

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

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CLERK

TENTEXKOTA, LLC, MARC OSWALD,
DALE MORRIS, TIMOTHY CONRAD,
MICHAEL GUSTAFSON, GEORGE
MITCHELL, RONALD WHEELER, W.
KENNETH ALPHIN, DWIGHT WILES,
DEADWOOD INVESTMENTS, LLC,
ORIGINAL DEADWOOD PARTNERS,
LLC, DIVISION STREET PARTNERS,
LLC, DOUBLE BAR X RANCH, LLC,
DEADWOOD INVESTMENTS, LLC,

Plaintiffs,

v.

JOOP BOLLEN, SDRC, INC., a South
Dakota Corporation, SDIF LIMITED
PARTNERSHIP 2, a South Dakota Limited
Partnership, SD INVESTMENT FUND
LLC2, a South Dakota Limited Liability
Company, John Doe 1-75.

Defendants.

CIV. 16-5101

**COMPLAINT
-AND-
DEMAND FOR JURY TRIAL**

The Plaintiffs, Tentexkota, LLC, Marc Oswald, Dale Morris, Timothy Conrad, Michael Gustafson, George Mitchell, Ronald Wheeler, W. Kenneth Alphin, Dwight Wiles, Deadwood Investments, LLC, Original Deadwood Partners, LLC, DJDW, LLC, Double Bar X Ranch, LLC, Deadwood Investments, LLC, by and through their counsel and for their claims against the above-named Defendants, hereby state and allege as follows:

PARTIES

1.

Plaintiff Tentexkota is a South Dakota Corporation with its principle place of business in Deadwood, South Dakota.

2.

Plaintiff Marc Oswald is a resident of Tennessee.

3.

Plaintiff Dale Morris is a resident of Tennessee.

4.

Plaintiff Timothy Conrad is a resident of South Dakota.

5.

Plaintiff Michael Gustafson is a resident of South Dakota.

6.

Plaintiff George Mitchell is a resident of South Dakota.

7.

Plaintiff Ronald Wheeler is a resident of South Dakota

8.

Plaintiff W. Kenneth Alphin is a resident of Tennessee.

9.

Plaintiff Dwight Wiles is a resident of Tennessee.

10.

Plaintiff Deadwood Investments, LLC, is a limited liability company with its principal place of business in Nashville, Tennessee.

11.

Plaintiff Original Deadwood Partners, LLC, is a limited liability company with its principal place of business in Rapid City, South Dakota.

12.

Plaintiff Division Street Partners, LLC, is a limited liability company with its principal place of business in Nashville, Tennessee.

13.

Plaintiff Double Bar X Ranch, LLC, is a limited liability company with its principal place of business in Rapid City, South Dakota.

14.

To the best of Plaintiff's knowledge, Defendant Joop Bollen is, and at all times relevant hereto was, a resident of Aberdeen, South Dakota.

15.

Defendant SDRC, Inc., is a South Dakota corporation with its principal place of business in South Dakota.

16.

Defendant SDIF Limited Partnership 2, is a South Dakota limited partnership with its principal place of business in South Dakota.

17.

Defendant SD Investment Fund LLC², is a South Dakota limited liability company with its principal place of business in South Dakota.

JURISDICTION AND VENUE

18.

Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1331 based upon federal question jurisdiction.

19.

Venue exists in this District pursuant to 28 U.S.C. 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTS

Relevant requirements of EB-5

20.

The United States Congress established the EB-5 Program in 1990 to bring new investment capital into the country and to create new jobs for U.S. workers. The EB-5 Program is based on our nation's interest in creating and preserving needed jobs for U.S. workers by promoting the immigration of people who invest their capital in new, restructured, or expanded businesses and projects in the United States.

21.

In the EB-5 Program, immigrants who invest their capital in job-creating businesses and projects in the United States receive conditional permanent resident status in the United States for a two-year period. After two years, if the immigrants have satisfied the conditions of the EB-5 Program and other criteria of eligibility, the conditions are removed and the immigrants become unconditional lawful, permanent residents of the United States.

22.

The EB-5 Program is based on four main elements: (1) the immigrant's investment of capital, (2) in a new commercial enterprise, (3) that creates jobs, (4) which must be at risk.

23.

The EB-5 Program is based in part upon the fact that the United States economy will benefit from an immigrant's contribution of capital. It is also based on the view that the benefit to the U.S. economy is greatest when capital is placed at risk and invested into a new commercial enterprise that, as a result of the investment, creates at least ten jobs for U.S. workers.

24.

EB-5 program regulations provide that in order to qualify as a valid investment in the EB-5 Program, the immigrant investor must actually place his or her capital "at risk" for the purpose of generating a return. For the capital to be "at risk" there must be a risk of loss and a chance for gain. *See* 8 C.F.R. 204.6.

25.

If the immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not at risk. *Matter of Izummi*, 22 I&N Dec. 169, 180-88.

26.

If the agreement between the new commercial enterprise and immigrant investor, such as a limited partnership agreement or operating agreement, provides that the investor may demand return of or redeem some portion of capital after obtaining conditional lawful permanent resident status, that portion of the capital is not at risk.

27.

An investment cannot be considered a qualifying contribution of capital at risk to the extent of a guaranteed return. *Izummi* at 184.

28.

The immigrant investor must invest at least \$1,000,000 in capital in a new commercial enterprise that creates not fewer than ten jobs. An exception exists if the immigrant investor invests capital in a new commercial enterprise that is principally doing business in, and creates jobs in, a targeted employment area that is a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate. In such case, the immigrant investor must invest a minimum of \$500,000 in capital.

29.

Upon information and belief, South Dakota qualifies as a targeted employment area.

South Dakota Regional Center, also known as SDRC

30.

Defendant SDIBI is a non-profit organization located in Aberdeen, South Dakota. SDIBI offers a variety of programs designed to facilitate and promote international trade by and amongst South Dakota companies. SDIBI is also responsible for attracting and recruiting foreign investment to South Dakota.

31.

In or about January 1994, Northern State University founded SDIBI.

32.

In or about January 1994, Defendant Joop Bollen was hired by Northern State University as the director of SDIBI.

33.

The EB-5 investor visa grants legal permanent residence to foreign nationals who, indirectly or directly, create or save 10 full-time jobs by investing at least \$500,000 in a U.S. business in a designated “regional center.”

34.

Regional centers, which must be approved by the federal government, are typically located in rural or high unemployment areas. Entities applying for regional center status must demonstrate that investor funds will be used to support a specific area of industry or economic

activity within the designated regional center, and that the investment will create permanent jobs for U.S. citizens.

35.

Upon information and belief, SDIBI became an approved regional center for a contiguous 45-county area in eastern South Dakota in or about June 2004.

36.

The regional center at SDIBI was called South Dakota Regional Center (hereinafter "SDRC").

37.

SDRC is focused on attracting investments that support approved investment opportunities/projects within its regional center.

38.

SDRC utilizes the employment-based EB-5 investor visa to attract foreign investments to South Dakota.

Formation of SDRC, Inc.

39.

Joop Bollen testified on or about April 16, 2014, that SDRC could not enter into agreements with foreign investors.

40.

On or about January 10, 2008, Joop Bollen incorporated SDRC, Inc. for the purpose of entering into agreements with investors and entities.

41.

Joop Bollen testified on or about April 16, 2014, that he was the part-owner and manager of SDRC, Inc. SDRC, Inc.'s Annual Report filed with the South Dakota Secretary of State in 2016, documents Joop Bollen as the registered agent and President of the corporation.

Formation of SDIF Limited Partnership 2

42.

Under his power as owner and manager of SDRC, Inc., Joop Bollen began creating limited partnerships in January 2008.

43.

SDIF Limited Partnership 2 was incorporated January 10, 2008. Joop Bollen has at all times relevant been the registered agent of SDIF Limited Partnership 2. The Domestic Certificate of Limited Partnership for SDIF Limited Partnership 2 lists the sole general partner as SD Investment Fund LLC2.

Formation of SD Investment Fund LLC2

44.

On or about January 10, 2008, SD Investment Fund LLC2 was incorporated. Joop Bollen has at all times relevant been the registered agent and manager of SD Investment Fund LLC2.

45.

SD Investment Fund LLC2 is the general partner of SDIF Limited Partnership 2.

Tentexkota, LLC

46.

Tentexkota, LLC, was incorporated in 2006. Tentexkota was founded to rehabilitate the historic Homestake Mining Co. in Deadwood, South Dakota, into a casino, bar, restaurant and entertainment events center capable of holding conventions and events for up to 2,500 people (“hereinafter “The Project”). The Homestake Mining Co. is also known as the “gold processing plant” or “slime plant”. The finished project was to be named the Deadwood Mountain Grand Event Center and Casino.

47.

To begin The Project, \$6,000,000.00 was invested by the members of TenTexKota and \$1,700,000.00 was received as a Historical Preservation Grant for a total of \$7,700,000.00 to start construction.

Actions of Joop Bollen

48.

In 2009, Tentexkota was in contact with Defendant Joop Bollen as director of SDIBI in regards to EB-5. On or about September 1, 2009, Tentexkota confirmed its commitments to working with SDIBI to obtain an EB-5 Program loan for The Project.

49.

Defendant Bollen represented to Tentexkota that personal guarantees were required to receive and secure EB-5 funds.

50.

Upon information and belief, at all times relevant, Defendant Bollen knew that the alien investment funds must be placed “at risk” under 8 C.F.R. 204.6.

Documents signed in reliance upon the actions of Joop Bollen

51.

On or about April 21, 2010, two Tentexkota members signed personal guarantees and pledge agreements.

52.

On or about April 22, 2010, four Tentexkota members signed personal guarantees and pledge agreements.

53.

On or about April 23, 2010, one Tentexkota member signed a personal guarantee and pledge agreement.

54.

On or about April 28, 2010, the managing member of Tentexkota signed a promissory note, credit agreement, security agreement, pledge agreement, collateral assignment and mortgage.

55.

On or about April 29, 2010, Joop Bollen as general partner of SDIF limited partnership 2 signed a credit agreement, security agreement and pledge agreement.

56.

On or about April 1, 2011, two members of Tentexkota signed a second guaranty and pledge agreement.

57.

On or about April 4, 2011, Tentexkota signed a consent to take action authorizing the borrowing of an additional \$4,500,000.00 from SDIF LP 2.

58.

On or about April 4, 2011, one member of Tentexkota signed a second guaranty and pledge agreement.

59.

On or about April 5, 2011, one member of Tentexkota signed a second guaranty and pledge agreement.

60.

On or about April 2011, two members of Tentexktoa signed a second guaranty and pledge agreement.

61.

On or about July 6, 2011, two members of Tentexkota signed a second guaranty and pledge agreement.

62.

On or about February 14, 2012, Tentexkota signed a new Mortgage-180 day redemption, security agreement and financing statement.

63.

Defendants sent their notice of default to Plaintiffs in a letter dated May 11, 2016.

Alien Investors

64.

Upon information and belief, sixty-five aliens provided funds to Tentexkota through the EB-5 visa program.

65.

Upon information and belief, all sixty-five aliens have been granted permanent American citizenship, or are in the process of receiving conditional lawful permanent resident status as a result of their participation in the EB-5 program.

COUNT I

Declaratory Judgment Action Under SDCL § 53-9-1

66.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

67.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the personal guarantees and pledge agreements signed by the Plaintiffs are void.

68.

“A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful.” SDCL § 53-9-1.

69.

An unlawful contract is “void, not voidable” and “[a] void contract is invalid or unlawful from its inception. It is a ‘mere nullity, and incapable of confirmation or ratification.’” *Nature’s 10 Jewelers v. Gunderson*, 2002 SD 80, ¶12, 648 N.W.2d 804, 807 (*citng* Black’s Law Dictionary at 1573 (6th ed. 1990)).

70.

Under 8 C.F.R. 204.6, the investment by the immigrant alien must be placed “at risk”.

71.

The personal guarantees and pledge agreements signed by members of Tentexkota, provide a secured return on the EB-5 funds, thereby violating the “at risk” requirement of 8 C.F.R. 504.6.

72.

By providing a guaranteed return of funds, the personal guarantees are expressly prohibited by 8 C.F.R. 204.6 and are therefore unlawful under SDCL § 53-9-1.

73.

Accordingly, Plaintiffs seek this Court’s declaration that the personal guarantees and pledge agreements are void as they are in violation of 8 C.F.R. 504.6 and are therefore void under SDCL 53-9-3 and as against public policy.

COUNT II

Declaratory Judgment Action Regarding lack of Consideration

74.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

75.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the personal guarantees and pledge agreements signed by the members of Tentexkota are void due to a lack of consideration.

76.

“If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void.” SDCL § 53-6-6.

77.

Under 8 C.F.R. 204.6 all funds provided through the EB-5 visa program must be placed “at risk”.

78.

As all funds provided to Tentexkota through the EB-5 visa program were secured by personal guarantees and pledge agreements, the funds were not placed at risk and are unlawful under 8 C.F.R. 204.6.

79.

Accordingly, Plaintiffs seek this Court's declaration that the personal guarantees and pledge agreements are void under SDCL § 53-6-6 due to the unlawful nature of the personal guarantees and pledge agreements under 8 C.F.R. 204.6.

COUNT III

Declaratory Judgment Action Regarding Estoppel

80.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

81.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the Defendants are estopped from enforcing the personal guarantees and pledge agreements signed by the Plaintiffs.

82.

Defendant Bollen, acting in his capacity as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2, represented to Tentexkota that the personal guarantees were required for the lending of EB-5 funds.

83.

Acting in his capacity as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2, Defendant Bollen represented to Tentexkota that the EB-5 funds had to be secured by a personal guarantee with the intention that Tentexkota members should sign the personal guarantees.

84.

Plaintiffs relied upon the representations made by Defendant Bollen acting in his capacity acting as director of SDIBI; as director of SDRC, as part-owner, manager, president and registered agent of SDRC, Inc.; as partner and/or registered agent of SDIF Limited Partnership 2, and as manager of SD Investment Fund LLC2 to its prejudice and injury.

85.

Accordingly, Plaintiffs seek this Court's declaration that Defendants are estopped from asserting the validity of the personal guarantees.

COUNT IV

Declaratory Judgment Action Regarding Waiver

86.

Plaintiffs reallege the preceding paragraphs and incorporate them as if set forth fully herein.

87.

Pursuant to SDCL § 21-24 *et. seq.*, Plaintiffs seek a declaration that the Defendants have waived their right to enforce the personal guarantees and pledge agreements signed by the members of Tentexkota.

88.

A waiver of a contractual right occurs “where one in possession of any [contractual] right ... and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it[.]” *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 22, 719 N.W.2d 780, 787.

89.

Upon information and belief the sixty-five alien investors have received or are in the process of receiving conditional lawful permanent resident status as a result of their investments in Tentexkota through the EB-5 program.

90.

As such, the Defendants represented to the United States Government that the money invested by the alien immigrants was legally invested under 8 C.F.R. 204.6.

91.

For the funds to be legally invested under 8 C.F.R. 204.6, the funds must have been placed “at risk”.

92.

In order for the funds to be placed at risk, they could not be secured by personal guarantees.

93.

The United States Government issued or is in the process of issuing conditional lawful permanent resident status based upon the Defendants' representations.

94.

Defendants knew the funds were not placed "at risk".

95.

Defendants' representations to the United States government are inconsistent with the right to take and hold Plaintiff's security or collateral to secure Plaintiff's obligation to repay EB-5 funds.

96.

Accordingly, Plaintiffs seek this Court's declaration that Defendants waived their contractual right under the personal guarantees.

WHEREFORE, Plaintiffs respectfully pray for damages against the Defendants as follows:

1. Declaratory relief as specified above;
2. Plaintiff's costs and attorneys' fees incurred in this action pursuant to SDCL §§ 21-24-11 and 58-12-3;
3. Grant such other and further relief to Plaintiff as the Court deems just and equitable.

Dated this 8th day of November, 2016.

**HEIDPRIEM, PURTELL
& SIEGEL, L.L.P.**

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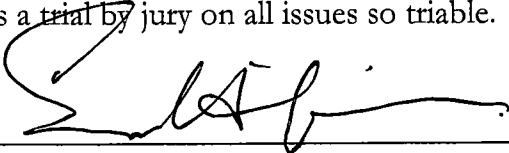
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DEMAND FOR JURY TRIAL

Plaintiffs hereby respectfully demands a trial by jury on all issues so triable.



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