

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

O

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARLEY INTERNATIONAL, LLC, a Delaware corporation,)	Case No. CV 08-05034 DDP (PLAx)
)	
Plaintiff,)	ORDER GRANTING DARLEY
)	INTERNATIONAL'S MOTION TO COMPEL
v.)	ARBITRATION
)	
SOUTH DAKOTA INTERNATIONAL BUSINESS INSTITUTE, a non- profit organization,)	[Petition filed on July 31, 2008]
)	
Defendant.)	
_____)	

This matter comes before the Court on Petitioner Darley International, LLC's ("Darley") motion to compel arbitration against Respondent South Dakota International Business Institute ("SDIBI"). SDIBI is not a party to any contract with Darley that contains an arbitration agreement; indeed, Darley and SDIBI do not have a formal contractual relationship. Darley's motion rests instead on the theory that a nonsignatory can be bound to an arbitration agreement under certain circumstances. In particular, Darley asserts that SDIBI should be compelled to arbitrate because (1) SDIBI is a third party beneficiary, (2) equitable estoppel

1 requires it, and (3) agency principles bind SDIBI to the
2 arbitration clause. For the reasons set forth below, the Court
3 grants Darley's motion to compel.

4 **I. BACKGROUND**

5 Respondent SDIBI is a non-profit organization associated with
6 the School of Business at Northern State University, a public
7 university in South Dakota. Pet'n ¶ 4; Bollen Decl. ¶ 3. On a
8 contract with the South Dakota Governor's Office for Economic
9 Development, SDIBI conducts foreign investment activities. Bollen
10 Decl. ¶ 2. Additionally, SDIBI runs the Regional Center Program, an
11 investment visa program approved by the USCIS that grants legal
12 permanent residency to foreign nationals who create ten direct or
13 indirect full-time jobs for South Dakota residents by investing at
14 least \$500,000. Bollen Decl. ¶ 5. (The Regional Center's status is
15 also known as EB-5 status.) SDIBI has a working relationship with
16 the Hanul Law Firm ("Hanul"), which recruits investors for SDIBI's
17 programs in South Korea and Asia. SDIBI cannot grant "exclusive
18 rights" to private entities with regard to SDIBI EB-5 programs;
19 however, SDIBI forwards all inquiries related to recruiting Asian
20 investors to Hanul. SDIBI also advertises its relationship with
21 Hanul on its website.

22 Petitioner Darley International, LLC is a corporation that
23 "offers a variety of international business services." Pet'n ¶ 3.
24 In or around July 2007, Darley President Robert Stratmore contacted
25 SDIBI about obtaining rights to recruit investors for SDIBI's EB-5
26 program. Stratmore Decl. ¶ 3. SDIBI Director Joop Bollen referred
27 Stratmore to Hanul. Id. ¶ 4; Bollen Decl. ¶ 14.

28

1 Darley and Hanul negotiated a contract essentially providing
2 that Darley would recruit Asian investors for SDIBI's EB-5 project
3 (specifically, its "Tilapia Project") and Hanul would deal with the
4 legal issues regarding immigration status for these investors. See
5 Pet'n Ex. 1. The Darley-Hanul contract ("the Agreement") set out
6 the obligations of Darley and Hanul, including "agent fees" for
7 each. The Agreement also contained an arbitration clause requiring
8 arbitration in San Francisco, California. The Agreement was executed
9 in October 2007.

10 SDIBI's role in the formation of the contract is disputed.
11 SDIBI admits that it "answer[ed] questions related to the Tilapia
12 project and any questions associated with the regional center when
13 asked by either of the parties to the contract." Bollen Decl. ¶ 19.
14 Darley maintains that "Bollen and SDIBI played an active role in
15 negotiating the terms of the contract," including "specifically
16 negotiat[ing] the terms of the agreement relating to Darley's
17 exclusivity rights with respect to recruiting investors for certain
18 territories." Stratmore Decl. ¶ 6. SDIBI did not sign the
19 Agreement. See Agreement ¶ 10(A) ("This Agreement will be effective
20 upon execution by and between Hanul and Darley.").

21 In December 2007, Darley conducted two seminars in China for
22 the purpose of recruiting investors. Around the same time, SDIBI
23 decided to pull the Tilapia project. SDIBI also created an internal
24 entity, SDRC, to manage its projects. Pet'n ¶ 12; Bollen Decl. ¶
25 22.

26 As a result of the disintegration of the Tilapia project and
27 the creation of SDRC, Darley initiated arbitration proceedings
28 against Hanul in accordance with the Agreement. Darley also tried

1 to initiate arbitration against SDIBI. Because SDIBI had not signed
2 the Agreement, SDIBI maintained that it could not be compelled to
3 arbitrate in accordance with the Agreement. Darley filed this
4 motion to compel SDIBI to arbitrate on the basis of 9 U.S.C. § 4.

5 **II. DISCUSSION**

6 **A. Jurisdiction and Venue**

7 1. Jurisdiction

8 a. Subject Matter Jurisdiction

9 Federal courts "have an independent obligation to determine
10 whether subject matter jurisdiction exists, even in the absence of
11 a challenge from any party." Arbaugh v. Y & H Corp., 546 U.S. 500,
12 514 (2006). Thus, although SDIBI does not contest the Court's
13 subject matter jurisdiction,¹ the Court must determine that it
14 properly has jurisdiction.

15 The Court does not have subject matter jurisdiction over a
16 motion to compel arbitration solely because a party brings the
17 motion pursuant to 9 U.S.C. § 4. The FAA does not provide a basis
18 for jurisdiction under 28 U.S.C. § 1331. Rather, "there must be
19 diversity of citizenship or some other independent basis for
20 federal jurisdiction" before an order to compel arbitration can
21 issue. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S.
22 1, 25 n. 32; 9 U.S.C. § 4 (a party may petition "any United States
23 district court which, save for the agreement, would have
24 jurisdiction under Title 28").

25 Because the underlying claim in this case is in the nature of
26 breach of contract, federal subject matter jurisdiction must lie,

27 _____

28 ¹SDIBI appears to concede that the Court has subject matter
based on the FAA. See Opp'n at 5.

1 if at all, in diversity jurisdiction. Under 28 U.S.C. § 1332, a
2 court has diversity jurisdiction where the amount in controversy
3 exceeds \$ 75,000, and there is complete diversity of citizenship
4 between all plaintiffs and all defendants.

5 Complete diversity exists here. Petitioner Darley is a citizen
6 of Delaware and California. Pet'n ¶ 1. SDIBI, a part of the School
7 of Business at the Northern State University in South Dakota, is a
8 citizen of South Dakota. Opp'n at 6; Pet'n ¶ 4.

9 Petitioner does not explicitly state that the amount of
10 controversy exceeds \$75,000. Darley's petition, however, claims
11 that Hanul and SDIBI's actions caused it lose investors and fees.
12 Pet'n ¶ 14. Darley also claims that it "received a definite or
13 concrete interest from 30 potential investors." Pet'n ¶ 10.
14 Additionally, under the contract between Darley and Hanul, Darley
15 was to receive roughly \$30,000 from each client Darley and Hanul
16 successfully retained. Pet'n Ex. 1 ¶ 6. Accordingly, the amount in
17 controversy is satisfied if Darley's claims against SDIBI are for
18 the full amount Darley would receive per client for three or more
19 clients. Thus, the Court finds that diversity jurisdiction exists.

20 b. Personal Jurisdiction

21 SDIBI contests the Court's personal jurisdiction over it. In
22 order to bind a party to a motion to compel arbitration, the Court
23 must have personal jurisdiction over the party.

24 A federal court exercises the personal jurisdiction of the
25 state in which it sits. Here, California's long-arm statute
26 applies, and authorizes this Court to exercise jurisdiction
27 consistent with federal constitutional standards. Cal. Civ. Proc.
28 Code § 410.10. The constitution permits a court to exercise

1 personal jurisdiction where a plaintiff has minimum contacts with
2 the forum state such that the exercise of personal jurisdiction is
3 reasonable, i.e., comports with notions of fair play and
4 substantial justice. International Shoe Co. v. Washington, 326 U.S.
5 310, 316-17 (1945); Burger King Corp. v. Rudzewicz, 471 U.S. 462,
6 472-76 (1985).

7 The exercise of personal jurisdiction is constitutionally
8 permissible where a court has specific jurisdiction, which exists
9 here if (1) SDIBI purposely availed itself of the benefits of the
10 forum; (2) the controversy is related to SDIBI's contacts with the
11 forum; and (3) the exercise of jurisdiction is reasonable. Burger
12 King, 471 U.S. at 472-76; Panavision Int'l, L.P. v. Toeppen, 141
13 F.3d 1316, 1320 (9th Cir. 1998).

14 The Court has specific personal jurisdiction over SDIBI here.
15 Through its ongoing relationship with Hanul, a California resident,
16 SDIBI deliberately directed activities at California and therefore
17 purposefully availed itself of this forum. See Hirsch v. Blue
18 Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1478 (9th Cir.
19 1986). As described above, SDIBI continually referred all specific
20 inquiries regarding Southeast Asia to Hanul, and advertised its
21 relationship with Hanul on its website. Additionally, the current
22 controversy is related to those contacts, as it arises out of
23 SDIBI's business relationship with Hanul and the potential
24 obligations flowing from that relationship.

25 Finally, personal jurisdiction over SDIBI is reasonable. In
26 determining whether the exercise of jurisdiction is reasonable, a
27 court looks to seven factors:

28

1 (1) the extent of a defendant's purposeful interjection; (2)
2 the burden on the defendant in defending in the forum; (3) the
3 extent of conflict with the sovereignty of the defendant's
4 state; (4) the forum state's interest in adjudicating the
5 dispute; (5) the most efficient judicial resolution of the
6 controversy; (6) the importance of the forum to the
7 plaintiff's interest in convenient and effective relief; and
8 (7) the existence of an alternative forum.

9 Panavision Int'l, 141 F.3d at 1323. These factors weigh in favor of
10 jurisdiction here because SDIBI's relationship with Hanul
11 constitutes a significant "purposeful interjection" into California
12 and Darley is a California corporation alleging that it was injured
13 by SDIBI. SDIBI has not presented a "compelling case that the
14 presence of some other considerations would render jurisdiction
15 unreasonable." Burger King, 471 U.S. at 477; Dole Food Co., Inc. v.
16 Watts, 303 F.3d 1104, 1114 ("Once it has been decided that a
17 defendant purposefully established minimum contacts with a forum,"
18 he has the burden to show the unreasonableness of jurisdiction.).

19 Accordingly, the Court finds that it has personal jurisdiction
20 to decide this motion.

21 2. Venue

22 SDIBI also argues that venue in this Court is improper under
23 the general federal venue statute. The federal venue statute, 28
24 U.S.C. § 1391, provides that, for a civil action where federal
25 jurisdiction is "founded only on diversity of citizenship," the
26 proper venue is:

27 (1) a judicial district where any defendant resides, if all
28 defendants reside in the same State, (2) a judicial district

1 in which a substantial part of the events or omissions giving
2 rise to the claim occurred, or a substantial part of property
3 that is the subject of the action is situated, or (3) a
4 judicial district in which any defendant is subject to
5 personal jurisdiction at the time the action is commenced, if
6 there is no district in which the action may otherwise be
7 brought.

8 28 U.S.C. § 1391(a). For the purposes of venue, a defendant that is
9 a corporation is deemed to reside "in any judicial district in
10 which it is subject to personal jurisdiction at the time the action
11 is commenced." § 1391(c).

12 In challenging venue, SDIBI contends that venue in the Central
13 District of California is improper because it is not subject to
14 personal jurisdiction in California, see § 1391(a)(1) & (c), and
15 because it was not a party to the agreement, which was drafted and
16 executed in California, see § 1391(a)(2). Because the Court finds
17 that SDIBI is subject to personal jurisdiction in California, venue
18 is proper in the Central District pursuant to § 1391(a)(1) and
19 § 1391(c).

20 **B. Can SDIBI Be Compelled to Arbitrate?**

21 Although Darley concedes that SDIBI did not sign the Agreement
22 containing the arbitration provision, Darley argues that SDIBI
23 should nonetheless be compelled to arbitrate. A court properly
24 determines whether an arbitration clause can be enforced by or
25 against a non-signatory because "[a]rbitrability is ordinarily for
26 courts ... to decide." Poweragent Inc. v. Electronic Data Sys.
27 Corp., 358 F.3d 1187, 1191 (9th Cir. 2004); see Chastain v. Union
28 Sec. Life Ins. Co., 502 F. Supp. 2d 1072, 1076 (C.D. Cal. 2007).

1 As the parties' briefs highlight, arbitration policy points in
2 two directions in this case: although there is a strong federal
3 policy favoring arbitration, "arbitration is a matter of contract
4 and a party cannot be required to submit to arbitration on any
5 dispute which he has not agreed to so submit." United Steelworkers
6 v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). In
7 other words, as a general rule, while we strongly enforce
8 arbitration agreements, we require that the parties actually or
9 equitably have consented to the clause.

10 This general rule against compelling non-parties to arbitrate
11 is subject to some exceptions. "[N]onsignatories of arbitration
12 agreements may be bound by the agreement under ordinary contract
13 and agency principles," Letizia v. Prudential Bache Securities,
14 Inc., 802 F.2d 1185, 1187-88 (9th Cir. 1986), including
15 incorporation by reference, assumption, agency, veil-piercing/alter
16 ego, and estoppel, Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th
17 Cir. 2006) (citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64
18 F.3d 773, 776 (2d Cir. 1995)). Additionally, in some cases
19 "nonsignatories can enforce arbitration agreements as third party
20 beneficiaries." Comer, 436 F.3d 1098.

21 Darley argues that SDIBI should be compelled to arbitrate
22 under three theories: (1) third party beneficiary status, (2)
23 equitable estoppel, and (3) agency principles.

24 1. Third Party Beneficiary

25 Darley first argues that SDIBI should be bound because it was
26 a third party beneficiary of the Agreement between Darley and
27 Hanul. SDIBI does not contest Darley's legal analysis. Instead,
28 SDIBI contests third party beneficiary status on the facts and

1 specifically argues that the Agreement does not mention any direct
2 benefits flowing to SDIBI and that any benefits that do exist are
3 incidental.

4 The Court need not decide whether SDIBI is a third party
5 beneficiary because the Ninth Circuit rejected the premise of
6 Darley's legal argument in Comer v. Micor. In Comer, the court
7 considered whether an ERISA plan participant could be compelled to
8 arbitrate an ERISA claim where the plan, but not the participant,
9 had signed an arbitration agreement. 436 F.3d at 1099. The
10 plaintiff, a participant in two ERISA plans, brought suit against
11 Smith Barney, which had been providing investment advice to the
12 plan's trustees, for breach of fiduciary duty. Id. at 1100. The
13 relationship between the trustees and Smith Barney was governed by
14 an arbitration agreement, but the plaintiff had not signed this
15 agreement. Id.

16 Affirming the lower court's denial of the motion to compel,
17 the Ninth Circuit held that the nonsignatory plaintiff could not be
18 bound to the arbitration agreement. The court rejected Smith
19 Barney's argument that Comer should be bound because he was a third
20 party beneficiary. The court noted that Smith Barney had "not
21 produced any evidence that the signatories ... intended to give
22 every beneficiary of the plans ... the right to sue under the
23 agreements." Id. at 1102. Accordingly, the plaintiff could not
24 "be bound to the terms of a contract he is not even entitled to
25 enforce." Id. Although the court recognized that "[a] third party
26 beneficiary might in certain circumstances have the power to sue
27 under a contract," it held that a third party "certainly cannot be

28

1 bound to a contract it did not sign or otherwise assent to." Id.
2 (emphasis in original).

3 Moreover, the court considered and rejected the approach taken
4 by the Third Circuit in E.I. DuPont de Nemours & Co. v. Rhone
5 Poulenc Fiber and Resin Intermediates, 269 F.3d 187 (3d Cir.
6 2001).² In DuPont, the Third Circuit left room for a third party
7 beneficiary to be bound by contract terms to which he did not
8 assent where the claim "arises out of the underlying contract to
9 which it was an intended third party beneficiary." 269 F.3d at 195.
10 In Comer, the Ninth Circuit held that it could not follow this
11 approach because the " 'arises out of' test is not grounded in any
12 principle of contract or agency law of which we are aware" and the
13 court was therefore "precluded by Letizia from adopting it." Comer,
14 436 F.3d at 1103.³

15 Here, like Smith Barney did in Comer, Darley seeks to bind
16 SDIBI to an arbitration clause it did not sign. The Court notes
17 that Darley does not provide facts suggesting that Hanul and Darley
18 intended that SDIBI would have the right to sue under the contract.
19 Cf. Comer, 436 F.3d at 1102. The facts of this case further counsel
20 against binding SDIBI under a third party beneficiary theory:
21 unlike the plaintiff in Comer, SDIBI has not sued Darley at all;

22 _____
23 ²Darley relies on DuPont for the proposition that third party
beneficiaries can be compelled to arbitrate.

24 ³See also Motorsport Eng'g, Inc. v. Maserati SPA, 316 F.3d 26,
25 29 (1st Cir. 2002) ("Obligations under [a contract with a third
26 party beneficiary], including any obligations to third parties, are
created by agreement between the *signatories*.... If the signatories
27 so intend, a third party can enforce the contract against the
signatory so obligated. But the third party beneficiary, who did
28 not sign the contract, is not liable for either signatory's
performance and has no contractual obligations to either."
(emphasis in original)(internal citations omitted)).

1 rather, *Darley* both has instigated action against SDIBI and seeks
2 to force SDIBI to litigate *Darley's* claim in arbitration.

3 Comer is binding on the Court. Because the Ninth Circuit has
4 rejected the legal argument on which *Darley's* third party
5 beneficiary theory rests, the Court need not consider whether SDIBI
6 is a third party beneficiary. SDIBI cannot be compelled to
7 arbitrate on a third party beneficiary theory. 2.

8 Equitable Estoppel

9 *Darley* also argues that SDIBI should be compelled to arbitrate
10 based on a theory of equitable estoppel. The parties do not dispute
11 the law so much as its application here.

12 Although the Ninth Circuit has addressed equitable estoppel in
13 this context only once, in Comer, the general principles that
14 govern seem undisputed here. "Equitable estoppel 'precludes a party
15 from claiming the benefits of a contract while simultaneously
16 attempting to avoid the burdens that contract imposes.'" Comer, 436
17 F.3d at 1101 (quoting Wash. Mut. Fin. Group, LLC v. Bailey, 364
18 F.3d 260, 267 (5th Cir. 2004)). In the arbitration context, two
19 lines of cases have followed from this principle, those where
20 signatories to an arbitration agreement have argued that
21 nonsignatories are bound by equitable estoppel, and those where
22 nonsignatories have sought to compel signatories to arbitrate. Id.;
23 see also DuPont, 269 F.3d at 202 (rejecting contention that
24 signatory cases and nonsignatory cases are the same).⁴

25

26

27 ⁴The Ninth Circuit rejected the portion of DuPont concerning
28 third party beneficiaries, but embraced the portion of DuPont that
concerned equitable estoppel. Comer, 436 F.3d at 1101-02.

1 The former is relevant here, and applies to bind
2 nonsignatories to an arbitration clause "where the nonsignatory
3 'knowingly exploits the agreement containing the arbitration clause
4 despite having never signed the agreement.'" Comer, 436 F.3d at
5 1001 (quoting DuPont, 269 F.3d at 199). A nonsignatory "exploits
6 the agreement" when the nonsignatory embraces a contract during its
7 life by either seeking to enforce the contract through litigation
8 or by receiving a direct benefit flowing from the contract itself.
9 See DuPont, 269 F.3d at 200; Thomson-CSF, 64 F.3d at 778-79; MAG
10 Portfolio Consultant, GMBH v. Merlin Biomed Group LLC, 268 F.3d 58,
11 61 (2d Cir. 2001). While under third party beneficiary theory a
12 court looks to the intent of the parties, when analyzing equitable
13 estoppel a court looks to the parties' conduct *after* the contract
14 was executed. See DuPont, 269 F.3d at 200 n.7.

15 a. Direct Benefit

16 Although there are limited published opinions on the topic,
17 the case law gives some life to the "direct benefit" requirement.
18 For example, a nonsignatory received a direct benefit when the
19 contract expressly provided that it would receive monetary fees.
20 See Legacy Wireless Services, Inc. v. Human Capital, LLC, 314 F.
21 Supp. 2d 1045, 1056 (D. Or. 2004). Additionally, a party that,
22 pursuant to the agreement, received lower insurance rates and the
23 ability to sail under the French flag received direct benefits. See
24 American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d
25 349, 353 (2d Cir. 1999).

26 On the other hand, a nonsignatory received only indirect
27 benefits from an agreement where the benefit derived from the third
28 party's acquisition of a signatory to the agreement, not from the

1 agreement itself. Thomson-CSF, 64 F.3d at 779; see also Capitol
2 Indemnities Corp. v. Dayton Board of Education, 492 F. Supp. 2d 829
3 (S.D. Ohio 2006).

4 Because SDIBI has not sought to enforce the terms of the
5 contract, the question is whether SDIBI otherwise exploited the
6 benefits of the contract between Darley and Hanul by receiving the
7 direct benefits of it. Although the agreement provided SDIBI no
8 monetary benefit, a direct benefit need not be monetary. Cf.
9 Tencara Shipyard, 170 F.3d at 353. Darley argues instead that the
10 "direct benefit" flowing from the Agreement was that Darley and
11 Hanul were recruiting investors for SDIBI's projects (specifically,
12 SDIBI's Tilapia project). Agreement ¶¶ C, G. SDIBI's mission is to
13 support the efforts of the State of South Dakota in encouraging
14 economic development and job creation in the state. Because the
15 purpose of the contract directly supports SDIBI's mission (indeed,
16 the contract mentions SDIBI), to the extent SDIBI actually received
17 any investors as a result of the contract, it would have received
18 direct benefits.⁵ See Agreement ¶ G ("During the period of time
19 when exclusivity for all of China is in effect (less Beijing and
20 Guandong above), Darley shall market only for SDIBI in regards to
21 EB-5 projects."). Additionally, the Court finds it plausible that
22 there could be a direct benefit from the publicity about SDIBI's
23 investment programs that Darley provided during its seminars in
24 China.

25 b. Receiving the Benefit
26

27 ⁵SDIBI appears to argue that any benefits it would receive
28 were for the people of South Dakota, not for it. This argument does
not hold up to scrutiny.

1 Of course, that the contract provides for a direct benefit is
2 not enough to bind a party to equitable estoppel. If it were, there
3 would be no difference between the analysis under a third party
4 beneficiary theory and an equitable estoppel theory, even though
5 the Ninth Circuit has rejected one and embraced the other. See
6 Comer, 463 F.3d at 1101-02. Rather, equitable estoppel appears to
7 require that SDIBI have actively received these direct benefits, or
8 otherwise actively exploited or encouraged Darley's performance of
9 the contract. Cf. id. (finding that plaintiff had not exploited the
10 arbitration contract because he was simply a "passive participant"
11 in the ERISA plan and he never sought to enforce the terms of the
12 agreement).

13 It does not appear that Darley was able to actually recruit
14 any investors, and Darley cannot argue that SDIBI is subject to
15 equitable estoppel based on that potential benefit, i.e., what
16 SDIBI *would have* received as a result of the contract. Were actual
17 investors to materialize, SDIBI would accept the benefits of the
18 contract by facilitating their cases or otherwise dealing with the
19 investment process in South Dakota.

20 Darley's argument that SDIBI received direct benefits in the
21 form of publicity from the seminars it actually conducted in China,
22 however, does concern benefits that SDIBI had the chance to
23 actually receive and accept under the facts in this case. The Court
24 would be hesitant to find that SDIBI received direct benefits and
25 should be subject to equitable estoppel simply because Darley
26 conducted a seminar without the involvement of SDIBI. SDIBI could
27 not be bound to arbitrate simply because Darley publicized for it,
28 something that SDIBI may have no control over. Rather, it must have

1 done something that indicated its exploitation or encouragement of
2 that publicity.

3 Here, SDIBI actively affirmed the existence of the contract.
4 SDIBI embraced Darley's performance of the contract, and has
5 indicated specific awareness and involvement in these seminars. In
6 fact, SDIBI's actions regarding the Tilapia project were in part a
7 response to the seminars: it was "during the seminar" that it
8 "became very clear that the Tilapia project was very risky."
9 Bollen Decl. ¶ 21. Thus, while the parties argue over the details
10 of SDIBI's involvement during the course of this contract, the
11 record at the very least reflects that SDIBI encouraged Darley's
12 efforts on behalf of the contract. See id.; Stratmore Decl. ¶ 9.
13 Through the seminars, SDIBI received the benefits of the Agreement.

14 The Court finds that SDIBI's actions represent an affirmation
15 of the benefits of the contract. Although the life of the contract
16 prior to the Tilapia project's dissipation was perhaps short, the
17 record reflects involvement from SDIBI in Darley's efforts to
18 perform its obligations. Darley has shown that SDIBI knew about the
19 contract and that SDIBI encouraged its formation; additionally, it
20 appears that, after formation, SDIBI affirmed the contract by
21 accepting the direct benefits of it. Accordingly, the Court finds
22 it equitable to compel SDIBI to arbitrate on the basis of estoppel.

23 3. Agency Theory

24 Additionally, the Court finds that agency theory provides a
25 basis on which to compel SDIBI to arbitrate. Darley also argues
26 that SDIBI should be bound under agency principles, specifically

27
28

1 apparent authority.⁶ "Traditional principles of agency law may
2 bind a nonsignatory to an arbitration agreement." Thomson-CSF, 64
3 F.3d at 777; see also Letizia, 802 F.2d at 1187-88. Whether an
4 agency relationship exists is an issue of fact.

5 Under principles of agency law, authority can be actual or
6 apparent. Apparent authority is created when there is "a
7 manifestation that another has authority to act with legal
8 consequences for the person who makes the manifestation" and a
9 third party "reasonably believes" that the actor is authorized
10 based on that manifestation. Restatement (3d) of Agency § 3.03; cf.
11 Cal. Civ. Code § 2300 (defining "ostensible agency" as that
12 resulting "when the principally intentionally, or by want of
13 ordinary care, causes a third person to believe another to be his
14 agent who is not really employed by him").

15 Although SDIBI may not have had a written agreement with Hanul
16 expressing an agency relationship, the record establishes that the
17 SDIBI held Hanul out as an entity who worked on its behalf, and
18 that reliance on these manifestations to support an agency
19 relationship was reasonable. There are outward manifestations from
20 SDIBI of an agency relationship between SDIBI and Hanul: SDIBI's
21 website links to Hanul Law Firm, SDIBI admittedly refers all
22 inquiries about Southeast Asian investment in SDIBI projects to
23 Hanul, and SDIBI specifically referred Darley's inquiry to Hanul in
24 this case. See Bollen Decl. ¶ 14; Blecher Decl., Ex. 9. Indeed, as
25 Darley's opposition explains, Hanul had the authority to market

26

27 ⁶ Darley did not discuss agency theory in its opening brief,
28 but SDIBI addressed agency theory in its Opposition and Darley
addressed it in the Reply.

1 SDIBI's programs with South Asian investors and to provide legal
2 services in connection with them. See Opp. at 7.

3 Additionally, reliance on these outward manifestations was
4 reasonable. While the record shows that Darley was aware of the
5 technically "unofficial" nature of Hanul and SDIBI's relationship,
6 see, e.g., Agreement ¶¶ 1(A), 11(B), mere technicalities do not
7 undermine apparent agency here. In particular, it appears that
8 SDIBI and Hanul gave the impression that, for all intents and
9 purposes, SDIBI and Hanul worked in conjunction on the EB-5
10 projects, and that Hanul had the authority to grant exclusive
11 promotion rights for SDIBI's Southeast Asian projects. Stratmore
12 Decl. ¶ 4; Agreement ¶ 1(A). SDIBI's characterization of its
13 relationship with Hanul, its actions in referring all inquiries --
14 including Stratmore's -- to Hanul, and its involvement in the
15 formation of the agreement between Darley and Hanul, all suggest
16 that reliance on outward manifestations of an agency relationship
17 between SDIBI and Hanul was reasonable.

18 Accordingly, the Court finds it appropriate and equitable to
19 compel SDIBI to arbitrate.

20 **III. CONCLUSION**

21 For the foregoing reasons, the Court grants Darley's motion to
22 compel arbitration in accordance with the Agreement. To allow SDIBI
23 to avoid arbitration here would create an inequitable result: SDIBI
24 would avoid arbitration despite its central role in facilitating
25 the Hanul-Darley relationship, its affirmation of the contract and
26 Darley's performance of it, and its manifestations that Hanul had
27 the authority to grant exclusive rights to act for the benefit of
28 SDIBI's projects.

1 The Court declines to award costs in connection with the
2 motion to compel arbitration.

3 IT IS SO ORDERED.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 7, 2008



DEAN D. PREGERSON
United States District Judge