UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ZHANG ZHEN, an individual resident of New York; FENG WEI, an individual resident of California; MA YIRONG, an individual resident of China; and YAO XIAO PING, an individual resident of China,

Plaintiffs,

vs.

SDRC, INC., a South Dakota corporation; SD INVESTMENT FUND LLC 6, a South Dakota limited liability company; and JOOP BOLLEN, an individual resident of South Dakota,

Defendants.

Case No. 11-4148

COMPLAINT

Plaintiffs Zhang Zhen, Feng Wei, Ma Yirong, and Yao Xiao Ping (collectively the "Investors"), by and through their undersigned counsel, file this Complaint against Defendants SDRC, Inc. ("SDRC"), its "subsidiary" SD Investment Fund LLC 6 (the "SD Fund 6" or the "General Partner"),[1] and Joop Bollen, who ultimately manages, and exerts dominion and control over SDRC and the SD Fund 6, and state as follows:

NATURE OF THE COMPLAINT

1. This dispute relates to a limited partnership that was formed for the purpose of investing in a project by Northern Beef Packers Limited Partnership ("NBP") to build a beef processing plant here in the State of South Dakota (the "Project"). Specifically, the Investors, along with dozens of others, paid $530,000 dollars *each* to invest and become limited partners in SDIF Limited Partnership 6 ("SDIF LP 6"), a South Dakota limited partnership, which was

[1] This case involves numerous defined terms. For ease of the Court, the Investors have attached hereto as Exhibit A a list of the defined terms used throughout this Complaint.

created and promoted by Defendants SDRC and Joop Bollen, and is managed by SD Fund 6 (through Joop Bollen) as the sole general partner.

2. As further discussed below, SDIF LP 6 was an investment vehicle designed and promoted by SDRC (through Bollen) under a federal program known as the immigrant investment program (the "EB-5 Program") which is designed to facilitate foreign investment in certain communities in the United States for projects that will significantly benefit those communities by creating needed jobs. *See generally* 8 U.S.C. § 1153(b)(5). In exchange for making such long-term investments, the foreign investors, their spouses, and any children under 21 years of age, are granted conditional lawful permanent resident status, which can become unconditional after two years.

3. Bollen and SDRC appointed a "subsidiary" of SDRC to serve as the sole general partner of SDIF LP 6: SD Fund 6. SD Fund 6's *only* relationship with SDRC is through Bollen as an individual. Bollen was the sole incorporator of SDRC, and he is also the sole director, officer, and the registered agent of SDRC. Bollen, as an individual, was the sole organizer of SD Fund 6, and continues to be the sole member-manager of SD Fund 6. Bollen is also the registered agent of SD Fund 6.

4. In or about late 2009, SDRC, through Bollen, in its capacity as the "Promoter" of the SDIF LP 6 investment opportunity, solicited the Investors to invest in the project through written materials, including the Confidential Offering Memorandum drafted by SDRC and Bollen, and their attorneys (the "Offering Memo"). A true and accurate copy of the English version of the Offering Memo provided to the Investors is attached hereto as Exhibit B. The Investors are not fluent in English. SDRC, knowing that its target audience was primarily non-

English speakers, prepared the key materials in both English and Chinese.[2] A true and accurate copy of the SDIF LP 6 Limited Partnership Agreement that was provided to the Investors is attached hereto as Exhibit C (the "LP Agreement"). The undated LP Agreement was attached to the Offering Memo and is the only copy of the LP Agreement provided to the Investors.

5. Relying on Bollen's and SDRC's representations, including those expressly contained in the Offering Memo, the Investors each executed subscription agreements for SDIF LP 6 and invested $530,000 in order to become limited partners in SDIF LP 6 and take part in the EB-5 program. (The Investors' executed subscription agreements are attached collectively as Exhibit D.) This investment served two purposes: (i) to obtain lawful permanent resident status; and (ii) to participate in an investment vehicle based on the recommendations regarding the project made by Defendants.

6. Defendants' representations and disclosures in the Offering Memo were incomplete and inaccurate; Defendants' subsequent disclosures to the limited partners thereafter were incomplete and inaccurate; and Defendants have mismanaged, and continue to mismanage, the SDIF LP 6 in direct violation of the terms of the LP Agreement and in violation of SD Fund 6's fiduciary duties as general partner of SDIF LP 6.

7. Among other things, SD Fund 6, as general partner and pursuant to the LP Agreement, was required to seek and obtain approval from at least 51% of the limited partners, including the Investors, before entering into any loan agreements or providing staged funding to the Project. In direct violation, however, on November 4, 2010, SD Fund 6 and Bollen improperly entered into a Credit Agreement ("Credit Agreement") whereby staged funding would be disbursed to NBP of up to $60 million dollars (substantial amounts of which already

[2] For ease of the Court and counsel, only the English versions are being attached hereto as Exhibits.

have been disbursed to NBP) – without seeking approval from the Investors before entering into that transaction and with full knowledge that the loan and loan terms were imprudent. Despite numerous requests, Defendants have not confirmed that the requisite approval of 51% of the limited partners was obtained and, on information and belief, no such approval was obtained before taking such actions – all as required by the terms of the LP Agreement. Notwithstanding the lack of requisite limited partner approvals, SD Fund 6 has sought and obtained the release, and continues to seek the release, of millions of dollars in loan proceeds for disbursement to NBP.

8. The Offering Memo, which is dated November 15, 2009 and was provided to the Investors in late 2009 and early 2010, contains a glowing description of the Project. Nowhere in the Offering Memo or in any subsequent amendment thereto, or in other SDIF LP 6 communications to limited partners, were the following adverse material facts and risks – all known to SDRC, SD Fund 6, and Bollen as of November 2009 and well before the November 2010 Credit Agreement – disclosed:

- The Project had already missed its initial completion date by nearly two years;
- The Project was facing financial difficulties and having trouble obtaining financing;
- That a prior group of EB-5 investors in the Project were in jeopardy of losing their investment in the Project at the time the Offering Memo was being provided to the Investors here;
- That NBP's own attorney had acknowledged that loans to the Project were "extraordinarily high-risk," because they would be used to "complete a half-constructed, failed project of enormous size," and also that lenders would have little or no recourse if the Project failed;

- That by the time the Offering Memo was circulated, substantial litigation liens had been filed against the Project;
- That NBP was unable to pay, or delinquent on, property taxes due and owing;
- That Bollen had lost other EB-5 investor funds in a similar project relating to the Veblen East Dairy in South Dakota;
- That Defendants had a business relationship and conflict of interest with Hanul Professional Law Corporation, a law firm that was appointed as escrow agent for funds paid by the Investors.

9. Accordingly, the Investors bring this Complaint seeking injunctive and other relief in order to protect the assets of SPIF LP 6 from further waste, mismanagement, and improper distribution by SD Fund 6, SDRC, and Bollen, protect the Project and Investors' investments therein, and assure the Investors' legal status in the EB-5 program.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 because there is more than $75,000 in controversy, and there is complete diversity between the parties. The Court also has jurisdiction to issue a declaratory judgment pursuant to 28 U.S.C. § 2201.

11. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(a) because all defendants reside in this Judicial District, and a substantial part of the events or omissions giving rise to the claim, or a substantial part of the property that is the subject of the action is situated in this District. Additionally, the LP Agreement contains a choice of venue provision that provides for jurisdiction in this Court.

PARTIES

12. Plaintiff Zhang Zhen is a Chinese national with conditional lawful permanent resident status. Zhang Zhen currently resides in New York City, New York, and is thus a citizen

of New York. Zhang Zhen is a limited partner of SDIF LP 6, and paid $530,000 in order to obtain his limited partnership unit.

13. Plaintiff Feng Wei is a Chinese national with conditional lawful permanent resident status. Feng Wei currently resides in Walnut, California, and is thus a citizen of California. Feng Wei is a limited partner of SDIF LP 6, and paid $530,000 in order to obtain his limited partnership unit.

14. Plaintiff Ma Yirong is a Chinese national. Ma Yirong currently resides in China, and is thus a citizen of China. Ma Yirong is a limited partner of SDIF LP 6, and paid $530,000 in order to obtain his limited partnership unit.

15. Plaintiff Yao Xiao Ping is a Chinese national. Yao Xiao Ping currently resides in China, and is thus a citizen of China. Yao Xiao Ping is a limited partner of SDIF LP 6, and paid $530,000 in order to obtain her limited partnership unit.

16. Defendant SDRC is a South Dakota corporation with its principal place of business at 416 Production Street North, Aberdeen, South Dakota 57401-8194, and is thus a citizen of South Dakota. SDRC's registered agent is Bollen, who is also SDRC's president.

17. Defendant SD Fund 6 is a South Dakota limited liability company with its principal place of business at 416 Production Street North, Aberdeen, South Dakota 57401-8194, and is thus a citizen of South Dakota. SD Fund 6 was organized by Bollen as a member-managed limited liability company on October 28, 2009. Bollen is the sole organizer and the sole member-manager of SD Fund 6. Bollen is also the registered agent of SD Fund 6.

18. Defendant Bollen is an individual resident of South Dakota, and is thus a citizen of South Dakota. Bollen exercises complete dominion and control over SDRC and SD Fund 6 and uses those entities as mere instrumentalities to further his improper conduct alleged herein.

FACTS APPLICABLE TO ALL COUNTS

The EB-5 Program.

19. Defendants are involved in the business of providing investment opportunities created as a result of a federal law that allows foreign investors to obtain lawful permanent resident status for themselves and their families by making qualifying investments in the United States. Under this program, sometimes referred to as the "EB-5 Program," an employment based preference immigrant visa category was created for immigrants seeking to enter the United States to engage or invest in a commercial enterprise that will benefit the U.S. economy and create jobs per the requirements of the EB-5 Program.

20. The requirements for the program include a minimum $1 million investment except that the investment need only be $500,000 if the funds are being utilized within a designated regional center. The South Dakota International Business Institute Dairy Economic Development Region ("SDIBI/DEDR") is an approved regional center.

21. As a result of such investments, lawful permanent resident status may be granted to the investor, his or her spouse and children less than 21 years of age. The lawful permanent resident status is initially provided on a conditional basis, however, the investor and his or her family can file an I-829 petition to have the conditional status removed after two years by showing that the investor and the commercial enterprise have complied with the requirements under the EB-5 Program.

Bollen, Through Defendant Entities, Completely Controlled The Creation, Solicitation, And Management Of SDIF LP 6.

22. Bollen is solely in control of the two defendant entities at issue here: he organized or incorporated them, he is the sole director/manager/officer of both, and he is the registered agent for both. *See* Group Exhibit E (relevant South Dakota Secretary of State records of SDRC and SD Fund 6 demonstrating they are exclusively controlled by Bollen).

23. SDRC holds itself out as a management company that operates and manages SDIBI/DEDR on behalf of the South Dakota Department of Tourism and State Development ("SDTSD"), and as a company that operates as the general partner for the South Dakota Investment Fund Limited Partnerships "to assure that the interest [sic] of limited partners are met, including the creation of necessary job credits needed for the I-829 process and the repayment [sic] the loans." *See* http://www.sdrc-eb5.com (copies of which are attached hereto as Group Exhibit F).

24. SDRC lists nine EB-5 loan projects that it has created and manages as general partner, including SPIF LP 6, which relates to the NBP project in Aberdeen, South Dakota, as well as other projects in several other counties in South Dakota. The SDRC website omits any reference to the original NBF related EB-5 project, as well as the failed Veblen Dairy EB-5 project.

25. SDRC promotes these projects through the creation of offering materials such as the Offering Memo here. All of the solicitation materials and legal documents related to investments are drafted at the direction of SDRC. SDRC is the formal "Promoter" of the investment vehicle, which includes actively selling and soliciting investments into the Project, including both domestically and overseas. SDRC acted through Bollen who made trips to China to promote SDIF LP 6 through presentations to potential investors.

26. According to SDIF LP 6's LP Agreement, which was distributed to the Investors as part of the Offering Memo materials, once investors were found and the limited partnership was created, SDRC's "subsidiary" – SD Fund 6 – was to be appointed as the general partner. (Exhibit B.) SD Fund 6 is wholly controlled by Bollen individually, and SD Fund 6 is only a "subsidiary" of SDRC in the sense that they are both controlled exclusively by Bollen.

Defendants' Failure To Disclose The Troubled Past Of The NBP Project And Other Material Risks And Facts.

27. The Offering Memo created by Defendants painted a glowing picture of the NBP Project. The Offering Memo, however, failed to disclose material problems at the Project, including litigation, millions of dollars in liens that had been filed before the November 2009 Offering Memo was circulated, and numerous other problems and conflicts of interest. Indeed, NBP's own attorney conceded that loans being made to the Project (including the SDIF LP 6 proposed loan) were "extraordinarily high-risk" because they would be used to "complete a half-constructed, failed project of enormous size."

28. The Project began in 2006 and originally was intended to be financed through government issued tax increment financing bonds ("TIFs"). When opposition arose, forcing a county-wide vote, NBP and others claimed the bonds would be sold within days of a successful vote, and that other counties had already indicated interest in the Project if Brown County voters failed to approve the TIF issue. While county voters ultimately approved the TIF issue, NBP was unable to sell the TIF bonds.

29. By October 2007, with the TIF bonds still unsold, NBP was searching for alternative sources of financing. NBP obtained such financing for the Project from certain foreign investors through the EB-5 program. On information and belief, those arrangements were organized and implemented by the Defendants.

30. Notwithstanding those efforts, however, yet additional funding still was necessary to sustain the Project. Additional funding was sought, and ultimately obtained from a British Virgin Islands entity named Epoch Star Limited ("Epoch").

31. In order for Epoch to make the $30 million loan to NBP, however, it was required to obtain approval from the South Dakota Banking Commission (the "Commission"). As part of that process, numerous affidavits were filed and sworn testimony was provided by original EB-5

investors, NBP's counsel, and others. In these regards, (i) NBP's attorney wrote to the Commission conceding that this was "an extraordinary high-risk loan," because the "proceeds will be used to complete a half-constructed, failed project of enormous size;" (ii) NBP's attorney conceded that there was little recourse to the lender if the Project failed because "[i]f 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 market;" and (iii) Epoch, through the affidavit of its representative submitted to the Commission in June 2010, stated that the "project is a financial failure," "the benefits and status of the original EB-5 investors is in some jeopardy," and that "NBP doesn't have the wherewithal to complete the project" absent the Epoch loan. None of this information was disclosed to the Investors.

32. As NBP was seeking yet additional funding, it also filed amendments regarding its management structure with the South Dakota Secretary of State. As of September 2009, NBP was a limited partnership managed by a general partner named Northern Beef Packers Management, LLC ("NBP Management"). On February 22, 2010, NBP amended its Certificate of Limited Partnership with respect to an earlier, September 2009 filing by which the general partner of NBP had been changed to an individual named Oshik Song, who was one of the original EB-5 investors -- correcting that prior filing slightly to state:

> The previous Certificate of Amendment was filed to change the name of the South Dakota Registered Agent. There was no intent, with the initial Certificate of Amendment, dated September 23, 2009, to change the general partner. *The general partner of Northern Beef Packers Limited Partnership has always been, and will continue to be, Northern Beef Packers Management, LLC. The membership of that Limited Liability Company has changed. Oshik Song is the new member/owner of the LLC.* On a previous Certificate of Amendment, Oshik Song, the sold [sic] member/owner of the General Partner, mistakenly listed his name as the new general partner. There is no new general partner. As indicated, the general partner remains Northern Beef Packers Management, LLC. This Amendment is submitted for the purpose of deleting the name of Oshik Song from item six (6) on the previous amendment. He is not the new general partner. The general partner has not changed.

(Exhibit G, February 18, 2010 Certificate of Amendment of the Certificate of Limited Partnership for NBP (emphasis added).)

33. In addition, by no later than July 2010, all or substantially all of the investors in the original EB-5 group that invested in the project became limited partners of NBP, itself.

34. Thus, as a result of these management and other changes at NBP, Song effectively assumed control of the Project by no later than September 2009, and the original EB-5 investors became owners. None of this information was disclosed to the Investors, nor did Defendants fully disclose their business relationship and connection with NBP's owners to the Investors.

SDRC And Bollen Create The SDIF LP 6 Offering Materials And Induce The Investors To Invest In The Project

35. In or about November 2009, SDRC and Bollen created SDIF LP 6 for the purpose of investing in NBP, purportedly (according to the Offering Memo) in order to provide financing for the continued construction and opening operations of the Project. (Exhibit B.)

36. The Offering Memo provides for "a maximum of One Hundred (100) [investors] with fifty (50) to seventy (70) being the target number of investors." (Exhibit B.) SDRC and Bollen spent the next several months soliciting Chinese investors for SDIF LP 6, including the Investors.

37. The Offering Memo failed to disclose the significant financial and other problems with the Project as discussed above. As of November 2009, when the Offering Memo was drafted and finalized, multiple liens had been filed against the Project totaling over $13 million, NBP had failed to pay $128,140 in back property taxes, the general partner of the Project had been replaced, and the ownership of the Project was apparently in a state of flux. Defendants did not disclose *any* of these facts in the Offering Memo, or in any subsequent amendment to the Offering Memo or other SDIF LP 6 communications to the Investors. Nor did Defendants ever disclose that SDRC and Bollen had also created the Veblen Dairy investment, which failed when

Veblen Dairy went into bankruptcy. The investors in that project, upon information and belief, have lost their $13.5 million investment.

SD Fund 6 Enters Into A Credit Agreement With NBP Without Approval Of The Limited Partners.

38. In entering into the Subscription Agreements to join SDIF LP 6, the Investors approved the general investment goal of investing in the Project in reliance on what they understood to be an accurate and complete Offering Memo. However, under the terms of the LP Agreement, SD Fund 6, as general partner, was still required to obtain approval of 51% of the limited partners, through an "Ordinary Resolution" for the specific conditions of the funding, as well as any modifications to those terms.

39. The LP Agreement expressly provides that:

> **4.11 Limited Partner Decisions.** Approval of Limited Partners is required by Ordinary Resolution (51% OF Limited Partners voting) with respect to the following matters:
> (a) Approving the conditions for the staged funding of the Project
> (b) Materially changing the terms of the Funding Agreement with the Project
> (c) Advising the General Partner in connection with the monitoring of the Project
> (d) Advising the General Partner in connection with its relationship with SDRC, Inc. pursuant to the Consulting Agreement
> (e) Approving the realization with any security given or rights granted to the Limited Partnership in connection with the Project
> (f) Changing the auditors of the Limited Partnership

(Exhibit C, LP Agreement at § 4.11.)

40. The LP Agreement also provides that:

> **16.11 Ordinary Resolutions.**
> (a) Limited Partners may, by Ordinary Resolution:.[sic]
> (i) approve the conditions for the staged funding of a Qualifying Investments [sic]
> (ii) materially change the terms of the Qualifying Investment;
> (iii) advise the General Partner in connection with the monitoring of Qualifying Investments;
> (iv) advise the General Partner in connection with its relationship with SDRC pursuant to the Consulting Agreement;

> (v) approve the realization plan in connection with any security given or rights granted to the Partnership in connection with a Qualifying Investment;
>
> (vi) approve the change of the auditors for the Partnership.

(Exhibit C, LP Agreement at § 16.11.)

41. The LP Agreement specifically provides that:

> **Standard of Care** The General Partner shall exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interests of the Partnership. The General Partner shall exercise the same degree of care, diligence and skill that a reasonable person would exercise in similar circumstances.

(Exhibit C, LP Agreement at § 4.5.)

42. In direct violation of these provisions, SD Fund 6 entered into the November 4, 2010 Credit Agreement, collectively with the related Promissory Note, the "Credit Agreement," a true and accurate copy of which is attached hereto as Exhibit H.

43. The Credit Agreement provided for funding up to $60 million dollars based on subscriptions of up to "One Hundred Twenty (120) investors (EB-5 Investors)" in SDIF LP 6 (Exhibit H), even though the SDIF LP 6 was limited to a maximum of one hundred investors, as noted above. Thus, SD Fund 6 (and the other Defendants), purportedly acting on behalf of SDIF LP 6, entered into an unauthorized and unapproved credit obligation for more funding than SDIF LP 6 had represented it was allowed to raise under the terms of the Offering Memo.

44. The Credit Agreement was also on terms that were significantly less favorable to the Investors than the then existing Epoch loan (which the funds from the SDIF LP 6 loan were used to replace). The terms of the Credit Agreement were also unreasonable given the risks involved and breached SD Fund 6's standard of care to the Investors as well as its fiduciary duties owed to the Investors.

45. The Credit Agreement contained numerous errors, omissions, and unreasonable terms that were harmful to the Investors, including, without limitation:

- The Credit Agreement contained inadequate construction related disbursement provisions;
- The Credit Agreement specifically defined an official Project Budget, yet failed to attach any such Budget for the Project;
- The Credit Agreement failed to contain standard covenants tying the funding to the Budget;
- The Credit Agreement failed to provide for lender review and approval of key Project agreements, such as the General Contractor and major subcontractor agreements.

46. Given the facts alleged herein, a reasonable person acting in good faith would not have entered into the Credit Agreement on the terms set forth therein.

Other Misconduct And Fiduciary Breaches By The Defendants

47. The SDIF LP 6 funding was intended to be made in stages through two different escrow agents appointed to hold funds invested by the Investors and other limited partners: Hanul Professional Law Corporation ("Hanul") a California subsidiary of a Korean entity; and Guangdong Development Bank Co., Ltd ("Guangdong") based in Macau (collectively the "Escrow Agents"). Under the Escrow Agreements, the Escrow Agents were authorized to make disbursements to SDIF LP 6 when certain conditions were met; which funds would then be dispersed by SDIF LP in stages to NBP.

48. The Offering Memo and related materials included a template escrow agreement providing for Hanul to be the escrow agent. An example of one of the Escrow Agreements is attached hereto as Exhibit I. Defendants failed to disclose that Hanul was associated with or in control of the prior EB-5 group, which previously invested in, and now controls, the Project, which EB-5 group was also created by SDRC and Bollen.

49. Defendants also failed to disclose the connections between Defendants, Hanul, and Song, who were also in business together regarding yet another undisclosed EB-5 investment project in South Dakota: the failed Veblen Dairy project, in which the most recent information suggests the EB-5 investors lost their entire investments.

50. The Escrow Agreements provide the following provision:

> 4.6 The parties hereto agree that should any dispute arise with respect to the payment, ownership or right of possession of the Escrow Account, the Escrow Agent is authorized and directed to retain in its possession, without liability to anyone, except for its bad faith, willful misconduct or gross negligence, all or any part of the Escrow Account until such dispute shall have been settled either by mutual agreement by the parties concerned or by the final order, decree or judgment of a court or other tribunal of competent jurisdiction, and a notice executed by the parties to the dispute or their authorized representatives shall have been delivered to the Escrow Agent setting forth the resolution of the dispute. The Escrow Agent shall be under no duty whatsoever to institute, defend or partake in such proceedings.

(Exhibit I at § 4.6.)

51. Concurrent with the filing of this Complaint, the Investors intend to notify the Escrow Agents that they are invoking Section 4.6 and demand that the Escrow Agents retain all remaining escrowed funds until this case is resolved by this Court.

52. Defendants also violated South Dakota law and the LP Agreement by failing to provide the Investors with access to the books and records of SDIF LP 6.

53. The South Dakota Limited Partnership Act provides that each limited partner has the right to:

> (1) Inspect and copy any of the partnership records required to be maintained by § 48-7-105; and
>
> (2) Obtain from the general partners from time to time upon reasonable demand:
>
> (a) True and full information regarding the state of the business and financial conduction of the limited partnership;

> (b) Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year; and
>
> (c) Other information regarding the affairs of the limited partnership as is just and reasonable.

S.D. Codified Laws § 48-7-305.

54. Additionally, the LP Agreement provides for access to certain information and books and records:

> **Books of Account.** The General Partner shall keep and maintain full, complete and accurate books of account and records of the Partnership with respect to the Partnership's activities and financial affairs at the principal address of the Partnership. Such books of account and records shall be retained by the General Partner for a minimum period of seven years or longer if required by applicable law and shall be made available for review by Limited Partners upon request.
>
> **Annual Reports.** Within 90 days after the end of each fiscal Year, the General Partner shall send to each person who is a Limited Partner at any time during such Fiscal Year a report summarizing the status of the end of such fiscal Year as well as statements of income, each Limited Partner's capital account balance, gains and losses and cash flow statement for such fiscal Year, all of which shall be prepared in accordance with GAAP.
>
> **Annual Reports.** The General Partner shall send to each Limited Partner an unaudited annual text-based report in sufficient detail to describe the progress of the Partnership within 60 days of the end of such period.

(Exhibit C, LP Agreement at §§ 17.1-17.3.)

55. The Investors have made repeated demands for such information, which have been refused by SD Fund 6 through its counsel and representative, and also through Bollen.

CAUSES OF ACTION

COUNT I

(Breach of Limited Partnership Agreement Against SD Fund 6)

56. The Investors reallege and incorporate by reference Paragraphs 1 to 55 as if alleged herein.

57. The Investors executed subscription agreements and paid the requisite $530,000 pursuant thereto to become limited partners in SDIF LP 6. The Investors therefore fully performed all their obligations under the LP Agreement.

58. While the Investors reserve all rights to assert that Defendants wrongfully induced them into entering into the LP Agreement, and that the LP Agreement is voidable, and subject to rescission, subject to that reservation, the LP Agreement is a valid and enforceable agreement.

59. SD Fund 6 failed to obtain an Ordinary Resolution approving the conditions, *i.e.*, loan terms, for the staged funding of the Project as required by Section 4.11 and 16.11 of the LP Agreement.

60. SD Fund 6 also breached the LP Agreement by breaching the standard of care imposed upon it under Section 4.5. As alleged above, even if the terms of the loan had been approved by Ordinary Resolution (which they were not), no reasonable general partner acting in good faith would have recommended, much less executed, a loan on such terms given the financial situation facing the borrower, NBP.

61. Additionally, SD Fund 6 breached the LP Agreement (sections 17.1 to 17.3) and South Dakota law (S.D. Codified Laws § 48-7-305) by failing to provide Investors with access to the Books of Account; failing to provide annual reports (and, upon information and belief, failing to even prepare such reports); and failing to advise Investors regarding the Project's ongoing financial problems and the conflicts of interest described above.

62. The Investors have been damaged and irreparably harmed as a direct and proximate result of those breaches as alleged further herein, including but not limited to having their substantial financial investment placed into jeopardy, and having their EB-5 immigration status subjected to potential risk. Unless SD Fund 6 is enjoined from continuing these breaches, the Investors will continue to suffer such damage and irreparable harm.

COUNT II

(Breach of Fiduciary Duty Against SD Fund 6)

63. Plaintiffs reallege and incorporate by reference Paragraphs 1 to 62 as if alleged herein.

64. SD Fund 6, as the general partner of SDIF LP 6, owes the limited partners, including the Investors, a fiduciary duty under South Dakota law: a duty that is characterized by "loyalty of the highest order," and a duty that requires SD Fund 6 to "walk a moral path about that tread by other members of the economic marketplace."

65. SD Fund 6 breached its fiduciary duty to the Investors by entering into the Credit Agreement without approval and on terms that are not reasonable or consistent with industry standards, including as set forth in detail above.

66. SD Fund 6 also breached its fiduciary duty to the Investors by (i) failing to disclose the many inherent conflicts of interest; (ii) failing to disclose the numerous problems with the Project; (iii) failing to properly manage SDIF LP 6; (iv) refusing to provide information, books and records to the Investors; and (v) placing its interests and the interest of SDRC and Bollen above the interests of the Investors.

67. The Investors have been damaged and irreparably harmed as a direct and proximate result of those breaches as alleged further herein, including but not limited to having their substantial financial investment placed into jeopardy, and having their EB-5 immigration status subjected to potential risk. Unless SD Fund 6 is enjoined from continuing these breaches, the Investors will continue to suffer such damage and irreparable harm.

COUNT III

(For Declaratory Judgment)

68. Plaintiffs reallege and incorporate by reference Paragraphs 1 to 67 as if alleged herein.

69. There exists between Plaintiffs and Defendants a substantial, actual and justiciable dispute regarding the application and interpretation of certain terms and conditions of the LP Agreement as set forth above.

70. Plaintiffs are entitled to have a declaration of their rights and a judicial interpretation of the rights and obligations of the parties under the LP Agreement.

71. Defendants have materially breached the SDIF LP 6 LP Agreement by their conduct for the reasons set forth above, and Plaintiffs are accordingly entitled to this Court's declaration to that effect.

COUNT IV

(Aiding and Abetting Breach of Fiduciary Duty Against SDRC and Bollen)

72. The Investors reallege and incorporate by reference Paragraphs 1 to 71 as if alleged herein.

73. As alleged above, SD Fund 6 owed the Investors a fiduciary duty and breached that duty.

74. SDRC and Bollen substantially assisted SD Fund 6 in the achievement of the breaches in carrying out the actions alleged above.

75. Specifically, SDRC and Bollen provided substantial assistance in SD Fund 6's conduct in: entering into the Credit Agreement with NBP without authorization or approval by the Investors; entering into the Credit Agreement with NBP on terms that breached SD Fund 6's fiduciary duties to the Investors as well as the standard of care owed to the Investors under the

LP Agreement; concealing the severity of the Project's ongoing financial problems and conflicts of interest; and preventing the Investors from gaining access to the books and records of SDIF LP 6 and learning other information regarding SDIF LP 6's business that the Investors are entitled to as a matter of law.

76. SDRC and Bollen, as mere alter-egos of SD Fund 6 given that Bollen controls both entities and merely uses them as his instrumentalities, were fully aware that SD Fund 6's conduct constituted breaches of its fiduciary duty to the Investors.

77. The Investors were damaged and irreparably harmed as a direct and proximate result of SDRC and Bollen's conduct in aiding and abetting SD Fund 6's breaches as alleged herein, including but not limited to having their substantial financial investment placed into jeopardy, and having their EB-5 immigration status subjected to potential risk. Unless SDRC and Bollen are enjoined from continuing to aid and abet these breaches, the Investors will continue to suffer damage and irreparable harm.

COUNT V

(Claim for Accounting against SD Fund 6)

78. The Investors reallege and incorporate by reference Paragraphs 1 to 77 as if alleged herein.

79. South Dakota law authorizes actions for accounting of limited partnerships.

80. Despite a demand for copies of or access to the books and records of SDIF LP 6, SD Fund 6 has failed to provide such information to the Investors.

81. SD Fund 6 has also failed to provide the requisite annual reports required by Sections 17.2 and 17.3 of the LP Agreement.

82. SD Fund 6 has also failed to respond to the Investors' demand to provide accurate and complete information regarding the state of the business and financial condition of SDIF LP 6 as required by S.D. Codified Laws § 48-7-305.

83. Accordingly, Investors are entitled to an accounting of all of the records, documents, and assets of SDIF LP 6.

COUNT VI

(Claim to Pierce the Corporate Veil as to All Defendants)

84. The Investors reallege and incorporate by reference Paragraphs 1 to 83 as if alleged herein.

85. As set forth above, Bollen exerts dominion and control over Defendants SDRC and SD Fund 6, and uses those entities as mere instrumentalities to further his improper conduct alleged herein.

86. Upon information and belief, Bollen controls all outstanding shares of stock in SDRC, and public record demonstrates that he is the sole member of SD Fund 6.

87. Bollen is the sole officer and director of SDRC, and he is the sole member-manager of SD Fund 6 showing that there is a unanimity of control between the two entities and Bollen.

88. For all the reasons above, continued recognition of the Defendant entities as separate legal entities would produce injustice and inequitable consequences by allowing Bollen to attempt to avoid personal liability for his wrongful conduct and the wrongful conduct committed by SDRC or SD Fund 6 as mere instrumentalities of Bollen. Thus, making Bollen personally liable for any damages or liability created by SDRC or SD Fund 6 would prevent this injustice and inequitable consequences.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Zhang Zhen, Feng Wei, Ma Yirong, and Yao Xiao Ping, through their undersigned counsel, respectfully request that the Court issue an Order and Judgment:

A. Preliminarily and permanently enjoining, and otherwise ordering, Defendants, their subordinates, agents, employees, and all others acting in concert with them:

1. from entering into any agreements or modifications of agreements on behalf of SDIF LP 6 without the approvals required by the LP Agreement;

2. from disbursing any funds from SDIF LP 6 accounts until such time as the requisite limited partner approvals have been obtained;

3. from seeking or requesting any funds from the Escrow Agents without the approvals required by the LP Agreement;

4. to produce copies of all books and records of SDIF LP 6, including but not limited to all tax records, bank records, legal documents, loan agreements, and records of due diligence regarding NBP;

B. Declaring that Defendants have materially breached the SDIF LP 6 LP Agreement;

C. Awarding Plaintiffs compensatory damages for the losses caused by Defendants' wrongdoing;

D. Awarding pre-judgment and post-judgment interest as authorized by law or contract;

E. Awarding Plaintiffs their reasonable attorneys' fees and costs pursuant to applicable law; and

F. Granting such other and further relief as this Court deems necessary and proper.

Dated at Sioux Falls, South Dakota, this 18th day of October, 2011.

DAVENPORT, EVANS, HURWITZ & SMITH, LLP

Vince M. Roche
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
vroche@dehs.com
Tel: (605) 357-1250
Fax: (605) 335-3639

OF COUNSEL:

John Grossbart (*pro hac vice* to be filed)
Anthony T. Eliseuson (*pro hac vice* to be filed)
Maria L. Domanskis (*pro hac vice* to be filed)
SNR DENTON US LLP
233 South Wacker Drive
Suite 7800
Chicago, Illinois 60606
(312) 876-8000
(312) 876-7934 (fax)
john.grossbart@snrdenton.com
anthony.eliseuson@snrdenton.com
maria.domanskis@snrdenton.com

Attorneys for Plaintiffs Zhang Zhen, Feng Wei, Ma Yirong, and Yao Xiao Ping

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION, SIOUX FALLS

ZHANG YONGJUN, an individual resident of California; YAN JINGQI, an individual resident of California; ZHENG CAIWEN, an individual resident of California; and WANG XINPING, an individual resident of California, Plaintiffs, vs. SDRC, INC., a South Dakota corporation; SD INVESTMENT FUND LLC 6, a South Dakota limited liability company; and JOOP BOLLEN, an individual resident of South Dakota, Defendants.	Case No. 11-cv-4148-KES Hon. Karen E. Schreier

RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs Zhang Yongjun, Yan Jingqi, Zheng Caiwen, and Wang Xinping (collectively, the "Investors") respectfully submit this memorandum of law in response to Defendants' Motion to Dismiss the Amended Complaint.

INTRODUCTION

Defendants' Motion to Dismiss ("Motion") asserts that the Investors impermissibly added new party-plaintiffs without leave of court despite the fact that the Amended Complaint was properly filed as a matter of course under Federal Rule of Civil Procedure 15(a)(1). Defendants rely on a single decision from another judge in this district that is contrary to the overwhelming majority of cases that have considered this issue, as well as subsequent rulings from the Eighth Circuit – all of which reject Defendants' argument here that leave of court was required before the filing of the Amended Complaint.

In any event, even if this Court were to rule otherwise, the proper remedy is not dismissal, but an order authorizing the addition of Investors as party-plaintiffs retroactive to the date the amendment was initially filed. Indeed, that is the remedy authorized by courts that follow the minority approach. Thus, Defendants' motion effectively serves no purpose other than to delay these proceedings and require a needless round of briefing that, no matter what, leads to the same result. Accordingly, the Investors respectfully request that this Court deny Defendants' Motion and order Defendants to answer the Amended Complaint so that the parties can proceed to discovery in this matter.

PROCEDURAL HISTORY

This action was filed on October 18, 2011 by Zhang Zhen, Feng Wei, Ma Yirong, and Yao Xiao Ping, individual investors in SDIF Limited Partnership 6 ("SDIF LP 6"), an organization that Defendants created and are heavily involved in operating. (Dkt. No. 1.) Defendants were served on October 26, 2011. (Dkt. Nos. 12–14.) On November 7, 2011, before Defendants appeared in the action, Notices of Voluntary Dismissal pursuant to Rule 41(a)(1) were filed by Zhang Zhen and Feng Wei. (Dkt. Nos. 15–16.) That same day, an amended complaint was filed by the remaining two original plaintiffs, Ma Yirong and Yao Xiao Ping, and the Investors. (Dkt. No. 17.) On November 15, 2011, two additional Notices of Voluntary Dismissal were filed by Ma Yirong and Yao Xiao Ping. (Dkt. Nos. 18–19.) Defendants still had not yet appeared in the action when these Notices were filed.

On November 16, 2011, Defendants appeared in this action through counsel. (Dkt. Nos. 20–21.) The following day, Defendants filed their Motion to Dismiss Plaintiffs' Amended Complaint, based solely on their contention that the filing of the Amended Complaint was not the proper procedure to add the Investors to the case as plaintiffs. (Dkt. No. 22.)

ARGUMENT

I. Defendants' Motion Is Contrary To The Well-Established Majority View Of Rule 15(a) Of The Federal Rules of Civil Procedure.

A. Under the majority rule, the addition of parties without leave of court is allowed "as a matter of course."

Federal Rule of Civil Procedure 15(a) provides that "[a] party may amend its pleading once as a matter of course" within certain time limits. It is undisputed the Investors' Amended Complaint was filed within these time limits. Rule 21, entitled "Misjoinder and Nonjoinder of Parties," indicates that "the court *may* at any time, on just terms, add or drop a party" and "sever any claim against a party." Fed. R. Civ. P. 21 (emphasis added). Contrary to Defendants' assertion, Rule 21's grant of authority does not operate to the exclusion of Rule 15's allowance of amendment as a matter of course under the circumstances presented in this case. Instead, Rules 15 and 21 are properly read together as allowing for the addition of a party without court order when a case is at its earliest stages but requiring leave of court once the period provided by Rule 15(a)(1) has expired.

"The theory behind the provision for amendments as of course is that the court should not be bothered with passing on amendments to the pleadings at an early stage in the proceedings when the other parties probably will not be prejudiced by any modification." 6 Wright & Miller, Fed. Practice & Procedure § 1479. This applies equally to amendments that add or delete factual allegations and claims, as it does to amendments that add or drop parties; no reason exists to treat the addition of a party differently. The vast majority of courts to have addressed this issue have so held, including the Second, Fourth, Fifth, and Tenth Circuits. *See Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir. 2010); *United States ex rel. Precision Co. v. Koch Indus.*, 31 F.3d 1015, 1018–19 (10th Cir. 1994); *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 795 (2d

Cir. 1983); *McLellan v. Mississippi Power & Light Co.*, 526 F.2d 870, 872–73 (5th Cir. 1976), *vacated in part on other grounds*, 545 F.2d 919 (5th Cir. 1977).

Although not squarely addressing the interplay of Rule 21 and Rule 15, the Eighth Circuit has also approved the addition of parties by way of amendment under Rule 15 without mention of Rule 21. *See Plubell v. Merck & Co.*, 434 F.3d 1070, 1072 (8th Cir. 2006) (discussing the relation back of an amendment adding an additional plaintiff under Rule 15(c)); *see also Speaks Family Legacy Chapels, Inc.* v. *Nat'l Heritage Enters.*, No. 08-4148-CV-C-NKL, 2009 WL 1035289, at *2–3 & n.1 (W.D. Mo. Apr. 16, 2009) ("While Defendants are correct that some courts have held that Federal Rule of Civil Procedure 21 rather than Rule 15 applies to motions to add parties, and that leave is always required to do so, even where no responsive pleading has been filed, *this does not appear to be the law in the Eighth Circuit.*") (citing *Plubell*, *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 955–57 (8th Cir. 2002), and *Nat'l Fed'n of the Blind of Missouri v. Cross*, 184 F.3d 973, 978 (8th Cir. 1999)) (emphasis added).

In accordance with these authorities, district courts in the Eighth Circuit overwhelmingly adhere to the majority (and correct) view. *See Speaks Family Legacy Chapels, Inc.*, 2009 WL 1035289, at *2–3 & n.1; *Lohrman v. Sunset Fin. Servs., Inc.*, No. 8:08CV422, 2009 WL 250019, at *1–2 (D. Neb. Feb. 2, 2009) (concluding that Rule 15(a) controls amendments adding or dropping parties before a defendant has filed a responsive pleading); *Chiu v. Am. Builders & Contractors Supply Co.*, No. 08-4002-CV-C-NKL, 2008 WL 922316, at *1 (W.D. Mo. Apr. 1, 2008) ("[T]his Court concludes it is better practice, under the federal rule's liberal amendment standards, to place primacy on Rule 15(a), and allow plaintiffs to amend as a matter of course before defendants have filed a responsive pleading.").

Secondary commentators are also in accord: "[t]he majority opinion now appears to be that a party's right to amend as a matter of course, if accomplished within the deadlines set by Rule 15(a), extends to all amendments – including amendments to drop or add parties." 4 Moore's Federal Practice – Civil § 21.02[5][b]; *see also* 3 Moore's Federal Practice – Civil § 15.16 ("The better view, however, rejects the notion that a motion to amend is required to add or drop parties. The more persuasive cases hold that a party's right to amend as a matter of course, if accomplished within the deadlines set by Rule 15(a), extends to all amendments including amendments to drop or add parties.").

B. Defendants' Motion relies on a single case that cannot be squared with these authorities or Eighth Circuit precedent, and that arose in highly unique and distinguishable circumstances.

Defendants' Motion mentions none of the foregoing authorities and instead relies on a single case from Judge Kornmann of this judicial district that is factually inapposite and does not even clearly support Defendants' argument. (Motion at 2 (citing *South Dakota ex rel. South Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 924 (D.S.D. 2003).) The *Burlington Northern* case involved highly unique and distinguishable circumstances arising on a motion to remand that involved an amendment that joined an ***involuntary*** plaintiff (*i.e.*, a party that did not want to be joined to the suit), and that occurred in *state court* under *the state rules of civil procedure*. *Id.* at 924. Thus, on its face the *Burlington Northern* case is inapplicable here, particularly since it was more squarely addressing Rule 19 issues.

Defendants fail to provide any reason for this Court to apply *Burlington Northern* here and ignore the well-reasoned analysis adopted by the vast majority of courts, including numerous other district courts within the Eighth Circuit. This is particularly so here, where Defendants had not even yet appeared at the time the Investors were added as parties, and the time to amend the

complaint as a matter of course had not yet expired. Defendants do not provide any argument that they were prejudiced by the filing of the Amended Complaint, and no such prejudice is conceivable. Amendment by way of Rule 15(a)(1) to add the Investors as plaintiffs thus furthered the underlying purpose of the Federal Rules of Civil Procedure – "to secure the just, speedy, and inexpensive determination of every action and proceeding" – as it did not require any intervention by the Court nor occasion any avoidable delay. Fed. R. Civ. P. 1.

Accordingly, the Investors respectfully submit that this Court should join the majority in following the controlling authorities cited above, rule that the Investors' Amended Complaint is proper, and deny Defendants' Motion.

II. In All Events, Dismissal Is Improper; Rather, The Proper Relief Is An Order Retroactively Allowing The Amendment Under Rule 21.

Even if this Court were to adopt a contrary view, Defendants cite no case law to support their request for dismissal.[1] Indeed, even those few courts that have applied the minority view recognize dismissal of the action would be in error, and instead merely allow the amendment retroactively. *See, e.g.*, *Streeter v. Sheriff of Cook County*, 256 F.R.D. 609, 613 n.1 (N.D. Ill. 2009) ("This is a correctable defect, however, and does not require dismissal. The Court grants Plaintiffs leave to add Jackson as a named Plaintiff, retroactive to the date the amended complaint was filed.") (citation omitted). Thus, it is unclear what purpose Defendants' Motion sought to serve, except to delay these proceedings and increase the Investors' costs by requiring briefing on this issue.

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[1] Certainly *Burlington Northern*, the lone case Defendants have cited, only noted the purported procedural irregularities in adding a plaintiff by amendment without leave of court before dismissing the added plaintiff on other grounds, namely that joinder was fraudulent and did not meet the requirements to join a party as an involuntary plaintiff. *Burlington Northern*, 280 F. Supp. 2d at 936–37.

This is particularly so here where Defendants have not lodged any substantive objection to the addition of the Investors as plaintiffs, apparently recognizing that there is no valid reason for the Court to deny leave if leave is deemed to have been necessary. Thus, if this Court determines that leave was required pursuant to Rule 21 to add the Investors as plaintiffs, then the Investors request that the Court grant such leave *nunc pro tunc* to November 7, 2011, the date the Amended Complaint was filed. *See Streeter*, 256 F.R.D. at 613 n.1 (granting exactly such relief).

CONCLUSION

For all the foregoing reasons, the Investors respectfully request that this Court deny Defendants' Motion to Dismiss Plaintiffs' Amended Complaint and order Defendants to answer the Amended Complaint. In the alternative, the Investors request that this Court grant them leave to be added as plaintiffs in this action, *nunc pro tunc* to November 7, 2011, and order Defendants to answer the Amended Complaint.

Dated at Sioux Falls, South Dakota, this 2nd day of December, 2011.

DAVENPORT, EVANS, HURWITZ,
& SMITH, LLP

/s/ Vince M. Roche
Vince M. Roche
Shane E. Eden
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
(605) 336-2880
vroche@dehs.com
seden@dehs.com

Of counsel

John Grossbart (pro hac vice)
Anthony T. Eliseuson (pro hac vice)
Maria L. Domanskis (pro hac vice)
SNR DENTON US LLP
233 South Wacker Drive
Suite 7800
Chicago, Illinois 60606
(312) 876-8000
(312) 876-7934 (fax)
john.grossbart@snrdenton.com
anthony.eliseuson@snrdenton.com
maria.domanskis@snrdenton.com
Attorneys for Plaintiffs