

JAMS ARBITRATION
Case No. 1100054680

DARLEY COMMERCIAL, LLC, fka
DARLEY INTERNATIONAL, LLC,
a Delaware limited liability company,

Claimant,

vs.

HANUL PROFESSIONAL LAW
CORPORATION; SOUTH DAKOTA
INTERNATIONAL BUSINESS INSTITUTE,
a non-profit organization.

Respondents.

HANUL PROFESSIONAL LAW
CORPORATION,

Counter-Claimant,

vs.

DARLEY COMMERCIAL, LLC, fka
DARLEY INTERNATIONAL, LLC,
a Delaware limited liability company,

Counter-Respondent.

SOUTH DAKOTA BOARD OF REGENTS, a
SOUTH DAKOTA STATE AGENCY,

Counter-Claimant,

vs.

HANUL PROFESSIONAL LAW
CORPORATION; DARLEY COMMERCIAL,
LLC, fka DARLEY INTERNATIONAL, LLC,
a Delaware limited liability company,

Counter-Respondents.

PARTIAL FINAL AWARD (PHASE I – LIABILITY)

PARTIAL FINAL AWARD (PHASE I – LIABILITY)

THE UNDERSIGNED, having been duly appointed in accordance with the terms of the "Overseas Recruitment and Service Agreement for US EB-5 Permanent Residency Visa," dated on or about October 18, 2007, and having examined the submissions, proofs, and allegations of the parties, finds, concludes, and issues this Partial Final Award, resolving all Phase I (liability) issue, as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

- A. **Parties and Counsel.** The parties to this arbitration are identified in the above caption and are represented as follows:

For Claimant/Counter-Respondent DARLEY COMMERCIAL, LLC,
fka DARLEY INTERNATIONAL, LLC ("Darley"):

Maxwell M. Blecher, Esq.
Jennifer S. Speno, Esq.
Blecher Collins Pepperman & Joye PC
515 S. Figueroa Street, Suite 1750
Los Angeles, CA 90071-3334
(213) 622-4222 (213) 622-1656 (fax)
mblecher@blechercollins.com
jclkayam@blechercollins.com

For Respondent/Counter-Claimants HANUL PROFESSIONAL LAW
CORPORATION ("Hanul"):

Alex Cha, Esq.
Law Offices of Alex Cha
3435 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010
(213) 351-3513 (213) 351-3514 (fax)
alexmyungcha@gmail.com

For Respondent/Counter-Claimant SOUTH DAKOTA BOARD OF
REGENTS (named as South Dakota International Business Institute in
Claimant's original demands for Arbitration) ("SDIBI"):

Chaka Okadigbo, Esq.
Garcia, Hernandez, Sawhney & Bermudez, LLP
700 N. Central Ave., Suite 570
Glendale, CA 91203
(213) 347-0210 (213) 347-0216 (fax)
cokadigbo@ghsblaw.com

B. Arbitrator. The parties have selected, as sole arbitrator:

Hon. Robert A. Baines (Ret.)
JAMS
160 W. Santa Clara Street, Suite 1600
San Jose, CA 95113
(408) 288-2240 (408) 295-5267 (fax)
rbaines@jamsadr.net

C. Arbitrator's Case Manager:

Cynthia Victory
JAMS
160 W. Santa Clara Street, Suite 1600
San Jose, CA 95113
(408) 346-0736 (408) 295-5267 (fax)
cvictory@jamsadr.com

D. Agreement to Arbitrate; Court Order to Arbitrate:

Pursuant to Paragraph 13(B) of the "Overseas Recruitment and Service Agreement for US EB-5 Permanent Residency Visa" dated on or about October 18, 2007 ("Agreement"), any dispute arising thereunder shall be resolved by binding arbitration through JAMS.

Respondent/Counter-Claimant SDIBI, although not a signatory to the Agreement, was ordered to participate in this arbitration. See, Order Compelling Arbitration issued by the Hon. Maureen Duffy-Lewis of the Los Angeles County Superior Court, on or about June 2, 2010, in the matter of *Darley International LLC v. South Dakota International Business Institute*, Case No. BS121441.

E. Commencement of Arbitration:

Claimant's initial Demands for Arbitration (one against Hanul and one against SDIBI) were received by JAMS on or about April 30, 2008.

This arbitration was formally commenced on May 7, 2008, with the sending of the JAMS "Commencement of Arbitration" letter to all parties.

The undersigned Arbitrator was appointed on or about May 16, 2008, and the JAMS "Appointment of Arbitrator" letter sent to all parties on that same date. The Written Disclosures of the Arbitrator were also sent to all parties on May 16, 2008.

F. Applicable Law and Rules:

Substantive Law: Pursuant to Paragraph 13(A) of the Agreement, California substantive law was applied in this matter.

Rules: Initially, the JAMS Streamlined Arbitration Rules were applied to these proceeding; subsequently, the Comprehensive rules were applied ("Rules")

G. Claims of the Parties:

Darley: Claimant Darley initially filed two separate Demands for Arbitration, one against each Respondent. Each Demand alleged a breach of the Agreement and requested damages and injunctive relief. Subsequently, Darley placed all its claims in one "Amended Claims Against Respondents South Dakota International Business Institute and Hanul Professional Law Corporation," filed on or about January 14, 2009 ("Amended Claims"). The Amended Claims requested damages only; the prayer for injunctive relief was deleted:

1. Breach of the Agreement's express terms;
2. Tortious interference with the Agreement (vs. SDIBI only); and
3. Breach of the Agreement's implied terms

Subsequently, and in light of the undersigned's announced interpretation of the Superior Court's order compelling arbitration, Darley dismissed its tortious interference claim. Darley's post-hearing request to add a new claim (interference with its contracts with its Chinese sub-agents) was denied. Thus, Darley's operative claims are the first and third causes of action of its Amended Claims.

Hanul: On July 14, 2010, Respondent Hanul Professional Law Corporation filed a counter-claim against Darley for:

1. Intentional or negligent misrepresentation inducing Hanul to enter into the Agreement; and
2. Breach of that Agreement.

SDIBI: Respondent SDIBI/Board of Regents filed counter-claims on or about June 30, 2010, for:

1. Breach of Fiduciary Duty (vs. Hanul);
2. Conspiracy (vs. Darley and Hanul)
3. Implied Contractual Indemnity (vs. Hanul); and
4. Equitable Indemnity (vs. Darley and Hanul; withdrawn in light of Darley's dismissal of its tortious interference claim)

Each party denies all claims of the others.

H. The Phase I Arbitration Hearing:

The Phase I arbitration hearing (on all liability issues) took place at the JAMS Los Angeles Resolution Center, 707 Wilshire Boulevard, 46th Floor, Los Angeles, California, on April 28, 29, and 30, 2014. Four witnesses testified in person¹, and two appeared by way of deposition testimony.² A number of exhibits were admitted into evidence, either by stipulation of counsel or order of the Arbitrator. The proceedings were reported, and a transcript prepared. Pursuant to stipulation, counsel made closing arguments by way of written briefs, the finals of which were filed on September 19, 2014; the Phase I matters were deemed submitted for decision on that date.

II. FACTS

The following is a statement of facts found by the Arbitrator to be true and necessary for this Phase I (Liability) Partial Final Award. To the extent this recitation differs from any party's position, that is the result of the Arbitrator's resolution of the factual disputes, including the making of determinations as to credibility of witnesses and the relevancy of evidence, as well as determinations of the burden of proof, and an overall weighing of the evidence, both oral and written.

This matter arises primarily from the activities of three individuals, acting through various entities, attempting to profit from the federal EB-5 immigrant visa program. Some background information is helpful:

A. General Background:

1. The EB-5 Immigrant Visa Program:

As part of the Immigration Act of 1990 ("Act"), Congress created what is known as the "EB-5" program,³ which essentially is an "invest-for-a-visa" program aimed at attracting foreign investments to create jobs in economically depressed regions of the U.S. Under the program, if an individual invests at least \$500,000 in an approved U.S.

¹ The witnesses (alphabetically): John Meyer, James Park (both in-person testimony and portions of his deposition were admitted into evidence), James Shekleton, and Robert Stratmore.

² Joop Bollen and Austin SuKi Kim, Esq.

³ "EB-5" is shorthand for the "employment-based, fifth preference" visa program described in 8 USCA § 1153(b)(5).

business, and thereby creates or preserves at least ten jobs, that investor, along with his or her immediate family, receives permanent resident alien status (i.e., “green cards”).

As an added incentive to the foreign investor, if the EB-5 project is successful, at the end of several years the investor can withdraw his or her investment (possibly with a profit) and also receive U.S. citizenship.

Originally, the EB-5 program required the foreign investor to create a wholly new business to generate the required jobs. Later the program was expanded to allow investments in existing businesses, and to allow pooled investments, such as into a limited partnership that would loan money to the target businesses.

The EB-5 program is under the supervision of the U.S. Customs and Immigration Service (“USCIS”), which administers it through agreements with approved Regional Centers. The Regional Centers, which can be public or private entities, select appropriate enterprises for foreign investment, find and screen potential investors, supervise the investments, and report compliance to USCIS.

2. The Main “Player Groups” in the EB-5 Program:

Although Congress may have had lofty intentions when creating the EB-5 program, our evidence revealed that it quickly became a magnet for entrepreneurs and lawyers seeking to profit from it. Aside from the investors and the target businesses, three main groups can profit from participating in the EB-5 program: (1) the “promoters,” i.e., the approved Regional Centers; (2) the “recruiters” or “marketers” that assist the promoters in finding foreign investors willing to participate in a project; and (3) the “legal processors” who assist the foreign investors with their visa applications (usually lawyers specializing in I-526 visas and related matters).

The activities of these three groups often overlap. That is, a Regional Center might do more than propose projects and supervise investments; it might help in the recruitment efforts and in preparing visa applications. Likewise, a recruiter might help a regional center find and screen investment projects and help investors with their visa applications. And, finally, the processors might also assist the Regional Center in project selection and recruitment efforts.

All three groups can make money from the EB-5 program: the Regional Center can collect administrative and other fees for its work, and the recruiters and processors share in the “legal and service fee” that each investor pays in addition to the required \$500,000 investment. Typically, this additional fee is in \$35,000 to \$95,000 range. Sometimes, too, a portion of that fee is shared with the Regional Center.

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3. The EB-5 Program in South Dakota:⁴

In 1994, the South Dakota Board of Regents, on behalf of Northern State University (“NSU”), created a new project within NSU’s School of Business in Aberdeen, South Dakota. This project, undertaken in conjunction with the Governor’s Office, was named the South Dakota International Business Institute (“SDIBI”). Its goal was to assist the Governor’s Office of Economic Development (“GOED”) by fostering international trade benefitting South Dakota businesses. The project was supervised by the Dean of the School of Business.

Joop Bollen (“Bollen”) was hired as SDIBI’s first Director in 1994, and remained in that position for fifteen years, including during our events in 2007 and 2008. Funding for his position came from both NSU and the Governor’s Office. He received administrative support through the School of Business, and although he reported to both the University and the Governor’s Office, it appears that he operated without significant supervision from either.⁵

In 2004, after ten years in operation, SDIBI took on a major new function: it became a designated Regional Center under the EB-5 program. The target business sector was the dairy industry in the state’s eastern counties, and the Regional Center was aptly named the “South Dakota International Business Institute-Dairy Economic Development Region” or “SDIBI-DEDR.” Bollen, as the Director of SDIBI, also served as the Director of this Regional Center. Later, when the Regional Center expanded both its geographic area and its target industries, it applied to USCIS to change its name to the more general “South Dakota Regional Center” or “SDIBI-SDRC.”⁶ That name change was approved by USCIS in June of 2008.

Once the Regional Center was formed, Bollen began locating projects for investment, and recruiting foreign investors for those projects. On a recruiting trip to Seoul in the fall of 2004, Bollen met with, and was befriended by, James J. Park, Esq. (“Park”), a lawyer affiliated with the Hanul law firm. The Hanul law firm was a Korean law firm that also had a U.S. presence; it had incorporated the “Hanul Professional Law Corporation,” a California corporation, in 2002. Park was a licensed California attorney.

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⁴ This section gives a brief history of Respondent SDIBI and its Regional Center operations from 2004 through early 2008, without discussion of Darley’s involvement; Darley’s involvement will then be included in Section 4.

⁵ The undersigned was not asked to rule on whether NSU or the Governor’s Office exercised proper supervision over Bollen’s activities.

⁶ As our case involves SDIBI’s activities as an EB-5 Regional Center, and not its other activities, unless otherwise indicated, any reference to “SDIBI” will be deemed to refer to its Regional Center activities, whether under the name of SDIBI-DEDR or SDIBI-SDRC.

Bollen and Park, on behalf of their respective entities, formed a close working relationship. From 2004 onward, including during most of our relevant events, SDIBI-DEDR used Hanul as the sole recruiter of investors for its EB-5 projects. Hanul also assisted in evaluating the investment projects, and in preparing marketing materials for presentation to prospective investors. It also provided legal advice to Bollen and SDIBI on various matters. Because of this close working relationship, Hanul did not perform EB-5 work for any other Regional Center.

The joint SDIBI-Hanul effort was fruitful; twelve EB-5 projects were undertaken in the first three years. In the process, Hanul secured hundreds of investors, who collectively invested over \$150,000,000 in SDIBI-DEDR projects. The Hanul firm not only served as the sole recruiter for these projects; it also was the exclusive visa advisor for each investor. As such, Hanul received the \$50,000 “legal and service fee” paid by each investor.⁷

Before 2006, Hanul’s recruitment efforts were primarily in Korea, and thus the great bulk of SDIBI’s early investors came from that country. By 2006, however, competition among Regional Centers for investors was increasing, and Korea was appearing to be “tapped out.” Bollen was expanding the Regional Center’s recruitment efforts into other countries, and was aware that its largest competitor, the Philadelphia Industrial Development Corporation (“PIDC”), a privately-run Regional Center, was securing a number of investors from China.

China allowed only licensed investment advisors to promote foreign investments, including EB-5 projects. The Hanul law firm had a Chinese employee who assisted in finding licensed agents in China, and by 2006, Hanul had secured two recruiters in China: Rachael Zhou and Brian Su. However, these two operated only in limited regions of China.

By 2007 Bollen had also decided to make major changes in the structure and operation of SDIBI’s Regional Center: he sought to change its investment model from an equity one to a loan one, expand its reach (geographically and industry-wise), and, importantly for our case, transfer its operations to a private entity that could operate it without the constraints imposed on a public Regional Center such as SDIBI-DEDR.

In furtherance of his plans, in early November of 2007, Bollen submitted to USCIS a formal request to amend the Regional Center’s charter so as to (1) expand its geographic area to include virtually all of South Dakota; (2) expand its list of target industries to include many non-dairy industries; (3) change the methodology for determining compliance with the Act’s job-creation requirement; (4) change the name of the Regional Center from the Dairy Economic Development Region (“DEDR”) to the South Dakota Regional Center (“SDRC”), and (5) have the Regional Center contract with a private corporation with a similar sounding name (“SDRC, Inc.”) to run the Regional Center’s operations. For this last item, Bollen submitted to USCIS a proposed

⁷ The costs of the recruitment effort, including payments to any sub-agents, would come out of this fee.

Memorandum of Understanding (“M.O.U.”) between SDIBI-DEDR and this private corporation, SDRC, Inc. In his submittal, he did not reveal that SDRC, Inc. was to be his own corporation; rather, he told USCIS that SDRC, Inc. “will be controlled by Hanul Professional Law Corporation.”

Without waiting for USCIS approval,⁸ Bollen put his plans into effect at the beginning of 2008. On January 3, 2008, he signed papers incorporating his new corporation (SDRC, Inc.), signed papers creating several new limited partnerships to serve as investment vehicles for the Regional Center’s next projects (including the “SDIF Limited Partnership 1” for the Dakota Provisions project), and signed papers creating new limited liability companies to serve as general partners for the new limited partnerships (such as the “SD Investment Fund LLC1,” which he created to serve as the general partner for the Dakota Provisions limited partnership). Bollen formed and controlled each of these new entities, all of which were officially recognized by the State of South Dakota on January 10, 2008.

A few days later, on January 15, 2008, Bollen executed the M.O.U. between SDIBI-DEDR and his newly formed corporation, SDRC, Inc. It transferred to SDRC, Inc. the bulk of the Regional Center’s functions. Bollen signed the M.O.U. on behalf of SDIBI-DEDR; it was signed on behalf of SDRC, Inc. by Park, the “Director” of SDRC, Inc.

The net effect of these changes was that all new EB-5 money coming into SDIBI’s Regional Center, although ostensibly still under the umbrella of a public Regional Center (SDIBI-DEDR at first, and later SDIBI-SDRC), would come into a limited partnership that Bollen fully controlled as its general partner (one of his LLCs). And, the operations of the Regional Center itself were now being handled by Bollen’s new private corporation, SDRC, Inc., of which he was the owner, President, and CEO.

With his new organizational structure in place by mid-January, 2008, Bollen proceeded to promote SDIBI projects through SDRC, Inc. As the Tilapia project had just been withdrawn, he held discussions with recruiters regarding SDIBI-DEDR’s next project, Dakota Provisions.

4. Darley’s Involvement with SDIBI and Hanul:

As noted above, by 2007, if not earlier, Bollen was working to expand SDIBI-DEDR’s recruitment efforts worldwide. Around that same time, several Regional Centers were scrambling to tap into a newly-opened market: China. The key to China was having licensed agents who could solicit and produce investors; those agents were scarce.

It was at that time that Robert Stratmore, acting on behalf of his Delaware limited liability company, Darley International, LLC, appeared on the scene, and offered to help

⁸ USCIS approval came later, on June 25, 2008.

SDIBI with its worldwide marketing efforts. Stratmore was a California attorney with some prior experience in international trade, particularly in the former Soviet Union. In mid-2007, although he had no prior EB-5 experience, he viewed the program as a potential money-maker and approached a number of Regional Centers, offering to serve as a recruiter of foreign investors.

Bollen referred Stratmore to Hanul, advising Stratmore that Hanul was SDIBI's sole marketer. Stratmore and Park began discussions that led to a meeting in Berkeley in August of 2007. At that meeting, Stratmore, Park, and Austin Kim (another attorney with Hanul) discussed possible marketing arrangements between Hanul and Darley. Stratmore touted his ability to recruit in China; Hanul was interested.

The meeting was followed by two months of negotiations over the terms of a recruitment agreement. The discussion topics included the size of the legal and promotional fees to be charged investors, the division of those fees between Darley and Hanul, the territories in which Darley would recruit, and whether any of those territories would be exclusive to Darley. Hanul was reluctant to give Darley any exclusive areas, especially in China, and Darley, of course, was eager to acquire as much exclusive territory as possible. Bollen was aware of these negotiations between Darley and Hanul, and made comments on some of the proposed contract terms.

In the negotiations, Darley asked for a provision essentially guaranteeing that SDIBI would continue to use Hanul as its exclusive marketer. Hanul rejected this, explaining that its marketing arrangement with SDIBI was unofficial, and that a guarantee of continued exclusive marketing was not possible, given the fact that SDIBI, as a public entity, had not, and would not, go through the cumbersome process of trying to grant official marketing rights.

Darley and Hanul reached agreement, and on October 18, 2007, signed the Overseas Recruitment and Service Agreement that lies at the heart of our dispute. This Agreement listed those countries in which Darley would recruit investors for SDIBI's projects, including those in which Darley would be Hanul's exclusive sub-recruiter. It also specified the division of the investor's legal and service fees between Darley and Hanul. It established performance goals for Darley (in terms of number of investors to be secured), and specified what would happen if those goals were not met. It required Darley to establish an office presence in China.

The Agreement recognized that Hanul had not guaranteed that SDIBI would continue to use Hanul as its unofficial exclusive recruiter, and it specifically provided that the Agreement would end when SDIBI ceased using Hanul as its sole marketer: "[this Agreement] shall be valid only while Hanul's [unofficial exclusive marketing] rights are honored by SDIBI and all rights, powers and authorities granted to Darley herein shall terminate when Hanul's rights are rescinded by SDIBI." Agreement, at ¶ 1(A).

After reaching this Agreement, Stratmore requested marketing materials on the new Tilapia project and asked whether he could market any of the remaining slots for the

NBP project. Hanul soon advised Stratmore that all NBP slots had been filled, leaving only the Tilapia project for marketing at that time. Hanul promised to quickly complete the marketing materials for that project and forward them to Darley. Hanul was somewhat slow in doing so.

Soon after entering into the Agreement, Hanul became concerned about Darley's ability to procure investors from China. Hanul requested more information on Darley's recruitment apparatus in China, including information on its sub-agents. Stratmore was reluctant to provide this information, both out of fear of possible poaching of his sub-agents, as well as knowing that he did not yet have a formal structure in place in China. Stratmore spoke neither Cantonese or Mandarin and, up to that time, had made no direct contact with any licensed Chinese recruiters. He was fully dependent on his associate, Frank Lin ("Lin") of L & L Trading Co., Shanghai, to find licensed Chinese recruiters and to establish Darley's office presence in China.

In response to Hanul's request for more information, Stratmore agreed to a meeting in Shanghai between Park and Darley's sub-agents. In addition to Park, the November 15, 2007, meeting was attended by recruiter Cindy Shi (an affiliate of Linda He's) and Joe Zhou Chuang (an associate of Lin's). Immediately following that meeting, Park expressed to Bollen his great disappointment and lack of confidence in Darley's recruiters in China.

Stratmore, upon learning of Park's concerns, responded by indicating that his lead marketer would be Linda He, and that once Ms. He finished her recruitment work for PIDC (and received an anticipated bonus), she would publicly take the lead for Darley. Lin had made Ms. He aware of the Darley-Hanul dealings from well before the signing of the Agreement, and had succeeded in persuading her to join Darley's planned operations in China.

Park was reassured by Stratmore's representations regarding Linda He, and the recruitment effort for the Tilapia project moved forward. In mid-December, Darley's sub-agents conducted two seminars for potential investors, one in Shanghai and one in Beijing. Among those present were Bollen, Stratmore, Park, and the owner of the Tilapia fish-farming company.

On the surface, the seminars went well; they were relatively well attended and resulted in several interested investors. However, behind the scenes activity was quite different. Discussions between Bollen and Darley's sub-agents had led Bollen to conclude that these sub-agents were dissatisfied with their arrangements with Darley. Also, when talking to the owner of the fish-farming business, Bollen learned that he previously had declared bankruptcy while operating a smaller fish-farming business.

The working relationships between the parties deteriorated rather quickly following the seminars. Bollen told Stratmore of his unhappiness with the terms of the Hanul-Darley Agreement, and with the fact that Darley's China agents appeared to be in revolt. Bollen expressed concern that these problems would hamper SDIBI's

recruitment efforts in China, and warned that SDIBI might altogether stop using Hanul as a recruiter. Around that same time Bollen placed the Tilapia project on hold, due to the owner's financial issues. Bollen partially blamed Hanul for the Tilapia project collapse, believing that Hanul had not properly screened that project before taking it to market.

Despite a flurry of emails, relations among the parties did not improve in January of 2008. Hanul offered nothing to Darley to market, even though the Dakota Provisions project was getting underway. Darley's Chinese sub-agents sought to end their dealings with Darley, and proposed to Stratmore an arrangement under which he would not be involved in their recruiting activities, but would still receive a portion of the investor fees. Further discussions took place between Darley and Hanul regarding salvaging their relationship, but nothing was resolved. During that time, Bollen continued to talk with various recruiters, including some of Darley's sub-agents, about directly promoting SDIBI's projects in China.

On March 3, 2008, Stratmore emailed Park and Bollen with what was essentially a final request/demand letter, asking that the Agreement be re-affirmed and with new performance deadlines set for Darley. Neither Hanul nor Bollen responded favorably, and thus two weeks later, on March 17, 2008, Stratmore's attorney signed two Demands for Arbitration with JAMS, one against Hanul and one against SDIBI, each alleging breach of the Agreement by not giving Darley projects to market and by talking to Darley's Chinese sub-agents.

Once Darley served its arbitration demand on SDIBI, Hanul assisted SDIBI in resisting arbitration. Specifically, Hanul helped Bollen prepare communications to JAMS and pleadings in the Federal Court challenging Darley's right to force SDIBI (a non-signatory of the Agreement) to arbitrate.

III. SUMMARY OF CONTENTIONS

A. Darley's Contentions:

Darley claims that both Hanul and SDIBI breached the express and implied terms of the Agreement (1) by not giving Darley adequate marketing materials for the Tilapia project and then withdrawing that project, (2) by not giving Darley any other projects to market, and (3) by dealing directly with Darley's Chinese sub-agents while the Agreement was in effect and within two years thereafter.

B. Hanul's Contentions:

Hanul claims (1) that Stratmore made misrepresentations, either intentionally or negligently, about Darley's ability to secure investors and that those misrepresentations wrongfully induced Hanul to enter into the Agreement, and (2) that Darley subsequently breached the Agreement by not producing the required number of investors.

C. SDIBI/Board of Regents' Contentions:

SDIBI/Board of Regents contend that SDIBI was not a party to the Agreement, and thus can have no liability for breach of contract. They also contend that if SDIBI is found liable for breach of contract, they are entitled to implied contractual indemnity from Hanul. SDIBI/Board of Regents also contend that Hanul, if found to have acted as a lawyer on behalf of the Board, breached its fiduciary duties. Finally, the Board of Regents contends that Darley and Hanul wrongfully conspired to conceal from it the making of the Agreement and Darley's subsequent arbitration proceedings involving that Agreement.

IV. DISCUSSION

A. The Duration of the Agreement:

Given the various breach of contract claims, it is helpful to first determine the period during which the Agreement was in effect. The start date is not in dispute; although SDIBI denies it is a party to that Agreement, no party in this arbitration, including SDIBI/Board of Regents, disputes that a contract was made, and became operative on October 18, 2007.⁹

However, the parties dispute when the Agreement ended. Hanul and SDIBI contend that it ended, by its own terms, approximately ninety days later when SDIBI ceased using Hanul as its exclusive marketer of EB-5 projects. Darley contends otherwise, arguing that SDIBI did not stop using Hanul as its exclusive marketer in January of 2008, and, if it did, that action represented a breach of the Agreement.

1. The Agreement Contain a Valid Condition Subsequent:

Although the Agreement calls for an initial two year term, it also clearly provides that it terminates if SDIBI discontinue its unofficial policy of using only Hanul to market its EB-5 projects. No party has argued that this is a *per se* impermissible or invalid contract provision, or that because it gives one of the alleged parties (SDIBI) the unilateral ability to end the contract, the contract is illusory and therefore unenforceable.

2. Did SDIBI Cease Using Hanul as its Exclusive Marketer of EB-5 Projects? If so, When?

Hanul and SDIBI contend that Hanul's exclusive marketing arrangement ended in mid-January of 2008 due to the creation of SDRC, Inc. and the signing of the M.O.U.

⁹ Although Hanul claims it was fraudulently induced into making that contract, it does not seek to void the Agreement. Rather, it seeks damages for being induced into making that contract, and damages for Darley's alleged subsequent breach. As such, Hanul has elected to affirm the validity of the Agreement.

between SDIBI and SDRC, Inc. However, these events would not necessarily have ended Hanul's role as the unofficial exclusive recruiter for the Regional Center. The M.O.U. does not address the issue of Hanul's continuing status as a recruiter, exclusive or otherwise. As such, the transfer of Regional Center control to SDRC, Inc. did not, by itself, indicate that the Regional Center (now acting through SDRC, Inc.) had ceased using Hanul as its exclusive marketer of EB-5 projects.

Bollen's and Park's other actions, however, tell us that Hanul's unofficial exclusive marketing status ended at that time. By January, Bollen was having direct discussions with other recruiters, without going through Hanul, and soon entered into recruiter agreements on behalf of SDRC, Inc. that bypassed Hanul. Similarly, in February of 2008, when Park was negotiating a contract with a recruiter on behalf of SDRC, Inc., the proposed contract called for that recruiter to perform direct recruitment services for SDRC, Inc.. The recruiter was not a sub-agent for Hanul, and the recruiter was to receive the entire "promotional fee."

This evidentiary record comports with the testimony by both Park and Bollen that, following the events of late December, 2007, and early January, 2008, Hanul no longer was considered SDIBI's sole recruiter and no longer received any share of the investors' recruitment fees. Although Hanul obviously continued to assist SDRC, Inc. in many of its functions, including finding recruiters for its projects, this was not done with Hanul serving as SDIBI's sole recruiter.

In sum, our evidence demonstrates that after the incorporation of SDRC, Inc., and the transfer of SDIBI's operations to that corporation on January 15, 2008, Bollen no longer recognized Hanul as the unofficial exclusive recruiter for SDIBI's projects. As such, the Agreement, by its very terms, ended at that juncture.

3. Did the Ending of Hanul's Exclusive Marketer Status Constitute a Breach of the Agreement?

Darley contends that if SDIBI ended its exclusive marketing arrangement with Hanul in January of 2008, that action constituted a breach of the Agreement. The issue essentially is whether SDIBI, as a party to the Agreement,¹⁰ could end its unofficial exclusive marketing relationship with Hanul (and thus end the Agreement), without breaching that Agreement. The answer is "yes;" SDIBI could end the marketing arrangement without being in breach.

First, the Agreement contains no express provision preventing SDIBI from ending Hanul's unofficial exclusive marketer status. Indeed, when negotiating for this Agreement, Darley asked for a provision indicating that Hanul held *official* exclusive marketing rights with SDIBI, which provision would essentially guarantee that SDIBI was not at liberty to end that arrangement. That provision was rejected, and Darley was clearly advised that neither Hanul nor SDIBI would agree to such a provision. Rather,

¹⁰ SDIBI's "party" status is discussed below in § E (1).

the Agreement made it clear that SDIBI's use of Hanul as its sole marketer was an *unofficial* arrangement, and that SDIBI held the power to end that arrangement.

Secondly, after being advised that Hanul's exclusive marketing arrangement was unofficial and subject to being ended by SDIBI, Darley did not attempt to include any language restricting SDIBI's exercise of that right, such as requiring a showing of "good cause" or the happening of specified events. As such, on its face, the Agreement did not restrict SDIBI's exercise of discretion to end its unofficial marketing relationship with Hanul.

Thirdly, the implied covenant of good faith and fair dealing cannot be used by Darley to now add a new term limiting SDIBI's discretion. Having asked for a contract provision stating that Hanul had *official* exclusive marketing rights (and thus that SDIBI would continue to use Hanul as its exclusive marketer), and having been unsuccessful in obtaining that provision, Darley cannot now ask that a similar provision be inserted by way of the implied covenant.

The covenant cannot imply terms at variance with the terms of the contract, and cannot be used to prohibit conduct the Agreement recognizes as permissible: "The conclusion to be drawn is that courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement. In all other situations where the contract is unambiguous, the express language is to govern, and '[n]o obligation can be implied . . . which would result in the obliteration of a right expressly given under a written contract.'" *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808 (internal citation omitted). Here, the Agreement expressly recognized that Hanul's exclusive-marketer status was unofficial, and that this status was subject to unilateral discontinuance by SDIBI.¹¹ That fact that Bollen may have ended that marketing arrangement with Hanul because he was unhappy with Hanul's recent performance or felt that SDIBI would be better served by using recruiters other than Hanul, does not mean that he breached an implied term of the contract.

In sum, there was nothing in the terms of the Agreement, express or implied, that precluded SDIBI from ending its use of Hanul as unofficial exclusive marketer for its EB-5 projects. As such, there was no breach of the Agreement when SDIBI ended that arrangement in January of 2008.

B. Did Hanul Breach the Agreement?

Darley claims that Hanul breached the Agreement (1) by not promptly furnishing marketing materials for the Tilapia project, (2) by not sending other projects for marketing after the Tilapia project was withdrawn, and (3) by communicating with Darley's sub-agents during and after the Agreement.

¹¹ Again, no party has argued that the Agreement is illusory and unenforceable due to SDIBI's ability to end the contract.

1 Hanul's Failure to Timely Provide Marketing Materials for Tilapia project:

Although Hanul was somewhat slow in completing and forwarding the marketing materials for the Tilapia project, that delay did not materially affect Darley's ability to market the project. The Shanghai and Beijing seminars came off as scheduled in mid-December, and investors were interested. The only reason that no investments took place was that Bollen pulled that entire project due to the owner's financial issues. It was this pulling of the project, not the timeliness of Hanul's delivery of marketing materials, that prevented Darley from securing investors for the Tilapia project.

2. After the Tilapia Project, Hanul Gave No New Projects to Darley to Market:

Darley is correct in asserting that it was not given other projects to market after the withdrawal of the Tilapia project at the end of December 2007. However, SDIBI's next project, Dakota Provisions, was in its very early stages at that time, and the marketing materials had not been finalized. The limited partnership for that project, the SDIF Limited Partnership 1, had just come into existence on January 10, 2008, and, as discussed above, the Agreement itself ended five days later, on or about January 15, 2008. As such, there was no breach of the Agreement by Hanul not providing new projects to Darley to market in the time between the withdrawal of the Tilapia project and the termination of the Agreement.

3. Hanul's Contacts with Darley's Chinese Sub-Agents:

The Agreement has two provisions relating to Hanul's dealings with Darley's sub-agents:

¶ 1(K): "HANUL agree [sic] to never circumvent the business relationship of DARLEY and its sub-agents even after termination of this Agreement . . ."

¶ 9(C): "HANUL shall not conduct business with DARLEY's sub-agents and Investors for two (2) years following termination of this Agreement . . ."

Assuming, for discussion, that Hanul had contacts with Darley's sub-agents in January of 2008 and thereafter (the bulk of these contacts appear to have been made by Bollen, not Hanul), the two contract provisions, aimed at preventing any "conduct of business" between Hanul and Darley sub-agents, are unenforceable under California law. Bus. & Prof. Code § 16600; *Edwards v. Arthur Anderson, LLP* (2008) 44 Cal.4th 937. See also, Judge Koh's discussion of Bus. & Prof. Code § 16600 in *SriCom, Inc. v. eBisLogic, Inc.* (N.D. Cal 2012) 2012 WL 4051222.

Based on the above, it must be concluded that Darely has not shown that Hanul breached the Agreement.

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C. Did Darley Fraudulently Induce Hanul to Make the Agreement?

Hanul contends that Stratmore made misrepresentations (either intentionally or negligently) as to Darley's ability to secure Chinese investors, that Hanul reasonably relied on these misrepresentations when deciding to enter into the Agreement, and that Hanul was damaged by entering into the Agreement.

It is clear that Stratmore, when negotiating for the Agreement, touted Darley's ability to secure investors worldwide, including in China. Whether Stratmore specifically represented that Darley could immediately secure twenty EB-5 investors from China, and whether he knew or should have known that this statement was false, is less clear. We know that the only information Stratmore possessed regarding available Chinese investors came from Frank Lin. Unfortunately, we have no clear evidence of what Lin told Stratmore during the time Stratmore was negotiating the Agreement; the parties chose not to depose Lin or call him as a witness. And Lin's unsworn statement from the federal case does not reveal what he told Stratmore in the summer of 2007 as to his recruiters' ability to procure investors in China.

It is reasonable that Lin, who stood to profit from working with Darley (he was to receive a share of each investor's fees), was positive when pitching his ability to recruit investors. Lin had involved Linda He, PIDC's star recruiter in China, in Darley's project from the start. And, it is likely that everyone along Darley's "recruitment pipeline" would tout his or her ability to deliver EB-5 investors (i.e., from Linda He to Frank Lin, from Frank Lin to Robert Stratmore, from Robert Stratmore to James Park). We have insufficient evidence of what Lin ultimately represented to Stratmore, and whether Stratmore merely conveyed what Lin had told him, and, if so, whether Stratmore had any reason to question Lin's representations.

Also, even assuming the "twenty ready investors" statement was made, there is serious doubt as to whether Park actually relied on that statement, and if so, whether his reliance was reasonable. If Darley's sub-agents' ability to quickly secure twenty investors had been material to Park, why was this not put into the Agreement? The Agreement clearly specified the number of investors Darley needed to procure, and his time for doing so. It gave Darley five months to come up with the first group of investors, and nine months to come up with additional ones. Immediate production of investors was not required. Further, if Darley did not produce the required number of investors, Darley was not in breach of the Agreement; rather Darley either lost some of its exclusive area or lost the opportunity to acquire additional exclusive areas.

As such, there is insufficient evidence to conclude that the immediate production of twenty investors, even if promised by Stratmore, was reasonably relied upon by Hanul when deciding to contract with Darley. Actionable misrepresentations have not been proven.

//////

D. Did Darley Breach the Agreement?

Hanul contends that, after making the Agreement, Darley breached it by not securing the number of investors required by the Agreement. This claim is also rejected. The Agreement ended in mid-January of 2008, and, as of that time, there were no performance goals Darley needed to meet. The first deadline was five months following the making of the Agreement, i.e., by March 18, 2008.

Also, our evidence revealed that Darley had received only one project to market (the Tilapia project), and this project was withdrawn by SDIBI shortly after launch. Darley could not be in breach for failing to find investors for non-existent projects.

Also, to the extent that Hanul might be arguing an anticipatory breach by Darley, that argument does not comport with our facts. An anticipatory breach arises when one party deliberately engages in conduct that makes that party's future performance of the contract impossible. Here, we have no evidence that Darley took actions that made his performance impossible. Even if Darley's sub-agents defected because they no longer liked the terms of their agreements with Darley, that defection cannot be considered an action by Darley to make its own performance impossible.

In sum, there is no evidence that Darley breached the Agreement during the ninety days that it was in effect. Hanul's claims of breach of contract are rejected.

E. Did SDIBI Breach the Agreement By Not Providing Recruitment Projects, or by Contacting Darley's Chinese Sub-Agents?

In addition to claiming that SDIBI wrongfully ended its exclusive marketing arrangement with Hanul [discussed above in Section IV(A)], Darley claims other contract breaches by SDIBI: (1) not timely providing materials for the Tilapia project; (2) withdrawing that project; (3) not furnishing marketing materials for any subsequent project; and (4) doing business with Darley's Chinese sub-agents.

Before examining these claimed breaches, a brief discussion of SDIBI's status as a party to the Agreement is necessary.

1. Was SDIBI a party to the Agreement?

SDIBI/Board of Regents assert that SDIBI was not a party to the Agreement, and request that the undersigned so rule. The invitation is respectfully declined.

Darley, in its initial demand for arbitration as well as in its Amended Claims, alleged that SDIBI was a party to the Agreement. SDIBI resisted arbitration, asserting that it was not a party to that Agreement. Darley then moved to compel SDIBI to arbitrate "pursuant to written contract," first in Federal Court and subsequently in State Court. Although no final order was made in the federal court, the Los Angeles County Superior Court granted Darley's motion and ordered SDIBI to arbitrate.

In ordering SDIBI to arbitrate, the Superior Court found, *inter alia*: “that respondent [SDIBI] is an appropriate legal entity” in the proceeding, “that [ordering] arbitration is proper under simple principles of contract and agency,” in that Bollen “was authorized to act on behalf of respondent [SDIBI]” and “[b]y arranging and facilitating the Darley-Hanul agreement [Bollen] acted within the scope of his role as director [of SDIBI]” and “that respondent [SDIBI] has received a benefit from the contract. [And that] Respondent’s actions show an affirmation of the agreement.”

In making these determinations, the Superior Court obviously had to consider the Agreement as a whole; the arbitration provision was not contained in a separate document, and the Court was not asked to determine whether SDIBI had affirmed portions of the Agreement. Rather, the Court found “an affirmation of *the agreement*.”

Once the Superior Court determined that SDIBI was a party to the Agreement, and thus ordered SDIBI to participate in this arbitration, the undersigned was without jurisdiction to revisit and reverse that determination:

“An arbitrator has no power to determine rights and obligations of one who is not a party to the arbitration agreement. Therefore, a trial court must first determine the status of a person who demands arbitration under a contract that he or she did not sign (or against whom arbitration is sought to be enforced).” Knight, et al., Cal. Prac. Guide: Alternative Dispute Resolution (The Rutter Group 2013) at ¶ 5:287, citing to *American Builder’s Ass’n v. Au-Yang* (1990) 226 Cal.App.3d 170, 179; *Smith v. Microskills San Diego L.P.* (2007) 153 Cal.App.4th 892, 900; *M & M Foods, Inc. v. Pacific American Fish Co., Inc.* (2011) 196 Cal.App.4th 554, 561. See also, *Winter v. Window Fashion Professionals* (2008) 166 Cal.App.4th 943, 948: “. . . a court must still consider one type of challenge to the overall contract, i.e., a claim that the party resisting arbitration never actually agreed to be bound.” (citing *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1284).

If this were not the rule, a circular process would result. For example, if the undersigned revisited the issue of whether SDIBI was a party to the Agreement, and ruled that it was not, by virtue of making that determination the undersigned will have found that he had no jurisdiction over any of SDIBI’s affairs in the first place. As noted in *Will-Drill Resources, Inc. v. Samson Resources Co.* (5th Cir. 2003) 352 F.3d 211, 219, “. . . where the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator *never* had any authority to decide the issue. . . . We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute.” [italics in original]

SDIBI/Board of Regents nonetheless argue that the evidence presented to the Superior Court was incomplete, and that if the Superior Court had been provided more information, it likely would have reached a different result. That argument, which in

essence is a request for reconsideration, is best addressed to the court making the ruling. If an award is entered against SDIBI in this arbitration, and confirmation is sought, at that time SDIBI can challenge the correctness of the Superior Court's order compelling SDIBI to arbitrate: "Under state law, an order compelling arbitration is *not* immediately appealable. An appeal lies only from the ultimate *judgment confirming* the arbitrator's award. *State Farm Fire & Cas. v. Hardin* (1989) 211 Cal.App.3d 501, 506; *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088-1089; *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1122." Knight, et al., Cal. Prac. Guide: Alternative Dispute Resolution (The Rutter Group 2013) at ¶ 5:337.15 (italics in original).

Accordingly, the undersigned will not review the Superior Court's determination that SDIBI is a party to the Agreement.

2. Did SDIBI Prevent Darley from Recruiting Investors?

Darley argues that SDIBI breached the Agreement by engaging in conduct that prevented it for securing investors, i.e., by not timely providing marketing materials for the Tilapia project, by withdrawing that project, and by not providing any other projects to market.

These claims of breach must be rejected. It was Hanul's responsibility to prepare and forward the Tilapia marketing materials to Darley, and there was no evidence that SDIBI impeded Hanul's ability to do that. And, even if these materials had been SDIBI's responsibility, any delay in forwarding them did not cause Darley to lose potential investors; the withdrawal of the entire project was the cause. Further, the withdrawal was due to previously-unknown financial issues involving the owner of the fish farm; there was nothing improper about SDIBI withdrawing that project once this problem surfaced. And, finally, once the Tilapia project was withdrawn, the next project (Dakota Provisions) was not ready for active marketing during the remaining time of the Agreement, i.e., before mid-January of 2008

3. Did SDIBI Breach the Agreement by Dealing with Darley's Sub-Agents?

Darley also argues that SDIBI breached the Agreement by conducting business with his sub-agents, both during the Agreement and within two years after its termination. There is little doubt from our evidence that Bollen, while acting on behalf of the SDIBI-DEDR (via SDRC, Inc.), held discussions with Darley's Chinese sub-agents, that these discussions began as early as January of 2008, and that they culminated in SDRC, Inc. using some of Darley's sub-agents to market SDIBI projects in China.

In response to this claim, SDIBI first argues that these communications did not violate the Agreement, as Darley's sub-agents initiated the discussions by approaching Bollen and complaining about Darley's fee arrangement. However, even if this version of the events is accepted, under the terms of the Agreement it makes no difference which party approaches the other; it is the "conduct of business" that is prohibited.

However, SDIBI also argues that this “conduct no business” prohibition is contrary to California law. SDIBI is correct in this argument; the undersigned is satisfied that California law, which applies to our Agreement, precludes enforcement of these provisions. Bus. & Prof. Code § 16600; *Edwards v. Arthur Anderson, LLP* (2008) 44 Cal.4th 937; *SriCom, Inc. v. eBisLogic, Inc.* (N.D. Cal 2012) 2012 WL 4051222.

For these reasons, Darley’s breach of contract claims against SDIBI are rejected.

F. SDIBI/Board of Regents’ Counter-Claims:

The bulk of SDIBI/Board of Regents’ counter-claims can be disposed of fairly straightforwardly based on the above findings and conclusions:

1. Implied Contractual Indemnity From Hanul:

If SDIBI is found liable for breach of contract, SDIBI/Board of Regents argue that this breach would have been due to Hanul’s wrongful actions, and thus seek implied contractual indemnity from Hanul. As SDIBI has not been found liable to Darley for breach of contract, this claim becomes moot.

2. Breach of Fiduciary Duty By Hanul:

On this claim, the Board of Regents argues that “[i]f Hanul purported to act as an attorney for the Board of Regents when contracting with Darley, then it breached various attorney-client based fiduciary duties [Hanul owed to this client].” (Amended Closing Brief at page 12). However, as Hanul has not claimed that it was acting as an attorney for the Board of Regents when it made the Agreement with Darley, this claim also becomes moot.¹²

3. Did Hanul and Darley Conspire Against the Board of Regents?

The Board of Regents also contends that Hanul and Darley conspired to “avoid the authority of the Board of Regents and NSU by contracting to unlawfully convey exclusive marketing rights to Darley when they knew that Hanul was not empowered to award Darley such rights . . .” (Amended Closing Brief at page 14).

However, as discussed above, when making the Agreement, Hanul and Darley did not attempt to convey to Darley anything that Hanul did not possess. The Agreement recognized that the working relationship between SDIBI and Hanul included an unofficial component under which SDIBI used Hanul as its exclusive marketer of projects. Despite Darley’s request, the Agreement did not change the unofficial nature of that arrangement or imply that Hanul had official rights. Rather, the Agreement merely stated that as long as SDIBI continued to honor that informal arrangement (and thus give

¹² Whether the Hanul Professional Law Corporation, when providing legal services to, and engaging in business transactions with, SDIBI, Bollen, and SDRG, Inc., complied with the Code of Professional Responsibility with regard to those clients, was not an issue presented to the undersigned for resolution.

projects to Hanul to market), Hanul would use Darley as a sub-marketer in certain territories, and use only Darley in certain of those territories.

As such, the conspiracy claim is rejected.

V. PARTIAL FINAL AWARD (PHASE I - LIABILITY)

Based on the above findings and conclusions, a Partial Final Award is hereby entered on the Phase I liability issues as follows:

All claims and counter-claims made in this matter are hereby denied, and no party is to take anything by way of its claims or counter-claims against any of the other parties.

No determination is made at this juncture as to whether any party is a prevailing party in this matter; see below.

VI. FURTHER PROCEEDINGS

Given the above, a Phase II hearing on damages becomes unnecessary.

The Agreement makes an award of attorneys' fees and costs discretionary with the arbitrator:

"The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party." Agreement at ¶13(B).

Given our underlying facts, the procedural history of this arbitration, and the determinations made in this Partial Final Award, the undersigned requests that counsel meet and confer and determine whether, with the consent of their clients, this matter could not be concluded at this juncture, with each party bearing its own fees and costs, and without incurring the time and additional expense of seeking a determination of which party or parties are the true prevailing parties, and whether any party, even if prevailing, should be awarded attorneys' fees and costs.

DATED: September 29, 2014.



Hon. Robert A. Baines
Judge of the Superior Court (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Darley International, LLC vs. Hanul Professional Law Corporation
Reference No. 1100054680

I, Cynthia Victory, not a party to the within action, hereby declare that on October 06, 2014 I served the attached Partial Final Award (Phase I – Liability) on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Jose, CALIFORNIA, addressed as follows:

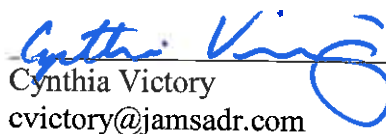
Maxwell M. Blecher Esq.
Jennifer Sabrina Elkayam Esq.
Blecher Collins Pepperman & Joye, P.C.
515 S. Figueroa St.
Suite 1750
Los Angeles, CA 90071
Phone: 213-622-4222
mblecher@blechercollins.com
jelkayam@blechercollins.com
Parties Represented:
Darley International, LLC

Austin Kim Esq.
Hanul Professional Law Corporation
2677 N. Main St.
Ste 1070
Santa Ana, CA 92705
Phone: 714-347-0008
austinkim@hnhplc.com
Parties Represented:
Hanul Professional Law Corporation

Alex M. Cha Esq.
L/O Alex Cha
3435 Wilshire Blvd
Suite 2000
Los Angeles, CA 90010
Phone: 213-351-3513
alexmyungcha@yahoo.com
Parties Represented:
Hanul Professional Law Corporation

Chaka C. Okadigbo Esq.
Garcia, Hernandez, Sawhney & Bermudez, LLP
700 N. Central Ave.
Suite 570
Glendale, CA 91203
Phone: 213-347-0210
cokadigbo@ghsblaw.com
Parties Represented:
South Dakota Board of Regents
South Dakota International Business Institute

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose, CALIFORNIA on October 06, 2014.


Cynthia Victory
cvictory@jamsadr.com