



TABLE OF CONTENTS

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

Page

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 2

III. ARGUMENT ..... 6

    A. Legal Standard ..... 6

    B. SDIBI Can Be Compelled to Arbitrate ..... 8

    C. SDIBI Is Required to Arbitrate Because It Was a  
    Third-Party Beneficiary of the October 18, 2007  
    Agreement ..... 8

    D. SDIBI Is Required to Arbitrate Under Principles of  
    Equitable Estoppel ..... 10

    E. Darley Should Receive Attorney Fees and Costs  
    in Connection with This Petition to Compel Arbitration ..... 12

IV. CONCLUSION ..... 12

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1 Metalclad Corp. v. Ventana Envtl. Organizational P'ship, ..... 7  
 2     109 Cal. App. 4th 1705 (2003)

3 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., ..... 7  
 4     473 U.S. 614, 105 S. Ct. 3346 (1985)

5 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., ..... 7  
 6     460 U.S. 1, 103 S. Ct. 927 (1983)

7 Thomson-CSF, S.A. v. American Arbitration Ass'n, ..... 7, 8  
 8     64 F.3d 773 (2d Cir. 1995)

9 Trans-Tec Asia v. M/V Harmony Container, ..... 8  
 10     435 F. Supp. 2d 1015 (C.D. Cal. 2005), *aff'd in part,*  
 11     *rev'd in part on other grounds,* 518 F.3d 1120 (9th Cir. 2008)

**STATUTES**

10 9 U.S.C. §§ 1-14 ..... 7

11 9 U.S.C. § 4 ..... 12

**MISCELLANEOUS**

13 1 B. E. Witkin, Summary of California Law Contracts ..... 9  
 14     § 655 (9th ed. 1987)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Petition asks the Court to decide a single issue: whether  
4 Respondent the South Dakota International Business Institute ("SDIBI" or  
5 "Respondent") must be compelled to participate in the existing arbitration  
6 between Petitioner Darley International, Inc. ("Darley") and Hanul  
7 Professional Law Corporation ("Hanul") currently pending in San Francisco,  
8 California. The answer is clearly "yes."

9 The genesis of this dispute arises out of an October 18, 2007 written  
10 Overseas Recruitment and Service Agreement ("Agreement") executed by  
11 Robert D. Stratmore ("Stratmore") as President of Darley and Si Il Jang,  
12 Esq. on behalf of Hanul. Respondent SDIBI, a non-profit organization, is  
13 responsible for recruiting and attracting foreign investment to South  
14 Dakota. SDIBI utilizes the U.S. EB-5 investor visa as a means to attract  
15 foreign investment to South Dakota's dairy and meat packing industries.  
16 The EB-5 investor visa grants United States residency rights to foreign  
17 nationals in exchange for a \$500,000 investment in an commercial  
18 enterprise located in areas designated by the federal government as a  
19 "regional center." In June 2004, SDIBI received regional center status for a  
20 contiguous 45-county area of South Dakota.

21 The subject Agreement appoints Petitioner Darley to act as an  
22 exclusive independent contractor for the purpose of recruiting foreign  
23 nationals seeking permanent resident status, i.e. an EB-5 investor visa, to  
24 invest in the approved projects/commercial enterprises located within  
25 SDIBI's designated regional center. Darley fully performed under the  
26 Agreement and recruited 30 investors with definite and concrete interest in  
27 investing in SDIBI's EB-5 projects. Hanul and SDIBI, however, failed to  
28 provide Darley with critical information and materials necessary to

1 successfully recruit investors for SDIBI's projects. This failure directly  
2 resulted in the loss of investors and, in turn, the loss of substantial service  
3 fees to Darley.

4 Pursuant to the express provisions of the Agreement, Darley  
5 initiated mandatory arbitration proceedings against Hanul and Respondent  
6 SDIBI seeking damages for, among other things, breach of contract.  
7 Hanul has properly submitted to the arbitration proceedings. Respondent  
8 SDIBI has refused, and continues to refuse, to participate in the arbitration  
9 on the alleged grounds that it is not a signatory to the Agreement.

10 As set forth below, Respondent SDIBI's position is simply without  
11 merit. SDIBI is clearly a direct and intended third-party beneficiary under  
12 the Agreement. Indeed, the entire purpose of the Agreement was to  
13 benefit SDIBI by recruiting foreign investors to invest in the approved EB-5  
14 projects located within its designated regional center. For the reasons  
15 herein, SDIBI should be ordered to participate in the arbitration  
16 proceedings between Darley and Hanul.

17 **II. STATEMENT OF FACTS**

18 This dispute arises out of an agreement between a law firm Hanul  
19 and an international consulting company Darley. Darley provides a variety  
20 of international business services that include representing, advising and  
21 consulting commercial and governmental clients worldwide. (Declaration of  
22 Robert D. Stratmore ("Stratmore Decl."), filed concurrently herewith, ¶ 2.)  
23 Robert D. Stratmore, Esq. ("Stratmore") is the President and founder of  
24 Darley. (Stratmore Decl. ¶ 2.)

25 Respondent South Dakota International Business Institute ("SDIBI")  
26 is a non-profit organization located in Aberdeen, South Dakota.  
27 (Declaration of Maxwell M. Blecher ("Blecher Decl."), filed concurrently  
28 herewith, Exh. 6.) Respondent SDIBI offers a variety of programs

1 designed to facilitate and promote international trade by and amongst  
2 South Dakota companies. Respondent SDIBI is also responsible for  
3 attracting and recruiting foreign investment to South Dakota. (Id.) SDIBI  
4 utilizes the employment-based EB-5 investor visa to attract foreign  
5 investment to South Dakota. (Id. Exh. 7 at 31.) The EB-5 investor visa  
6 grants legal permanent residence (green cards) to foreign nationals who  
7 will, indirectly or directly, create or save (generally) 10 full-time jobs by  
8 investing at least \$500,000 in a U.S. business in a designated "regional  
9 center." (Id. at 3-6) Regional centers, which must be approved by the  
10 federal government, are typically located in rural or high unemployment  
11 areas. (Id.) Entities applying for regional center status must demonstrate  
12 that investor funds will be used to support a specific area of industry or  
13 economic activity within the designated region center and that the  
14 investment will create permanent jobs for U.S. citizens. (Id.)

15 In June 2004, SDIBI became an approved regional center for a  
16 contiguous 45-county area in eastern South Dakota. (Id. Exh. 8.) SDIBI's  
17 regional center is focused on attracting investments that support its  
18 approved investment opportunities/projects within its regional center. (Id.  
19 Exh. 7 at 31.) The approved EB-5 commercial enterprises located within  
20 SDIBI's regional center are related to South Dakota's dairy and meat  
21 packing industries. (Id.) As such, foreign entrepreneurs seeking  
22 permanent resident status may apply for an EB-5 visa by making a  
23 minimum \$500,000 investment in one of the 13 commercial enterprises  
24 located within SDIBI's designated regional center.

25 Hanul Professional Law Corporation ("Hanul"), with offices in Seoul  
26 and Los Angeles, works closely with SDIBI to recruit foreign investors to  
27 South Dakota. (Id. Exh. 9.) Hanul has "unofficial" exclusive rights to  
28

1 market SDIBI's 13 EB-5 projects as well as provide the foreign investors  
2 with legal services relating to their visa applications. (Petition, Exh. 1 at 1.)

3 In or around July 2007, Stratmore, on behalf of Darley, contacted  
4 SDIBI about obtaining exclusive rights to recruit investors for its EB-5  
5 approved projects. (Stratmore Decl. ¶ 3.) Joop Bollen ("Bollen"), SDIBI's  
6 director, explained that Hanul had authority to appoint companies to recruit  
7 investor's for SDIBI's EB-5 projects on both an exclusive and non-exclusive  
8 basis vis-a vis certain geographic territories. (*Id.* ¶ 4.) Bollen directed  
9 Darley to contact James J. Park, Esq. ("Park"), a partner in Hanul's Los  
10 Angeles office. (*Id.*) By late August 2007, Darley and Hanul began  
11 negotiating the terms of an agreement that supported both parties' mutual  
12 efforts to promote and recruit investors solely for SDIBI's EB-5 projects.  
13 (*Id.* ¶ 6.) Although SDIBI did not sign the agreement, it played an active  
14 role in negotiating the terms of the contract between Hanul and Darley.  
15 (*Id.*) In fact, SDIBI was copied on virtually all correspondence between  
16 Darley and Hanul and specifically negotiated the terms of the Agreement  
17 relating to Darley's exclusivity rights with respect to particular territories  
18 designated in the Agreement. (*Id.*)

19 On October 18, 2007, Stratmore as President of Darley and Si Ill  
20 Jang, Esq., a Partner Attorney with Hanul, entered into an Overseas  
21 Recruitment and Service Agreement for U.S. EB-5 Permanent Residence  
22 Visa ("Agreement"), of which SDIBI was a direct third-party beneficiary.  
23 (See Petition, Exh. 1.) The Agreement contained an arbitration provision  
24 relating to claims arising under the Agreement. (*Id.*) Under the Agreement,  
25 Darley (and its international sub-agents) was appointed as an exclusive  
26 independent contractor to recruit foreign nationals from specified territories  
27 solely for SDIBI's approved EB-5 projects within its designated regional  
28 center. (*Id.* Exh. 1 at 1.) Darley was precluded from recruiting investors



1 for any other EB-5 program in the United States. (Stratmore Decl. ¶ 8.)  
2 Under the Agreement, Hanul was obligated to support Darley's marketing  
3 and recruitment efforts by, *inter alia*, providing Darley with information and  
4 materials, translating documents into Mandarin and English and  
5 processing visa applications for investors recruited by Darley. (See  
6 Petition, Exh. 1)

7 In accordance with the terms of the Agreement, Darley employed its  
8 best efforts to recruit qualified foreign nationals to invest in SDIBI's EB-5  
9 projects, namely SDIBI's "Tilapia" project. (Stratmore Decl. ¶ 9.) In  
10 December 2007, less than two months after the parties entered into the  
11 Agreement, Darley and its Chinese sub-agents conducted seminars in  
12 Beijing and Shanghai to recruit investors solely for SDIBI's Tilapia project.  
13 (Id.) Prior to the seminars, both Hanul and SDIBI promised that Hanul  
14 would provide Darley with the information necessary to conduct the  
15 seminars by November 2007 - one month prior to the Chinese seminars.  
16 (Id.) Hanul failed to do so. (Id.)

17 Despite the lack of project materials and information, Darley received  
18 a definite and concrete interest from 30 potential investors that attended its  
19 seminars. (Id. ¶ 10.) Darley, however, could not continue its recruitment  
20 process or help interested foreign nationals initiate the EB-5 visa  
21 application with the information from Hanul. (Id.)

22 Upon returning from China, Darley continued to request that Hanul  
23 and/or SDIBI provide the requisite documents so that its sub-agents could  
24 continue the recruitment process with respect to the 30 interested  
25 investors. (Id. ¶ 11.) Hanul and SDIBI again failed to provide the  
26 requested and required information. (Id.) In late December 2007, SDIBI  
27 informed Darley that it was withdrawing the SDIBI Tilapia project. (Id.) At  
28 this same time, SDIBI also established a separate entity to manage

1 relationships with overseas immigration agencies and recruit investors  
2 exclusively for SDIBI's EB-5 projects. (Id. ¶ 12.) This agency has become  
3 Hanul and SDIBI's exclusive agent/partner for recruiting investors to  
4 SDIBI's designated regional center. (Id.)

5 Hanul and SDIBI's failures caused Darley to lose credibility with its  
6 Chinese sub-agents, interfered with its business relationships, and  
7 drastically affected its ability to successfully recruit the interested investors.  
8 (Id. ¶ 13.) Indeed, Hanul's lack of diligence in providing Darley with the  
9 requested and required information and SDIBI's sudden withdrawal of the  
10 Tilapia project and creation of its own recruitment agency directly resulted  
11 in the loss of investors and substantial fees to Darley. (Id.)

12 Pursuant to the terms of the Agreement, Petitioner initiated  
13 arbitration against Hanul and SDIBI for breach of the Agreement. (Id. ¶  
14 15.) Although Hanul agreed to submit to arbitration, Respondent SDIBI  
15 has refused to submit arguing that it is not bound by the Agreement. (Id.)  
16 Petitioner now requests that the Court compel Respondent SDIBI to submit  
17 to the ongoing arbitration between Petitioner and Hanul.

18 **III. ARGUMENT**

19 **A. Legal Standard**

20 A court determines questions of arbitrability such as who is bound by  
21 an agreement's arbitration clause and the scope of that provision.  
22 Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588,  
23 592 (2002); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-46,  
24 115 S. Ct. 1920, 1924-25 (1995) (holding that a court should decide  
25 whether arbitration contract bound parties who did not sign it). The instant  
26 case is subject to the Federal Arbitration Act ("FAA"), which applies to  
27 written arbitration provisions in contracts *involving interstate or foreign*

28

1 *commerce*. 9 U.S.C. §§ 1-14. Here, the Agreement at issue involves  
2 international commerce and is subject to the FAA.

3 Under the FAA, the determination of whether Respondent Darley is  
4 bound by the Agreement's arbitration clause is governed by federal law.  
5 See International Paper Co. v. Schwabedissen Maschinen & Anlagen  
6 GMBH, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (because the determination  
7 of whether a nonsignatory is bound by a contract presents no state law  
8 question of formation or validity, courts look to the "federal substantive law  
9 of arbitrability" to resolve this question (citation omitted)); Mitsubishi  
10 Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.  
11 Ct. 3346, 3353-54 (1985); Metalclad Corp. v. Ventana Envtl. Organizational  
12 P'ship, 109 Cal. App. 4th 1705, 1712-13 (2003). The FAA and  
13 concomitant federal law establish a strong federal policy favoring  
14 arbitration agreements wherein any doubts concerning the scope of  
15 arbitrable issues should be resolved in favor of arbitration. Moses H. Cone  
16 Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927,  
17 941 (1983). The FAA's presumption in favor of arbitration "applies with  
18 special force in the field of international commerce." See Mitsubishi  
19 Motors, 473 U.S. at 631, 105 S. Ct. at 3356.

20 Respondent SDIBI contends that even if the Agreement at issue  
21 contains an arbitration clause, it cannot be enforced against it because it is  
22 not a party to the Agreement. As discussed below, nonsignatories have  
23 routinely been bound to arbitration clauses under a variety of  
24 circumstances. Matthau v. Superior Court, 151 Cal. App. 4th 593, 599  
25 (2007); Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773,  
26 776 (2d Cir. 1995). For example, a nonsignatory can be bound by an  
27 agreement to arbitrate under ordinary contract and agency principles.  
28 Thomson-CSF, 64 F.3d at 776.

1           **B. SDIBI Can Be Compelled to Arbitrate**

2           The decisional law interpreting the FAA provides that a nonsignatory  
3 can be bound by an arbitration agreement pursuant to ordinary principles  
4 of contract and agency law. "Among these principles are: '1) incorporation  
5 by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5)  
6 estoppel.'" Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006)  
7 (quoting Thomson-CSF, 64 F.3d at 776); see Fisser v. International Bank,  
8 282 F.2d 231, 233 n.6 (2d Cir. 1960). Arbitration agreements can also be  
9 enforced against nonsignatory third-party beneficiaries. Trans-Tec Asia v.  
10 MV Harmony Container, 435 F. Supp. 2d 1015, 1030 (C.D. Cal. 2005); E.I.  
11 DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates.  
12 S.A.S. 269 F.3d 187, 195 (3d Cir. 2001).<sup>1</sup>

13           As discussed below, Respondent SDIBI must be compelled to  
14 arbitrate because it was an intended third-party beneficiary of the  
15 Agreement between Darley and Hanul.

16           **C. SDIBI Is Required to Arbitrate Because It Was a Third-Party**  
17 **Beneficiary of the October 18, 2007 Agreement**

18           SDIBI is bound to the provisions of the Agreement because it was an  
19 intended third-party beneficiary of Darley and Hanul's October 18, 2008  
20 Agreement. The law is well settled that third-party beneficiaries are treated  
21

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22           <sup>1</sup> Because the question of who is bound by an arbitration agreement  
23 involves the general law of contracts, courts applying the FAA, will look to  
24 state law for guidance as long as it does not conflict with the  
25 federal law favoring arbitration. Crowley Maritime Corp. v. Boston Old  
26 Colony Ins. Co., 158 Cal. App. 4th 1061, 1069-70 (2008). For example,  
27 under California law, a nonsignatory can be compelled to arbitrate: 1)  
28 where the nonsignatory is a third-party beneficiary of the contract  
containing the arbitration agreement; or 2) where a preexisting agency  
relationship existed between the nonsignatory and one of the signatory  
parties to the arbitration agreement, making it equitable to compel the  
nonsignatory to arbitration. County of Contra Costa v. Kaiser Foundation  
Health Plan, Inc., 47 Cal. App. 4th 237, 242 (1996); see Matthau, 151 Cal.  
App. 4th at 599-600. California law is plainly in accord with federal law.

1 as parties to the contract and are thus bound by its arbitration provisions.  
2 See E.I. Dupont de Nemours, 269 F.3d at 195; InterGen N.V. v. Grina, 344  
3 F.3d 134, 146 (1st Cir. 2003). California law is in accord. County of  
4 Contra Costa, 47 Cal. App. 4th at 242; Matthau, 151 Cal. App. 4th at 599-  
5 600. A third-party beneficiary is a beneficiary to a contract when the  
6 promisee intends to give the beneficiary the benefit of the promised  
7 performance. See Medical Staff of Doctors Med. Center in Modesto v.  
8 Kamil, 132 Cal. App. 4th 679, 685-86 (2005) (citing 1 B. E. Witkin,  
9 Summary of California Law Contracts § 655, at 594-95 (9th ed. 1987)).  
10 The language of the Agreement itself clearly establishes that SDIBI was  
11 the intended recipient and third-party beneficiary of Petitioner Darley's  
12 performance.

13 First, the object and purpose of the Agreement was to recruit foreign  
14 nationals to invest solely in SDIBI's EB-5 projects. (Petition, Exh. 1.)  
15 Paragraph 1(B) of the Agreement appoints Darley to recruit investors for  
16 the purpose of investing in SDIBI's approved EB-5 projects located within  
17 SDIBI's designated regional center. (Id.) The appointment of Darley and  
18 its sub-agents satisfied both the object and purpose of the Agreement.

19 Second, the language of the Agreement itself evinces the requisite  
20 intent to make SDIBI a third-party beneficiary. Specifically, the Agreement  
21 provides that Darley was obligated to market and recruit investors for  
22 SDIBI's projects. (Id. Exh. 1 at 1, 4-5.) Darley was also required to explain  
23 all relevant aspects and benefits of SDIBI's investment opportunities to  
24 qualified foreign national seeking permanent resident status in the United  
25 States. (Id.) SDIBI via Hanul was obligated to provide Darley with  
26 information and documentation necessary to support Darley's marketing  
27 and recruitment efforts. (Id. at 1-3.) The Agreement makes no mention of  
28 any other EB-5 projects or programs other than those associated solely

1 with SDIBI and located within its designated regional center. Accordingly,  
2 it is clear that the Agreement was made for SDIBI's benefit.

3 Third, the circumstances surrounding the Agreement also indicate  
4 the parties' (Darley and Hanul) intentions to give SDIBI the benefit of their  
5 performance. At the time the parties entered into the Agreement, Darley  
6 was interested in forming a partnership or joint venture with an EB-5  
7 regional center for the purpose of obtaining exclusive rights to recruit  
8 foreign investors for its approved EB-5 projects. (Stratmore Decl. ¶ 9.)  
9 SDIBI immediately directed Darley to contact Hanul about obtaining  
10 recruitment rights for the EB-5 projects located within its regional center.  
11 (Id.) Darley entered into an Agreement with Hanul based on the close  
12 relationship and inextricable link between Hanul and SDIBI. In fact, Hanul  
13 is listed on SDIBI's website as its partner entity with respect to the SB-5  
14 program.

15 Further, the activities that formed the basis for the Agreement, i.e.  
16 recruiting investors solely for SDIBI, not Hanul, also demonstrates the  
17 parties intent to make intent to make SDIBI a third-party beneficiary.  
18 Finally, SDIBI's voluntary acceptance of Darley's efforts under the  
19 Agreement constitutes consent to all the obligations arising from it. See  
20 Harris v. Superior Court, 188 Cal. App. 3d 475, 479 (1986). Accordingly,  
21 SDIBI should be compelled to arbitrate because of its status as a third-  
22 party beneficiary of the October 18, 2007 Agreement.

23 **D. SDIBI Is Required to Arbitrate Under Principles of**  
24 **Equitable Estoppel**

25 Similarly, equitable estoppel also requires that SDIBI also be  
26 compelled to arbitrate. SDIBI cannot receive the benefits of the Agreement  
27 and subsequently reject its arbitration clause. Nonsignatories, such as  
28 SDIBI, are bound by a contract's arbitration clause when they obtain a

1 “direct” benefit flowing from the underlying contract. MAG Portfolio  
2 Consult, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58, 61 (2d Cir.  
3 2001); see also International Paper, 206 F.3d at 418 (“A nonsignatory is  
4 estopped from refusing to comply with an arbitration clause ‘when it  
5 receives a “direct benefit” from a contract containing an arbitration clause.’”  
6 (citation omitted)); Amkor Tech., Inc. v. Alcatel Bus. Sys., 278 F. Supp. 2d  
7 519, 521-23 (E.D. Pa. 2003). Under this theory, courts prevent a  
8 nonsignatory from embracing a contract, and then turning its back on the  
9 portions of the contract, such as an arbitration clause, that it finds  
10 distasteful. American Bureau of Shipping v. Tencara Shipyard S.P.A., 170  
11 F.3d 349, 353 (2d Cir. 1999); International Paper, 206 F.3d at 418  
12 (allowing a nonsignatory “to claim the benefit of the contract and  
13 simultaneously avoid its burdens would both disregard equity and  
14 contravene the purposes underlying enactment of the [FAA]” (citation  
15 omitted)).

16 SDIBI clearly received “direct benefits” flowing from the underlying  
17 Agreement. For example, the Agreement provided that, in return for  
18 Hanul’s promise to provide Darley with the requisite materials and  
19 documents to support its obligations under the Agreement, Darley had  
20 exclusive rights to market and recruit investors for SDIBI’s EB-5 projects in  
21 specific territories designated in the Agreement. During the term of the  
22 Agreement, Darley conducted two seminars in China (Beijing and  
23 Shanghai) specifically to market, promote and recruit investors for SDIBI’s  
24 Tilapia project. (Stratmore Decl. ¶ 9.) Darley regularly communicated with  
25 and consulted SDIBI about its efforts to recruit investors on its behalf. (Id.)  
26 SDIBI received and accepted direct benefits from the Agreement and,  
27 consequently should be equitably estopped from refusing to arbitrate  
28 Petitioner’s claims against it.

1           **E. Darley Should Receive Attorney Fees and Costs in**  
2           **Connection with This Petition to Compel Arbitration**

3           A court may award attorney fees pursuant to an arbitration provision  
4 that imposes fees against a party who unsuccessfully resists efforts to  
5 compel arbitration. See Acosta v. Kerrigan, 150 Cal. App. 4th 1124, 1132  
6 (2007). Paragraph 13(B) of the Agreement provides, in pertinent part, that

7                     This [arbitration] clause shall not preclude parties  
8                     from seeking provisional remedies in aid of  
9                     arbitration from a court of appropriate jurisdiction.

10          Moreover, the court may make the fee award *before* the arbitrator  
11 determines the merits of the claim. Id.

12          **IV. CONCLUSION**

13                 Pursuant to 9 U.S.C. § 4 of the FAA, Petitioner respectfully requests  
14 that the Court compel Respondent SDIBI to submit the current controversy  
15 to arbitration consistent with the October 18, 2007 Overseas Recruitment  
16 Agreement.

17          Dated: July 30, 2008

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