of
27 the diversity of citizenship was raised for the first time on appeal, because subject matter
28 jurisdiction is 'non-waivable and delimits the power of federal courts.'" *McDonal v. Abbott*

1 *Laboratories*, 408 F.3d 177, 182 (5th Cir. 2005), quoting *Ruhrgas AG v. Marathon Oil Co.*, 526
2 U.S. 574 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999); *see, also, Arbaugh v. Y & H Corp.*, 546
3 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (“subject-matter jurisdiction, because it
4 involves the court’s power to hear a case, can never be forfeited or waived”) (quoting *United*
5 *States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). When a federal
6 court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in
7 its entirety. *Arbaugh*, 546 U.S. at 514.

8 States are not citizen for purpose of 28 U.S.C. § 1332(a)(1). *Moor v. County of Alameda*,
9 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) (“There is no question that a State is
10 not a ‘citizen’ for purposes of the diversity jurisdiction.”). In *South Dakota Board of Regents v.*
11 *Hoops*, 624 F.Supp 1179 (D.SD 1986), the District Court of the District of South Dakota
12 remanded a declaratory judgment action back to state court concluding it lacked diversity
13 jurisdiction since the Board of Regents was an arm or alter ego of the State of South Dakota.
14 The analysis by the district court in reaching its conclusion that the Board of Regents is an arm
15 or alter ego of the State is compelling.

16 In *Hoops*, the district court found that the Board of Regents’ corporate form did not
17 preclude the finding the Board of Regents to be an arm or alter ego of the State because,
18 ultimately, the Board of Regents lacked financial autonomy from the State. The district court
19 also found that the Board of Regents’ capacity to sue and be sued in its own name did not
20 constitute a waiver of its Eleventh Amendment immunity. *Id.*, at 1181-1183. Respondent
21 respectfully requests that the Court follow the holding in *Hoops* in reviewing the merits of its
22 motion.

23 In like guise, in *Prostrollo v. Univ. of South Dakota*, 507 F.2d 775 (8th Cir. 1974), *cert.*
24 *denied*, 421 U.S. 952 (1975), *sua sponte*, the Eighth Circuit Court of Appeals found that the
25 district court erred in accepting jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343
26 because the University of South Dakota and the corporate body constituting the Board of
27 Regents were both political subdivisions of the state. *Prostrollo*, 507 F.2d at 777.

28 It follows from *Prostrollo* that NSU and the Board of Regents should be treated in the

1 same fashion when a federal court is determining whether it may take jurisdiction over a dispute.
2 Since the SDIBI is merely an administrative unit created by the Board of Regents and operating
3 within NSU under Board of Regents control, Perry Dec., ¶ 4, it follows, further, that the SDIBI
4 should be treated for purposes of determining jurisdiction in the same fashion as the university
5 and its governing board.

6 Based upon the foregoing authorities, this Court may not accept jurisdiction over the
7 SDIBI, NSU or the Board of Regents, since none is a citizen for purposes of 28 U.S.C. § 1332.
8 Moreover, under *Fifty Associates* no action by Mr. Bollen or by Hanul, even assuming *arguendo*
9 authority that they patently lacked, could have created jurisdiction in this case. *Fifty Associates*,
10 446 F.2d at 1192.

11 II.

12 THIS COURT HAS NO JURISDICTION OVER AN ENTITY WHICH IS AN ALTER 13 EGO OR ARM OF A STATE AND SHARES ITS ELEVENTH AMENDMENT 14 IMMUNITY.

15 This Court lacks jurisdiction over the SDIBI as it shares the State of South Dakota's
16 Eleventh Amendment immunity.

17 The Eleventh Amendment to the U.S. Constitution states:

18 "The Judicial power of the United States shall not be construed to extend to any
19 suit in law or equity, commenced or prosecuted against one of the United States
20 by Citizens of another State, or by Citizens or Subjects of any Foreign State."

21 U.S. Const. amend. XI.

22 The Eleventh Amendment deprives the federal courts of jurisdiction over suits against a
23 State that are based on diversity of citizenship. Indeed, precluding federal court jurisdiction over
24 non-consenting states was the purpose of the adoption of the Amendment. *Seminole Tribe v.*
25 *Florida*, 517 U.S. 44, 69-70, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("The text [of the
26 Eleventh Amendment] dealt in terms only with the problem presented by the decision in
27 *Chisholm*; in light of the fact that the federal courts did not have federal question jurisdiction at
28 the time the Amendment was passed (and would not have it until 1875), it seems unlikely that

1 much thought was given to the prospect of federal-question jurisdiction over the States.”).

2 Thus, if the SDIBI is an alter ego or arm of the State of South Dakota, the state is the real
3 party in interest. Consequently, the SDIBI is neither a “citizen” for purposes of this Court’s
4 diversity jurisdiction nor is it subject to this Court’s jurisdiction for the claims raised by Darley,
5 per the Eleventh Amendment. This Court, having no jurisdiction in either event, was compelled
6 to dismiss Darley’s Petition for lack of jurisdiction instead of ruling on its merits.

7 **III.**

8 **BECAUSE THE SOUTH DAKOTA INTERNATIONAL BUSINESS INSTITUTE IS**
9 **PART OF THE SOUTH DAKOTA BOARD OF REGENTS, THIS COURT’S**
10 **JURISDICTION IS PRECLUDED AND THE COURT’S ARBITRATION ORDER WAS**
11 **VOID.**

12 The sole basis for jurisdiction in this case is diversity of citizenship; indeed, no federal
13 law-based claims have been pleaded. Consequently, because this Court lacks jurisdiction over
14 an arm of the State of South Dakota it had no jurisdiction and no authority to issue its Order to
15 the SDIBI if the SDIBI, as the Board of Regents, is an alter ego or arm of the state.

16 The SDIBI is an alter ego or arm of the State of South Dakota because it exists purely as
17 a component of the Board of Regents. NSU is part of the South Dakota public system of higher
18 education, over which the Board of Regents presides. The SDIBI has no greater legal capacity to
19 distinguish itself from or the Board of Regents than the NSU Department of Political Science,
20 the NSU College of Business, or NSU itself. Lastly, the SDIBI’s funds ultimately belong to
21 NSU, the Board of Regents, and, therefore, the State of South Dakota, and a judgment against
22 the SDIBI would be paid from State funds. Consequently, the SDIBI is not a “citizen” within the
23 meaning of 28 U.S.C. § 1332 and this Court has no diversity jurisdiction over the matter or the
24 SDIBI. *Moor, supra; Hoops, supra*, 624 F. Supp at 1181, 1184-1185.

25 An order issued by a federal court in excess of its subject matter jurisdiction is void.
26 *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985).

27 //

28 //

IV.

THE ACTIONS OF JOOP BOLLEN AND AUSTIN KIM COULD NOT WAIVE THE ELEVENTH AMENDMENT IMMUNITY OF THE STATE OF SOUTH DAKOTA OR THE SOUTH DAKOTA BOARD OF REGENTS.

Since the SDIBI is in fact the South Dakota Board of Regents and it is indisputable that this Court lacks jurisdiction over the Board of Regents, Darley's only remaining argument is that the Board of Regents or the State of South Dakota waived their Eleventh Amendment immunity by consenting to this Court's issuance of the Order. Of course, no such consent is evident on these facts. Indeed, it is impossible for there to have been a waiver.

Section 3-21-10 of the *South Dakota Codified Law* explicitly prohibits any officer or agent of the State from waiving the State's immunities in federal court:

"Immunity from lawsuits in courts of other jurisdictions. No waiver of state immunity by statute or, where permitted, by any officer or agent of the state may constitute or be interpreted as a waiver of the state's immunity from lawsuits in federal court or the courts of any jurisdiction other than the South Dakota Unified Judicial System." *SDCL* § 3-21-10.

This explicit prohibition of a waiver aside, neither the South Dakota Attorney General nor any executive or attorney for the Board of Regents has consented to this Court's jurisdiction or otherwise waived sovereign immunity; indeed, the record in this case shows that they have never been served and were not involved in the proceedings until now. Thus, any consent or waiver argument by Darley necessarily has to be that Mr. Bollen or Mr. Kim, the only two persons who ever "appeared" in this action in 2008, consented to jurisdiction, thereby waiving the immunity.

Mr. Kim was never authorized to represent the Board of Regents or South Dakota and so he could not have consented to or waived anything on their behalf. Under South Dakota law, an attorney must be a deputy or assistant attorney general, or have contracted in writing with a State entity to represent the entity, filed the contract with the State Attorney General, and received an appointment as a special assistant attorney general in order to act on behalf of any South Dakota

1 State entity. SDCL §§ 1-11-15, 1-11-5. Mr. Kim was never so employed, appointed, or retained
2 by contract with the Board of Regents or the State of South Dakota. There is no contract on file
3 with the State Attorney General. James Lynch, on the other hand, has received such an
4 appointment, hence his authority to make this motion—but he has not consented to this Court’s
5 jurisdiction or waived immunity. Ex. 4. There is no evidence that the Board of Regents or the
6 South Dakota Attorney General’s Office were even aware that Mr. Kim was purporting to serve
7 as their representative in September/October 2008, let alone retaining him.

8 Mr. Bollen, while delegated certain authority to perform the duties of Director of the
9 SDIBI, had no authority to act on behalf of the Board of Regents or South Dakota, appear in this
10 action on their behalf, or take any action that would affect their legal interests. Like Mr. Kim,
11 Mr. Bollen has never received an appointment as a special assistant attorney general. As with
12 Mr. Kim’s actions, Mr. Bollen’s actions were unknown to the Board of Regents or the South
13 Dakota Attorney General’s office prior to 2009. These facts compel the conclusion that Mr.
14 Bollen did not and could not consent to this Court’s jurisdiction or waive the State’s or the Board
15 of Regents’ immunity.³

16 Even if Eleventh Amendment immunity could be waived by Mr. Kim or Mr. Bollen,
17 however, this Court’s subject matter jurisdiction cannot be established through waiver or
18 consent. The Court’s subject matter jurisdiction is constitutionally limited; diversity is a form of
19 subject matter jurisdiction. *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 757
20 (9th Cir. 1999); *Hoops, supra*, 624 F. Supp. at 1184-1185; *Healy, supra*, *McDonal, supra*,
21 *Ruhrgas, supra*. Parties cannot confer subject matter jurisdiction upon a federal court in excess
22 of the court’s constitutional reach. *Hill, supra*; *Arbaugh, supra*. Thus, this Court cannot acquire
23 diversity jurisdiction over Darley’s state law claims by a purported “consent” to jurisdiction by
24

25 ³ Indeed, Mr. Bollen is not an attorney and he is not admitted to the bar of this Court. Bollen Dec., pg. 1, ¶ 3.
26 Corporations and unincorporated associations must appear in court through licensed attorneys, however. They may
27 not be represented by a non-attorney. *In re America West Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994) (citing
28 *Rowland v. California Men’s Colony*, 506 U.S. 194, 201-202, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993)). Mr. Bollen
was not sued in his personal capacity and he could never have lawfully have represented the SDIBI before this
Court, so there was no authority for him to properly file an opposition brief for the SDIBI or make a request to
appear on the SDIBI’s behalf telephonically. Mr. Kim did not purport to substitute into the case until the end of
September 2008, only about a week before the Court issued its Order.

1 Mr. Bollen or Mr. Kim, or even by the Board of Regents itself, where in fact diversity does not
2 exist. While a state or its arm/alter ego may waive its Eleventh immunity, it cannot create
3 diversity jurisdiction. *Fifty Associates, supra*, 446 F.2d at 1192.

4 As previously noted, the Board of Regents, acting as the SDIBI, is not a "citizen," as
5 matter of law. It cannot consent to become a citizen so as to create subject matter jurisdiction
6 that does not exist in this Court.

7 **V.**

8 **THE ACTIONS TAKEN IN THIS CASE IN 2008 FALL WITHIN THE PROVISIONS OF**
9 **SUBDIVISIONS (1), (3), (4), AND (6) OF SUBDIVISION (b) OF RULE 60.**

10 **A. The Order Was Obtained Through The Mistake Of All Involved, Which Did Not**
11 **Include The Board Of Regents.**

12 The circumstances under which this Court's Order to the SDIBI was procured constituted
13 mistake. Fed. R. Civ. P. 60(b)(1). Mr. Bollen was clearly mistaken in his belief that he could
14 retain legal counsel in violation of South Dakota law, Darley was mistaken in its belief that it
15 could sue the SDIBI in its own name and in federal court, and Hanul mistakenly believed it could
16 appear on behalf of the SDIBI. Under South Dakota law, neither Mr. Bollen nor Hanul were
17 legally authorized to accept service of process or appear on behalf of the SDIBI or the Board of
18 Regents in this action; the direct consequence was total failure to raise defenses that would have
19 commanded the dismissal of this action.

20 Had any one of these parties understood it was mistaken, the Court would have
21 immediately known it lacked jurisdiction and would not have issued the Order.

22 **B. The Board Of Regents Was Justifiably Surprised By The Order.**

23 The issuance of the Order understandably came as a surprise to the Board of Regents
24 (Fed. R. Civ. P. 60(b)(1)), which did not become aware of this action until well after the Order
25 was issued and the time to appeal had expired.⁴ Darley's failure to properly ascertain the nature
26 //

27
28 ⁴ The time to appeal expired on November 6, 2008, 30 days after the entry of this Court's Order. Fed. R. App. P. 4(a)(1)(A).

1 of the entity it was suing and Hanul's unauthorized, unknown "representation" of the SDIBI
2 directly caused this surprise.

3 **C. To The Extent It Can Even Be Argued That The Board Of Regents Was Negligent,**
4 **Such Neglect Was Excusable.**

5 The Board of Regents' failure to raise the appropriate jurisdictional defenses was clearly
6 excusable in light of its ignorance of the existence of this action. Fed. R. Civ. P. 60(b)(1).

7 "[T]he determination of whether neglect is excusable depends on at least four factors: (1)
8 the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact
9 on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith."
10 *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223-1224 (9th Cir. 2000) (citing *Pioneer*
11 *Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395, 113 S.Ct.
12 1489, 123 L.Ed.2d 74 (1993)). Ultimately, whether neglect is excusable is an equitable
13 determination. *Id.*

14 Applying the factors to the instant case, first, there is no danger of prejudice to Darley.
15 Darley never had a right to receive the Order, as this Court never had jurisdiction. Darley would
16 be no worse off by the grant of relief under Rule 60 than it was at the outset of the case: heading
17 to an arbitration involving only Darley and Hanul.

18 Second, the length of the delay and its potential impact on these proceedings is irrelevant,
19 as the Petition ought to have been dismissed in October and the case should have ended on that
20 note. As to the impact on the arbitration, Darley had no right to include the Board of Regents or
21 the SDIBI in that proceeding and it may still proceed against Hanul, so it is no worse off than it
22 should have been in the first instance.

23 Third, the reason for the delay ought to favor the Board of Regents. They never had the
24 opportunity to join this action and raise proper defenses, due in large part to Darley's own failure
25 to properly describe the relationship of the SDIBI to the Board of Regents.

26 Lastly, the Board of Regents is acting in good faith for the reasons already stated; it
27 certainly could not have previously acted in bad faith, never having been advised of the instant
28 action before all of the deadlines expired.

1 The equities and the highly unusual circumstances favor granting relief to the Board of
2 Regents.

3 **D. Darley's Misrepresentation To The Court About The SDIBI's Form Of Existence**
4 **Led Directly To The Issuance Of The Order.**

5 The circumstances under which the Order was procured also demonstrate
6 misrepresentation by Darley to this Court. Fed. R. Civ. P. 60(b)(3). Whether intentionally or
7 negligently, Darley misrepresented the nature of the SDIBI by portraying it as an independent,
8 private actor when in fact it is the Board of Regents. That misrepresentation was material, in that
9 this Court would have to have dismissed the case had Darley properly stated the SDIBI's nature.
10 Moreover, Hanul, whose potential interest in shifting liability to the SDIBI was in direct conflict
11 with the Board of Regents' interest in avoiding liability, misrepresented its authority to represent
12 the SDIBI to this Court, resulting in an Order detrimental to the Board of Regents' and the
13 SDIBI's interests.

14 **E. The Order Is Void Because This Court Lacked Jurisdiction.**

15 As has been previously discussed, this Court's judgment is void for lack of jurisdiction.
16 A motion under Rule 60 is the appropriate means for vacating a void judgment. *Watts, supra*,
17 752 F.2d at 409; Fed. R. Civ. P. 60(b)(4). Further for reasons stated previously, the SDIBI's lack
18 of citizenship and the resulting lack of diversity jurisdiction is an additional basis for vacating
19 the Order.

20 While the Court has discretion whether to rule favorably on a Rule 60(b) motion as to
21 most of the grounds stated therein, it has no such discretion if its Order is void for lack of
22 jurisdiction. In that circumstance, it is required to grant relief from the Order. *Thos. P. Gonzalez*
23 *Corp. v. Consejo Nacional De Produccion De Costa Rica, et al.*, 614 F.2d 1247, 1255-1256 (9th
24 Cir. 1980) (ruling on a default judgment taken without personal jurisdiction over defendant).

25 **F. If No Other Cause For Relief Is Found To Exist, The Order Should Be Dismissed**
26 **For Equitable Reasons.**

27 If for no reason other than fairness, this Court must grant relief. Fed. R. Civ. P. 60(b)(6).
28 Although courts rarely issue relief under the 'savings clause' of (b)(6), it is "used sparingly as an

1 equitable remedy to prevent manifest injustice” and “is to be utilized only where extraordinary
2 circumstances prevented a party from taking timely action to prevent or correct an erroneous
3 judgment.” *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting *United*
4 *States v. Alpine Land & Reservoir Co.*, 984 F.3d 1047, 1049 (9th Cir. 1993)).

5 The circumstances in the instant action are extraordinary, such that they meet the narrow
6 standard of Rule 60(b)(6). Darley sued an entity that lacks the capacity to be sued, without
7 notice or service of a Summons to the actual entities possessing such capacity and which would
8 be financially responsible for any arbitration award against the SDIBI; neither the Board of
9 Regents nor the State of South Dakota were represented by counsel retained in accordance with
10 South Dakota law, which means they were in fact unrepresented; as a direct result, this Court
11 issued an Order against a party which was not served, not aware of Darley’s Petition, and not
12 even aware of the instant action or the Order until late January 2009.

13 The unfairness of this situation was compounded by the fact that Hanul, the SDIBI’s
14 purported representative, disregarded a glaring conflict of interest and provided incompetent
15 representation. Competent counsel representing a State entity would have at least raised the
16 Eleventh Amendment and diversity jurisdictional issues.

17 The adverse, prejudicial impact of the foregoing actions is patent: the time for appeal
18 expired months before the Board of Regents even knew it had been sued. This Court simply
19 cannot allow Darley (and Hanul) to be rewarded under these circumstances, when the Court
20 never had jurisdiction. Surely the circumstances surrounding this action constitute equitable
21 grounds for relief from the Court’s Order, which was procured under false premises.

22 VI.

23 **THIS COURT HAS NO JURISDICTION OVER THIS ACTION BECAUSE DARLEY**
24 **HAS NOT SERVED THE RESPONDING PARTY WITH PROCESS IN ACCORDANCE**
25 **WITH THE FEDERAL RULES OF CIVIL PROCEDURE.**

26 Section 4 of title 9 of the U.S. Code provides that this Court may consider and rule upon
27 a petition to compel arbitration if the Court would, but for the arbitration agreement, have
28 jurisdiction under title 28 of the U.S. Code. 9 U.S.C. § 4. Darley’s Petition relied upon this

1 statute and the diversity jurisdiction provisions of section 1332 of title 28 to invoke this Court's
2 jurisdiction over SDIBI.

3 Section 4 of title 9 requires a petitioner to serve the petition in the manner provided in the
4 Federal Rules of Civil Procedure. 9 U.S.C. § 4. Rule 4(c)(1) and 4(j)(2) of the Federal Rules of
5 Civil Procedure require that a Summons and complaint (in this case, a Summons and the
6 Petition) be served together on a State entity by either serving the Chief Executive Officer of the
7 entity or in compliance with the rules of that State. Fed. R. Civ. P. 4(c)(1), (j)(2). The Chief
8 Executive Officer of the State of South Dakota at all relevant times has been Governor M.
9 Michael Rounds. The Chief Executive Officer of the Board of Regents at all relevant times has
10 been Robert T. Perry, Ph.D. As previously noted, South Dakota's laws concerning service of
11 process against State entities require service upon its Governor and Attorney General in this
12 matter.

13 The Court's record in this case is devoid of proof of service of a Summons upon *anyone*,
14 let alone Governor Rounds, Dr. Perry, or Attorney General Long. Even if service upon the
15 SDIBI through Ms. Brick or Mr. Bollen may be implied, it would not show compliance with
16 Rule 4 because they are not Governor Rounds, Dr. Perry, or Attorney General Long; moreover,
17 no Summons was served upon Mr. Bollen or Ms. Brick.

18 The failure of a plaintiff to properly serve a responding party in accordance with Rule 4
19 deprives a District Court of personal jurisdiction over the responding party. *Jackson v.*
20 *Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). It does not matter whether the party had actual
21 notice of the proceedings. The failure to comply with Rule 4 is fatal to jurisdiction. *Id.*

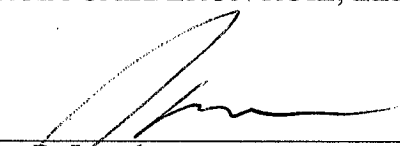
22 Since this Court lacked jurisdiction because there was no lawful service of process upon
23 the State of South Dakota or the Board of Regents and no service whatsoever of the Summons in
24 compliance with Rule 4, its Order is void. *Veeck v. Commodity Enterprises, Inc.*, 487 F.2d 423,
25 426 (9th Cir. 1973) (default judgment void for lack of personal jurisdiction over defendant; Fed.
26 R. Civ. P. 60(b)(4) motion to set aside judgment for failure to comply with Rule 4 ordered
27 granted). The void status of the Order is therefore a basis for vacating the Order under Rule
28 60(b)(4).

CONCLUSION

For the foregoing reasons, Respondent South Dakota Board of Regents, doing business as the South Dakota International Business Institute, requests that this Court vacate its October 7, 2008, Order compelling the SDIBI to participate in the arbitration between Darley International, LLC, and Hanul Professional Law Corporation.

Dated: March 20, 2009

GARCIA CALDERÓN RUÍZ, LLP

By: 
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International Business Institute