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6 Attorneys for Petitioner  
 7 DARLEY INTERNATIONAL, LLC

8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA  
 10 WESTERN DIVISION

<p>12 Darley International, LLC, a Delaware          13 corporation,</p> <p style="text-align: center;">14 Petitioner,</p> <p style="text-align: center;">15 vs.</p> <p>16 South Dakota International Business          Institute, a non-Profit organization</p> <p style="text-align: center;">17 Respondent.</p>	<p>CASE NO. CV 08-05034 DDP (PLAx)</p> <p>PETITIONER DARLEY          INTERNATIONAL, LLC'S REPLY          MEMORANDUM IN SUPPORT OF          PETITION FOR ORDER          COMPELLING ARBITRATION          PURSUANT TO WRITTEN          AGREEMENT</p> <p>[9 U.S.C. § 4]</p> <p>Date: September 15, 2008          Time: 10:00 a.m.          Place: Courtroom 3</p>
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 21 Hon. Dean D. Pregerson  
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1 **I. INTRODUCTION**

2 Respondent South Dakota International Business Institute (“SDIBI” or  
3 “Respondent”) opposes Petitioner Darley International, LLC’s (“Darley” or  
4 “Petitioner”) petition for order compelling arbitration pursuant to a written  
5 agreement based on erroneous legal arguments as to why it is not bound  
6 by the arbitration clause contained in the disputed Agreement.

7 Respondent also claims that it is not subject to the personal jurisdiction of  
8 this Court.

9 As discussed below, SDIBI’s opposing papers are replete with  
10 conclusory and misleading statements concerning the obligations of  
11 nonsignatories. Throughout its opposition, SDIBI fails to cite any authority  
12 for many of its assertions. In an effort to detract from the real question  
13 before the Court, Respondent attempts to argue the merits of Petitioner’s  
14 claims. The only issue before the Court is whether SDIBI is bound by the  
15 arbitration clause contained in the disputed Overseas Recruitment Agreement  
16 (“Agreement”) entered into by Darley and Hanul Professional Law  
17 Corporation (“Hanul”). Darley’s petition, moving papers and  
18 accompanying declarations and exhibits present evidence that support the  
19 notion that SDIBI should be compelled to join the pending arbitration  
20 between Petitioner Darley and Hanul Professional Law Corporation  
21 (“Hanul”).

22 **II. ARGUMENT**

23 **A. This Court Has Personal Jurisdiction Over Defendant**

24 SDIBI contends that it is not subject to personal jurisdiction in  
25 California because it is not domiciled in California, has not consented to  
26 jurisdiction and does not have “minimum contacts” with the forum state. As  
27 discussed below, SDIBI maintains the requisite “minimum contacts” with  
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1 California to support a finding that it is subject to the specific, and likely  
2 general, jurisdiction of this Court.

3 In a diversity action, such as this, the Court establishes the existence  
4 of personal jurisdiction by applying the California long-arm statute, which is  
5 coextensive with federal constitutional standards. See Cal. Civ. Proc.  
6 Code § 410.10 (“A court of this state may exercise jurisdiction on any basis  
7 not inconsistent with the Constitution of this state or of the United States.”);  
8 Dole Food Co. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002) (citing  
9 Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998)).

10 The exercise of personal jurisdiction is constitutionally permissible so  
11 long as (1) a nonresident defendant has “minimum contacts” with the  
12 forum, and (2) the exercise of jurisdiction is reasonable in that it “does not  
13 offend ‘traditional notions of fair play and substantial justice.’” International  
14 Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)  
15 (citation omitted); accord Pavlovich v. Superior Court, 29 Cal. 4th 262, 268,  
16 127 Cal. Rptr. 2d 329 (2002). Personal jurisdiction may be either general  
17 or specific.

18 **1. SDIBI Is Subject to This Court’s Specific Jurisdiction**

19 Specific jurisdiction exists where: (1) the nonresident defendant  
20 purposely availed itself of forum benefits; (2) the controversy is related to or  
21 arises out of a defendant’s contacts with the forum; and (3) the exercise of  
22 personal jurisdiction must be reasonable. Burger King Corp. v. Rudzewicz,  
23 471 U.S. 462, 472-76, 105 S. Ct. 2174, 2182-84 (1985); Helicopteros  
24 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & n.8, 104 S. Ct.  
25 1868, 1872 & n.8 (1984); accord World-Wide Volkswagen Corp. v.  
26 Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980); Roth v. Garcia  
27 Marquez, 942 F.2d 617, 620 (9th Cir. 1991).

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1 **a. Purposeful Availment**

2 SDIBI's opposing papers provide evidence demonstrating that it has  
 3 purposefully directed activities at Hanul, a California resident, and has  
 4 derived significant benefits from doing so. See Burger King, 471 U.S. at  
 5 472-76, 105 S. Ct. at 2182-84; Panavision Int'l, L.P. v. Toeppen, 141 F.3d  
 6 1316, 1320 (9th Cir. 1998) (so long as defendant's efforts were  
 7 "purposefully directed" toward a forum resident, the nonresident defendant  
 8 need not have been physically present or have had physical contact with  
 9 the forum state (citing Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir.  
 10 1995)). Significantly, SDIBI granted Hanul the exclusive right to market  
 11 SDIBI's EB-5 projects and appoint independent contractors to do the  
 12 same.<sup>1</sup> Respondent readily admits that all inquiries related to recruiting  
 13 Asian investors for SDIBI's projects are forwarded directly to Hanul. (Opp.  
 14 at 7.) SDIBI further admits that Hanul's recruitment efforts have helped to  
 15 result in the success of 12 dairy projects. (*Id.*)

16 As further proof of SDIBI's deliberate contact with California, one  
 17 need only look at SDIBI's website, which not only provides a direct link to  
 18 Hanul's website, but states: "SDIBI, in collaboration with Hanul  
 19 Professional Law Corporation has unique access to Regional Center  
 20 Immigrant Visas (green cards)!!!" (Declaration of Jennifer S. Elkayam  
 21 ("Elkayam Decl."), filed concurrently, Exh. 1.) Similarly, Hanul promotes its  
 22 ability to offer EB-5 investment opportunities, on an exclusive basis, in  
 23 South Dakota. (*Id.*, Exh. 2.) Hanul and SDIBI appear to have an agency  
 24 type relationship in that Hanul has the exclusive right to market and  
 25 promote SDIBI's EB-5 projects in Asia.

26 \_\_\_\_\_  
 27 <sup>1</sup> As set forth in section 1(A) of the disputed Agreement, Hanul's  
 28 exclusive rights to market SDIBI's EB-5 projects are unofficial "[b]ecause  
 State of South Dakota is prohibited from granting exclusive rights to private  
 entities in regards to SDIBI EB-5 Projects."

1           Significantly, many California courts have found that principles of  
2 agency can establish a basis for specific personal jurisdiction. VirtualMagic  
3 Asia, Inc. v. Fil-Cartoons, Inc., 99 Cal. App. 4th 228, 244-46, 121 Cal. Rptr.  
4 2d 1 (2002) (principles of alter ego and agency can establish a basis for  
5 specific personal jurisdiction); Magnecomp Corp. v. Athene Co., 209 Cal.  
6 App. 3d 526, 535-39, 257 Cal. Rptr. 278 (1989) (applied state law of  
7 agency in finding specific jurisdiction over a foreign corporation); Vons Cos.  
8 v. Seabest Foods, Inc., 14 Cal. 4th 434, 459 n.7, 58 Cal. Rptr. 2d 899  
9 (1996) (stated in dictum, “corporate veils may be pierced and agents’  
10 activities may be considered in appropriate cases”).

11           For these reasons it is clear that SDIBI’s relationship with Hanul  
12 constitutes purposeful availment in California.

13                           **b. Darley’s Claims Arise Out of and Relate to**  
14                           **SDIBI’s Forum-Related Activities**

15           Darley’s claims are substantially connected to SDIBI’s business  
16 relationship with Hanul. See Cornelison v. Chaney, 16 Cal. 3d 143, 149,  
17 127 Cal. Rptr. 352 (1976) (a controversy is related to or arises out of the  
18 defendant’s forum contacts as long as the claim bears a substantial  
19 connection to the nonresident’s forum contacts); see *also* Vons, 14 Cal. 4th  
20 at 452. In the subject Agreement, Hanul appointed Darley as an  
21 independent contractor to recruit investors solely for SDIBI’s EB-5 projects  
22 in specific territories. The subject Agreement is based on Hanul’s right to  
23 grant exclusive marketing rights of SDIBI’s projects. But for SDIBI’s  
24 contacts with California, Darley’s claims would not have arisen. See  
25 Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995); Vons, 14 Cal. 4th at  
26 452 (claim need not arise directly from defendant’s forum contacts in order  
27 to be sufficiently related to the contact to warrant the exercise of specific  
28 jurisdiction).

1                                    **c.    Reasonableness**

2            Where, as here, Respondent SDIBI's minimum contacts have been  
3 established, the Court is required to presume that personal jurisdiction over  
4 Respondent is reasonable (see Ballard, 65 F.3d at 1500), and the burden  
5 shifts to Respondent to "present a compelling case that the presence of  
6 some other considerations would render jurisdiction unreasonable' in order  
7 to defeat personal jurisdiction" (Dole Food, 303 F.3d at 114 (quoting  
8 Burger King, 471 U.S. at 477, 105 S. Ct. at 2185)).

9            The Ninth Circuit has set out seven factors to ensure personal  
10 jurisdiction is "reasonable" and comports with "fair play and substantial  
11 justice": "(1) the extent of a defendant's purposeful interjection [into the  
12 forum state's affairs]; (2) the burden on the defendant in defending in the  
13 forum; (3) the extent of conflict with the sovereignty of the defendant's  
14 state; (4) the forum state's interest in adjudicating the dispute; (5) the most  
15 efficient judicial resolution of the controversy; (6) the importance of the  
16 forum to the plaintiff's interest in convenient and effective relief; and (7) the  
17 existence of an alternative forum." Panavision Int'l, 141 F.3d at 1323.  
18 Courts must balance the factors and no single factor is dispositive. *Id.*

19            Applying these factors to the case, Respondent cannot possibly  
20 overcome the presumption that personal jurisdiction is reasonable.  
21 Respondent chose to inject itself into California by doing business with and  
22 maintaining an ongoing relationship with Hanul. Nor can Respondent  
23 possibly show that it would be seriously burdened by litigating the issue of  
24 arbitration in California. The Ninth Circuit has consistently refused to allow  
25 foreign defendants with demonstrable minimum contacts to escape  
26 jurisdiction by claiming undue burden. Dole Food, 303 F.3d at 1115; Roth,  
27 942 F.2d at 623; Ballard, 65 F.3d at 1501.

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1 The remaining factors either balance in favor of litigating in California  
2 or are neutral as between California and South Dakota. Petitioner is a  
3 California corporation alleging that it was injured by SDIBI and Hanul based  
4 on an Agreement entered into in this forum. As alleged in the petition,  
5 SDIBI played a significant role in negotiating the disputed Agreement. It is  
6 unquestionably more efficient and convenient for Petitioner to bring its  
7 petition to compel arbitration in the same state where the arbitration  
8 between Darley and Hanul is currently pending. 2.

9 **SDIBI Is Likely Subject to This Court's General Jurisdiction**

10 A court may exercise general jurisdiction over a defendant where its  
11 contacts in the forum state are "substantial. . .continuous and systematic"  
12 even if the cause of action is unrelated to the defendant's business  
13 relationship with the forum. Perkins v. Benguet Consol. Mining Co., 342  
14 U.S. 437, 445-46, 72 S. Ct. 413, 418 (1952); see also Helicopteros  
15 Nacionales, 466 U.S. at 414-15, 104 S. Ct. at 1872; Cornelison, 16 Cal. 3d  
16 at 147. Based upon information available in the public record and the  
17 carefully culled disclosures in Respondent's opposing papers, it would  
18 appear that Respondent has systematic and continuous contacts with  
19 California.

20 Since at least 2004, SDIBI and Hanul have worked collaboratively to  
21 recruit investors for SDIBI's EB-5 projects. (Opp. at 6-7.) Hanul locates  
22 Asian investors for SDIBI projects and, in return receives the business and  
23 legal fees associated with completing all paperwork related to the  
24 recruitment and green card petitions. SDIBI has maintained systematic  
25 and continuous contact with California based on its relationship with Hanul.  
26 When Robert Stratmore, Darley's president, contacted SDIBI about  
27 recruiting investors, SDIBI forwarded the inquiry directly to Hanul.  
28 Although this does not likely answer the full nature of SDIBI's business

1 activities in California, and in the unlikely event that this Court finds specific  
2 jurisdiction lacking, Darley respectfully requests the opportunity to engage  
3 in limited discovery on the issue of general jurisdiction. See, e.g., GTE  
4 New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351 (D.C. Cir.  
5 2000) (jurisdictional discovery appropriate if court makes preliminary  
6 determination jurisdiction is lacking).

7 **B. Venue Is Proper in the Central District of California**

8 The federal venue statute, 28 U.S.C. § 1391, provides that a civil  
9 action wherein federal jurisdiction is founded solely on diversity of  
10 citizenship may be brought only in:

11 (1) a judicial district where any defendant resides, if  
12 all defendants reside in the same State, (2) a  
13 judicial district in which a substantial part of the  
14 events or omissions giving rise to the claim  
15 occurred, or a substantial part of property that is the  
16 subject of the action is situated, or (3) a judicial  
17 district in which any defendant is subject to personal  
18 jurisdiction at the time the action is commenced, if  
19 there is no district in which the action may otherwise  
20 be brought.

21 28 U.S.C. § 1391(a).

22 Petitioner's choice of venue is proper since it satisfies subsection (1)  
23 in that "a defendant that is a corporation shall be deemed to reside in any  
24 judicial district in which it is subject to personal jurisdiction at the time the  
25 action is commenced." 28 U.S.C. § 1391(c). As discussed above, SDIBI's  
26 business relationship with Hanul, a Los Angeles-based law firm, satisfies  
27 the minimum contacts test subjecting SDIBI to personal jurisdiction in this  
28



1 district. Darley’s choice of venue also satisfies subsection (2) as its claims  
2 arise from an agreement drafted and negotiated in California.

3 **C. SDIBI Is Clearly a Third-Party Beneficiary to the Agreement**

4 Despite SDIBI’s contentions otherwise, the intent to confer a direct  
5 benefit on SDIBI is inherent in the language of the Agreement. The clear  
6 purpose of the Agreement was to attract foreign nationals to invest in  
7 SDIBI’s approved EB-5 projects. Under the Agreement, Hanul appointed  
8 Darley for exactly this purpose.

9 As further proof of SDIBI’s status as a third-party beneficiary, one  
10 need only look to the declaration of Joop Bollen, SDIBI’s director.  
11 Paragraph 20 explains that with respect to the disputed Agreement, SDIBI  
12 provided information to Hanul and Darley “with the hope that they would  
13 quickly start recruiting investors for South Dakota’s benefit.” Clearly, SDIBI  
14 was aware of the parties intent to confer a direct benefit upon SDIBI in  
15 performing their obligations under the Agreement. Accordingly, SDIBI was  
16 more than an indirect beneficiary and should be subject to the pending  
17 arbitration.

18 **D. SDIBI Is Bound by Direct Benefits Estoppel**

19 Under direct benefits estoppel, a company that “knowingly accepted  
20 the benefits” of an agreement with an arbitration clause, even without  
21 signing the agreement, may be bound by the arbitration clause. Deloitte  
22 Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993);  
23 MAG Portfolio Consult, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58,  
24 61 (2d Cir. 2001). So long as the nonsignatory receives a direct benefit  
25 flowing from the underlying agreement, it can be bound by its terms.  
26 Deloitte Noraudit, for example, concerned an agreement containing an  
27 arbitration clause which governed the terms of use of a trade name. The  
28 court found that a nonsignatory who had received a copy of the agreement,

1 raised no objections to it and made use of the trade name pursuant to the  
2 agreement was estopped from arguing it was not bound by the arbitration  
3 clause in the agreement. 9 F.3d at 1064.

4 In the instant case, SDIBI was not only made aware of the  
5 recruitment contract between Darley and Hanul, but participated in  
6 negotiating the terms relating to Darley's exclusivity rights in certain  
7 territories. SDIBI received the direct benefits of the seminars conducted by  
8 Darley in China as they were held specifically to recruit investors for  
9 SDIBI's projects. Darley's performance obligations under the Agreement  
10 all resulted in benefits flowing directly and purposefully to SDIBI.

11 **E. SDIBI Is Required to Arbitrate Under Principles of Agency**

12 SDIBI contends that it does not have the type of intimate relationship  
13 with Hanul to constitute agency and is not bound to the Agreement under  
14 this principle. The existence of agency, however, is mainly a question of  
15 fact. 3 B. E. Witkin, Summary of California Law § 93 (10th ed. 2005). "An  
16 agency may be created, and an authority may be conferred, by a precedent  
17 authorization or a subsequent ratification." Cal. Civ. Code § 2307. SDIBI's  
18 own statements about its working relationship with Hanul and Hanul's  
19 "unofficial" exclusive right to market and promote SDIBI's projects  
20 contradicts the notion that Hanul lacks authority to act on its behalf.

21 On one hand, SDIBI's makes clear that Hanul has the right to market  
22 and promote its projects and authority to grant exclusive marketing rights to  
23 independent contractors. (Opp. at 7.) SDIBI honors Hanul's rights by  
24 forwarding all inquiries related to recruiting Asian investors to Hanul. (*Id.*)  
25 On the other hand, SDIBI claims that Hanul is not an agent of SDIBI  
26 because it has not expressly consented to Hanul acting on its behalf. (*Id.*  
27 at 17.) This argument is flawed for several reasons. First, agency can be  
28 either actual or ostensible. Cal. Civ. Code § 2298. The relationship

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1 between SDIBI and Hanul shows that Hanul, at the very least, had  
2 ostensible authority to act for SDIBI's benefit with respect to recruiting  
3 investors. See Anderson v. Thacher, 76 Cal. App. 2d 50, 65, 172 P.2d 533  
4 (1946). Second, the disputed Agreement reveals SDIBI has granted Hanul  
5 the right to recruit investors for its projects and the authority to grant  
6 exclusive marketing rights to independent contractors. (Petition, Exh. 1 at  
7 1.) Specifically, the Agreement provides that Hanul's appointment of  
8 Darley relies on SDIBI honoring Hanul's unofficial exclusive rights to  
9 market SDIBI's EB-5 projects. The facts demonstrate that, at the very  
10 least, Hanul has ostensible authority to act on SDIBI's behalf.

11 Based on the extensive facts harnessed by Petitioner thus far, and  
12 Respondent's failure to provide anything other than brief and conclusory  
13 declarations, this Court can certainly find that an agency relationship  
14 between Hanul and SDIBI existed. Alternatively, Petitioner should be  
15 permitted to conduct jurisdictional discovery on this issue should the Court  
16 be unable to determine whether an agency relationship existed.

17 **III. CONCLUSION**

18 For all the foregoing reasons, Darley's petition for order compelling  
19 SDIBI to join the ongoing arbitration between Hanul and Darley should be  
20 granted. If this Court finds that specific jurisdiction is lacking, Petitioner  
21 respectfully requests the opportunity to engage in limited discovery to  
22 determine if this Court has general jurisdiction over Respondent.

23 Dated: September 8, 2008 BLECHER & COLLINS, P.C.

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