UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

THE BANCORP BANK, a Delaware chartered banking corporation,

CASE NO. 0:18-CV-60171-RNS

Plaintiff,

v.

550 SEABREEZE DEVELOPMENT LLC, a Florida limited liability company, and JAWOF 515 SEABREEZE, LLC, a Florida limited liability company,

Defendants
____/

MOTION FOR LIMITED INTERVENTION; RESPONSE OF PROPOSED INTERVENORS TO PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER; INCORPORATED MEMORANDUM OF LAW

The thirty-one nonparty movants identified on Exhibit A hereto ("EB-5 Investors") respectfully move this Court, pursuant to Fed. R. Civ. P. 24(a)(2), for an Order (i) granting the EB-5 Investors leave to intervene in this action for the limited purpose of being heard on matters relating to their EB-5 immigration interests in the subject of the action, including their position on Plaintiff's pending motion for appointment of a receiver; (ii) dispensing with the requirement under Rule 24 that this Motion be accompanied by a pleading setting out the claim or defense for which intervention is sought; and (iii) to the extent Plaintiff's application for appointment of a receiver is granted, appointing a receiver with relevant EB-5 project experience who will take into account the interests of the EB-5 Investors.

I. Factual Background and Procedural History

On January 25, 2018, Plaintiff The Bancorp Bank (the "Bank") filed this action against Defendants 550 Seabreeze Development LLC and Jawof 515 Seabreeze, LLC to foreclose on a construction-loan lien in certain collateral, consisting of a partially constructed resort hotel project

located at 550 Seabreeze Blvd., Fort Lauderdale, Florida, owned by Defendant 550 Seabreeze Development LLC (the "Developer"), and a parcel of land across the street on which a small building sits owned by Defendant Jawof 515 Seabreeze, LLC (collectively, the "Project" or the "Seabreeze Project"). The Bank claims that the Developer has defaulted on a loan with an outstanding principal balance of approximately $37 million.

On January 26, 2018, the Bank filed an emergency motion for appointment of a receiver to take over the Seabreeze Project. The Bank claims, among other things, waste and mismanagement by the Developer, that Claims of Lien in excess of $5 million have been recorded against the Project, and that the general contractor has submitted a "Notice of Stopping Work for Nonpayment." These breaches of the loan agreement jeopardize the collateral.

While these basic facts suggest that this action involves an ordinary commercial foreclosure, the reality is far more complicated. In addition to the Bank's construction loan, the Seabreeze Project is substantially financed by foreign investors under the federal government's EB-5 immigrant visa program ("EB-5 Program").

A. <u>Seabreeze Is Required To Be Maintained As An EB-5 Project</u>

The EB-5 Program, administered by the U.S. Citizenship and Immigration Services ("USCIS"), permits qualified foreign investors to obtain U.S. lawful permanent residence by investing in a commercial enterprise that meets certain qualifications, including creating or preserving at least ten jobs per investor. (See generally www.uscis.gov/eb-5)

The proposed intervenors are thirty-one Chinese investors, each of whom invested $500,000 in the Project, in connection with his or her EB-5 immigration application. According to the offering materials provided to the EB-5 Investors, each investor was solicited to invest $500,000 in Las Olas Ocean Resort Partners LP (the "Partnership") and to become a limited partner of the Partnership. Through the offering, the Partnership raised $30 million from 60 EB-5 investors.[1]

The EB-5 financing structure used for the Project is as follows: the Partnership loaned the $30 million EB-5 investment funds ("EB-5 Loan") to Las Olas Mezzanine Borrower, LLC (the "Parent Company"), which owns and controls the Developer. (The Developer, one of the defendants in this action, is the borrower under the construction loan agreement with the Bank.)

[1] The nonparty movants are 31 of the 60 investors who participated in the offering.

The EB-5 Loan is secured by the Parent Company's equity interest in the Developer. The Parent Company contributed the proceeds of the EB-5 Loan to the Developer to acquire the land and to develop the Project.

Indeed, the Seabreeze Project was designed and marketed to foreign investors as an EB-5 project. The offering materials made a series of representations and commitments that the Project would be developed in compliance with EB-5 requirements and would remain an EB-5 project:

- "this offering is being made to persons who are not U.S. citizens or nationals and who wish to invest in a U.S. based job creating commercial enterprise with the objective of obtaining permanent residency in the United States through the Regional Center Pilot Program of the Immigrant Investor Program, also known as "EB-5."" (PPM page 1; excerpts of the PPM are attached as Exhibit B) [2]

- ". . . the General Partner has sought to structure the Partnership and the offering of Units to comply with the EB-5 visa program requirements and will seek to carry out the activities of the Partnership in compliance with these requirements . . ." (PPM page 1)
- "Partnership's Objective: The Partnership's principal investment objectives are: (i) to provide funding to a new commercial enterprise in a "targeted employment area" that seeks to create a sufficient number of jobs to permit each Limited Partner to satisfy the requirements of the EB-5 program; and (ii) to seek to provide Limited Partners with a conservative return on their investment through the funding of the Loan." (PPM page 17)

Consistent with these representations, the Parent Company and the Developer are contractually obligated to pursue the development and maintenance of the EB-5 Project. The Business Plan for the Project explains that "Las Olas Ocean Partners, LP [Partnership] and Las Olas Mezzanine Borrower, LLC [Parent Company] will enter into a 5-year loan agreement that is structured to comply with the EB-5 Investor Visa Program's requirements." Business Plan page 10 (attached as Exhibit C). The terms of the mezzanine loan agreement, provided to the investors in draft form and subsequently signed by the parties thereto, require that the Developer "shall develop, lease and operate a hotel, restaurant and retail property on the 550 Property" -- defined

[2] The EB-5 Investors are attaching only redacted versions of the offering materials and other documents because portions of the materials are confidential. Should the Court require full, unredacted copies of these documents, the EB-5 Investors will make them available to the Court for *in camera* inspection.

as the "Project" -- "using the proceeds of the Loan, the Senior Loan, and Borrower's Equity." See Mezzanine Loan Agreement draft, page 1 (attached as Exhibit D).

To ensure continuing compliance with EB-5 requirements, the Developer is required to preserve and maintain the Project. Section 4.5 of the loan agreement, denominated "Preservation and Maintenance of the Project," thus expressly provides that "Borrower [Parent Company] shall, and shall cause the Operating Company [Developer] to: . . . (b) not abandon the Project . . . ."

B. The EB-5 Application Process

To understand how the proposed receivership could affect the EB-5 Investors' interests, it is useful to summarize the EB-5 application process, which involves two primary steps:

First, after an individual subscribes to become an EB-5 investor, he or she files with USCIS a Form I-526 Immigration Petition for Entrepreneur ("I-526 Petition") to show, based on the project's business plan and supporting documents, that the investment will satisfy EB-5 requirements. 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6(a) and (j). Upon approval of the I-526 Petition, the USCIS will grant the investor conditional permanent residency, often referred to as a "conditional green card." 8 U.S.C. § 1186 b(a)(1).

Second, within two years after receiving a conditional green card, the investor must file with USCIS a Form I-829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status ("I-829 Petition") to show that the investor satisfied the investment and job creation requirements of the EB-5 program.8 U.S.C. § 1186b(c); 8 C.F.R. § 216.6(a) and (c). Upon satisfaction of these requirements, USCIS will approve the I-829 Petition and grant the investor lawful permanent residence status, concluding the immigration process. 8 C.F.R. § 216.6(d)(1). If the I-829 Petition is denied, the USCIS will terminate the conditional green card and institute removal proceedings to deport the investor from the United States. 8 C.F.R. § 216.6(d)(2)

In the Seabreeze Project, all 60 EB-5 investors, including all of the proposed intervenors, have had their I-526 petitions approved by USCIS, and they have received their conditional green cards. Of the 31 proposed intervenors, 28 have submitted their I-829 Petitions, which are still pending.

C. EB-5 Requirements Would Be Jeopardized By Disposition of the Collateral

There are two main requirements under the EB-5 Program that would be jeopardized if a receiver were appointed and acted to discontinue the development and operation of the Project without regard to the interests of the EB-5 Investors.

First, under applicable USCIS rules, an EB-5 investor must maintain his investment "at risk" and cannot receive a return of his capital during the course of the immigration process[3]. If a receiver were to prematurely sell the collateral and return some or all of the capital to the EB-5 investors, the EB-5 Investors be unable to satisfy the "capital at risk" requirement and their I-829 Petitions would be denied.[4] Again, if the I-829 Petition is denied, the USCIS will terminate the conditional green card and institute removal proceedings to deport the investor from the United States. 8 C.F.R. § 216.6(d)(2)

Second, each EB-5 Investor is required to show that his or her investment created or preserved at least ten jobs.[5] According to the business plan for the Seabreeze Project, the EB-5 job creation requirement will be met through a combination of construction jobs, as well as jobs associated with the operation of the hotel, retail shops, and restaurants. The business plan explains that many of these jobs will not be created until after construction is complete. For example, the plan states that "[a]fter the building is built, job creation will occur as hotel employees are hired prior to the opening of the hotel." (Exhibit C, page 60) As of the filing of this pleading, the hotel is still under construction. To ensure that the EB-5 Investors will meet the job creation requirements, it is critical for the construction to be completed or, at a minimum, for a receiver to be appointed who is mindful of these requirements before deciding simply to sell the collateral to satisfy the interests of the Bank.

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[3] The EB-5 Investors made their investments under the "Pilot Program" through an affiliated regional center approved by USCIS. 8 C.F.R. § 204.6(e) and (m). Under the Pilot Program, the investor must prove that he or she has invested or is actively in the process of investing the required amount of capital within an approved regional center, and that this capital has been placed "at risk" by the investment. 8 C.F.R. § 204.6(j)(4)(2), (3).

[4] According to the USCIS Policy Manual, after the I-526 Petition is approved, an investor must also sustain his or her investment "at risk" during the period of "conditional residency," when an investor's I-829 Petition is reviewed and decided. USCIS Policy Manual, Vol. 6: Immigrants, Part G, Investors [6 USCIS-PM G].

[5] All 31 proposed intervenors have received approval of their I-526 Petitions. To receive approval of their I-829 Petitions, each investor will still need to demonstrate that the investment has created or can be expected to create within a reasonable period of time ten full-time jobs. 8 C.F.R. § 216.6(c)(1).

II. Memorandum of Law

A. The EB-5 Investors are Entitled to Intervene As of Right To Protect Their Interests

Under Federal Rule 24(a), a nonparty is permitted to intervene as of right where the proposed intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

In the Eleventh Circuit, an applicant seeking to intervene as of right must demonstrate: "(1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit." *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996).

The EB-5 Investors readily make the required showing.

First, the EB-5 Investors' motion to intervene is timely filed. Plaintiff's Complaint was filed less than one month ago, on January 25, 2018, and Defendants have not yet filed a response to the Complaint. The case is still in its earliest stage, and no conceivable prejudice to any party will result from the EB-5 Investors' intervention. *See Bernath v. Seavey*, No. 2:15-cv-358-FtM-99CM, 2016 WL 1732626 (M.D. Fla., May 2, 2016) (motion to intervene timely when filed within four and a half months after filing of original complaint).

Second, the EB-5 Investors have a significant legally protectable interest in the subject of this action by virtue of their status as investors in the Project who have received conditional green cards and whose immigration status is currently contingent on the direction (and, ultimately, survival) of the Project.

Under Rule 24(a), "a legally protectable interest is an interest that derives from a legal right." *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005). The Eleventh Circuit's inquiry on this issue "is a flexible one, which focuses on the particular facts and circumstances" of the case. *Id*. In keeping with the flexible nature of the inquiry, "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Worlds v. Dep't of Health &*

Rehab. Servs., 929 F.2d 591, 594 (11th Cir. 1991) (citing *Nuesse v. Camp,* 385 F.2d 694, 700 (D.C.Cir.1967)).

Here, the rights and interests that the EB-5 Investors seek to protect by this limited intervention are real and substantial. Each EB-5 Investor invested $500,000 in the Project with the goal of immigrating to the United States. Each has received approval of the I-526 Petition for a conditional green card, while none to date has received approval of the I-829 Petition for a permanent green card. According to the offering materials provided to them, the Project would be structured and maintained in compliance with EB-5 program requirements and would qualify them for a green card. The EB-5 Investors thus have a substantial interest in making sure that the Project is continued and operated in compliance with the EB-5 requirements, including the creation of enough jobs as provided in the business plan submitted to USCIS and the maintenance of their at-risk investments in the Project. Otherwise, they may be subject to not only the loss of their investments but also the denial of their I-829 Petitions and the prospect of removal from this country.

Third, it is evident that disposition of this foreclosure action, as a practical matter, may impede or impair the EB-5 Investors' ability to protect their interests. As set forth above, the investors' EB-5 status is imperiled by the requested relief of foreclosure sought by the Bank in this case and could be imperiled if a receiver were to be appointed who was unfamiliar with the complicated EB-5 issues. If the receiver sold the collateral or otherwise altered the development or operation of the Project, the EB-5 Investors' immigration petitions would likely be denied.

Fourth, the EB-5 Investors' interests are not sufficiently represented by the existing parties in this action. Indeed, there is barely even a mention of the EB-5 Investors, or the USCIS requirements enumerated above, in the pleadings filed in this action thus far.

The proposed intervenor's burden to show that its interests are inadequately represented is "minimal." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989). The Eleventh Circuit has instructed that "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action*." Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993).

Unsurprisingly, Courts will find that the existing parties to the lawsuit may not adequately represent the interests of proposed intervenors where the parties in the litigation "possess interests inimical to" the proposed intervenors. *Id*.

Here, neither the Bank's nor the Defendants' interests are aligned with the EB-5 Investors' interests. The Bank's interest in this action is to foreclose on the Collateral, to receive repayment of the loan amount, and to seek damages caused by Defendants' alleged breach of the loan agreement. (ECF # 1) Moreover, as stated above, the Bank's Complaint and its motion papers mention the EB-5 Investors only in passing and ignore altogether the EB-5 Investors' immigration interests in the Project. In fact, the Bank's motion for appointment of a receiver characterizes the proposed receivership simply as a "commercial building receivership," without mentioning the EB-5 investors' immigration interests in the Project at all.

Likewise, none of the Defendants' interests in this action are aligned with the EB-5 investors' interests. In their opposition papers, Defendants do not even mention the EB-5 Investors' interests; indeed, 550 Seabreeze claims it is "pursuing expressed interests in acquiring the premises," without any regard to the EB-5 Investors' interests. (ECF #38, ¶ 6) This statement is consistent with the representation made by the Bank in its motion papers that Defendants proposed a restructuring arrangement that would wipe out the EB-5 loan and thereby eliminate the EB-5 Investors' immigration prospects entirely. (ECF # 9, at page 6) Assuming this is true, the Defendants' interests not only differ from, but appear to be actively hostile to, the EB-5 Investors' interests.

For the foregoing reasons, the Court should allow the EB-5 Investors to intervene as a matter of right in order to protect their interests in the Collateral Project under Federal Rule of Civil Procedure 24(a)(2).

B. <u>The Court Should Excuse the Requirement of Filing a Pleading With this Motion</u>

Because the EB-5 Investors seek a limited intervention and are not at this time pursuing affirmative claims for relief, the EB-5 Investors respectfully submit that they be excused from the literal requirement of Rule 24(c) that the motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

It is well established in the Eleventh Circuit that a Court can grant leave to intervene despite a lack of formal compliance with the pleading requirement of Rule 24(c), so long as the non-compliance does not cause prejudice to other parties. *Piambino v. Bailey*, 757 F.2d 1112, 1120–

21 (11th Cir. 1985) (following "majority of circuits" in disregarding "nonprejudicial technical defects" and affirming that intervention without filing of separate pleading containing claims for relief would "not work a manifest injustice."). The pleading requirement is designed to put the other parties "on notice of the position, claim, and relief sought by the intervenor," and can be dispensed with when those purposes are otherwise met. *Danner Constr. Co., Inc. v. Hillsborough Cty.*, No. 809-cv-650-T-17TBM, 2009 WL 2525486 (M.D. Fla. Aug. 17, 2009). *See Nat. Res. Def. Council v. Serv.*, No. 2:16-CV-585-FTM-99CM, 2016 WL 5415127 (M.D. Fla. Sept. 28, 2016) (granting motion to intervene where the motion, not accompanied by a pleading, clearly stated intervenor's position and relief sought).

Through the instant motion, the EB-5 Investors have specified the bases and grounds for the proposed intervention and provided clear notice to the existing parties of their position on the application for a receiver. No party in this case will suffer prejudice if the EB-5 Investors are permitted to intervene without formal compliance with the pleading requirement of Rule 24(c). Therefore, the Court should dispense with the requirement of a separate pleading by the proposed intervenors.

III. Opposition By EB-5 Investors to Appointment Of Receiver with No EB-5 Project Experience

The appointment of a receiver in a Federal action is an equitable remedy within the broad equitable power of the Court. *Roberts v. American Bank & Trust Co.,* Inc., 835 F. Supp. 2d 183 (E.D. La. 2011). "A federal court supervising an equity receivership has inherent equitable authority to issue a variety of ancillary relief to protect the receivership and, true enough, the scope of that relief is not limited to parties before the court." *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 762 (8th Cir. 2011).

As set forth above, the EB-5 Investors' interests in this Project differ from those of the Bank. The EB-5 Investors' interests are best served by completion of the Project in compliance with the rules and requirements of the EB-5 program. If that cannot be accomplished, there may be other options for the EB-5 Investors (such as re-deployment to another project) that do not jeopardize their immigration status with USCIS. In contrast, the Bank's interest is simply to foreclose on the Collateral, receive repayment of the loan amount, and seek other damages caused by Defendants' alleged breach of the loan agreement.

In its motion for appointment of a receiver, the Bank does not even recognize the EB-5 nature of this Project and characterizes it as an ordinary commercial building matter. The Bank's main focus is to preserve and maximize the value of the Collateral. It asks the Court to grant the receiver the authority to possess, preserve, protect, and manage the Collateral, as well as the authority to sell the Collateral, without considering the EB-5 Investors' immigration interests in the Project.

To this end, the Bank proposes Andrew J. Bolnick as a candidate to be the receiver. It would appear from his resume that Mr. Bolnick is an experienced commercial development receiver but that he has no relevant experience with EB-5 projects. A receiver in a traditional commercial development receivership would ordinarily look to maximize the value of the collateral, liquidate the assets, and repay the creditors and investors. However, a receivership in an EB-5 Project requires additional considerations and involves additional layers of complexity to navigate the EB-5 requirements and to take into consideration the EB-5 investors' interests. As set forth above, the continued construction and operation of the Project in compliance with EB-5 requirements is vital to protect the interests of the EB-5 Investors.

This is not a typical construction project. The unique nature of this EB-5 project requires that this Court exercise its equitable authority to appoint a receiver that will recognize and accommodate the EB-5 Investors' immigration needs. The Bank extended the loan in question with the full understanding that the proceeds thereof were to be used to finish the Seabreeze Project and necessarily fulfill the EB-5 requirements so that the EB-5 Investors could be green card-eligible. Indeed, the Bank's loan documents and correspondence expressly refer to the EB-5 Investors' loan and interest in the Project. The Bank extended the loan based on the condition that the EB-5 funds would be obtained and, indeed, used for the Project. In other words, the Bank's loan was contingent on the EB-5 Investors' funding, and the Bank knew that this project was an EB-5 project and that special considerations would be required for the EB-5 Investors' success. Attached as Composite Exhibit E are redacted excerpts from the Bank's loan documents and correspondence reflecting its understanding of the Project as an EB-5 project and conditioning the Bank's funding on the receipt of half of the EB-5 investors' funds (*i.e.*, $15 million).

In such a situation, where the Bank is on clear notice of the EB-5 component of this project and lends money as part of a transaction that is dependent on the EB-5 Investors' immigration needs, the Bank should be deemed to have limitedly waived its right to ignore the EB-5 Investors'

immigration needs upon default. *Koschorek v. Fischer*, 145 So. 2d 755, 757 (Fla. 2d DCA 1962) ("A long established principle with respect to waiver and estoppel is that, through his conduct, a holder of a mortgage may induce others to believe and act upon the belief that he will not enforce it and, because of this, may be estopped from doing so, as to them."). Otherwise, the Bank is engaging in inequitable conduct sufficient to limit its rights upon default vis-à-vis the EB-5 Investors. *See Knight Energy Servs. v. Amoco Oil Co.*, 660 So. 2d 786, 788 – 89 (Fla. 4th DCA 1995) (discussing availability of equitable "unclean hands" and estoppel defense where mortgagee reasonably leads other party to believe that it will not exercise certain rights immediately upon default but does so). Accordingly, the Bank should not be able to totally ignore the EB-5 Investors' immigration needs during this foreclosure proceeding.

As a result of these unique considerations, the EB-5 Investors respectfully request that, if the Court is inclined to appoint a receiver, the Court consider the EB-5 Investors' immigration interests and exercise its equitable power to appoint a receiver who has experience shepherding distressed EB-5 projects to completion. On that basis, the EB-5 Investors ask the Court to consider the appointment of Michael I. Goldberg, a highly respected receiver with substantial EB-5 project experience who has confirmed his availability and willingness to serve in this role.

Given the complexity of the rules and regulations of the EB-5 Program, Mr. Goldberg's experience with EB-5 matters renders him much better suited for this case. For nearly the past two years, Mr. Goldberg has served as the receiver for the Jay Peak entities, in the largest EB-5 fraud case in U.S. history, involving eight related EB-5 projects, more than 800 EB-5 investors, and more than $400 million in EB-5 investments. The case is currently pending before the Honorable Darrin P. Gayles.

In the Jay Peak case, Mr. Goldberg has dealt with all of the USCIS issues identified above, among others. Mr. Goldberg has re-deployed certain investors to other projects; completed construction to preserve the USCIS status of other investors; and returned funds to other investors.

In addition to the Jay Peak case, Mr. Goldberg has served as receiver in other EB-5 cases.

Mr. Goldberg has expressed his willingness to serve as a receiver in this matter. Mr. Goldberg's resume is attached as Exhibit F.

IV. Conclusion

Based upon the forgoing, the EB-5 Investors respectfully request that the Court grant their motion to intervene, dispense with the requirement of a pleading, and, to the extent the Court grants the Bank's motion for a receiver, appoint a receiver with relevant EB-5 project experience.

Dated: February 23, 2018.

By: */s/Jeffrey C. Schneider*
Jeffrey C. Schneider, P.A.
FL Bar No. 933244
Primary: jcs@lklsg.com
Secondary: lv@lklsg.com
Marcelo Diaz-Cortes, Esq.
Primary: md@lklsg.com
Secondary: cod@lklsg.com
LEVINE KELLOGG LEHMAN
SCHNEIDER + GROSSMAN LLP
201 South Biscayne Blvd., 22nd Floor
Miami, FL 33131
Telephone: 305.403.8788
Facsimile: 305.403.8789

and

Matthew Sava
(*pro hac vice to be filed*)
REID & WISE LLC
One Penn Plaza, Suite 2015
New York, NY 10119
P: 212-858-9968
C: 917-885-2430

Counsel for EB-5 Investors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2018, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel or parties of record via electronic filing generated by CM/ECF to counsel of record.

By: */s/Jeffrey C. Schneider*
Jeffrey C. Schneider, P.A.,