

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

| | |
|--|---|
| -----X | |
| THE BASSUK ORGANIZATION, INC., GREYSTONE | : |
| EB-5 HOLDINGS CORP. and GS EB5 VI LLC, | : |
| | : |
| Plaintiffs, | : |
| | : |
| -against- | : |
| | : |
| CRITERION GROUP LLC, SHIBBER A. KHAN, EFIM | : |
| KOGAN, YUNG CHING SIU and DAVID | : |
| LUBINITSKY, | : |
| | : |
| Defendants, | : |
| | : |
| -and- | : |
| | : |
| 11-12 30TH DRIVE LLC, | : |
| | : |
| Nominal Defendant. | : |
| -----X | |

Index No. _____/2018

Plaintiffs designate New York
County as the place of trial

SUMMONS

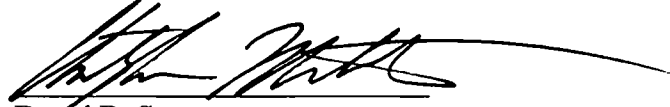
The basis of venue is Plaintiffs’
place of business:
152 West 57th Street
New York, New York 10019

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer on Plaintiffs’ attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to answer, judgment will be taken against you by default for the relief demanded herein. The basis of the venue designated is that Plaintiffs’ place of business is in New York County.

Dated: New York, New York
March 5, 2018

MORRISON COHEN LLP

By: 

David B. Saxe
Y. David Scharf
Christopher Milito
Joaquin Ezcurra

909 Third Avenue
New York, New York 10022
(212) 735-8600

Defendants' Addresses:

Criterion Group LLC
35-11 36th Street, 3rd Floor
Long Island City, New York 11106

Shibber A. Khan
23-10 41st Street
Astoria, New York 11105

Efim Kogan
Soldatskiy st. 3-6
Saint Petersburg, Russia

Yung Ching Siu
23-10 41st Street
Astoria, New York 11105

David Lubinitsky
8 Markwood Road
Flushing, New York 11375

11-12 30th Drive LLC
35-11 36th Street, 3rd Floor
Long Island City, New York 11106

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

| | |
|--|---------------------------|
| -----X | : |
| THE BASSUK ORGANIZATION, INC., GREYSTONE | : Index No. _____/2018 |
| EB-5 HOLDINGS CORP. and GS EB5 VI LLC, | : |
| | : |
| Plaintiffs, | : |
| | : |
| -against- | : <u>COMPLAINT</u> |
| | : |
| CRITERION GROUP LLC, SHIBBER A. KHAN, | : |
| EFIM KOGAN, YUNG CHING SIU and DAVID | : |
| LUBINITSKY, | : |
| | : |
| Defendants, | : |
| | : |
| -and- | : |
| | : |
| 11-12 30TH DRIVE LLC, | : |
| | : |
| Nominal Defendant. | : |
| -----X | : |

Plaintiffs The Bassuk Organization, Inc. (“TBO”), Greystone EB-5 Holdings Corp. (“Greystone EB-5”) and GS EB5 VI LLC (“EB-5 Lender” and, together with TBO and Greystone EB-5, “Plaintiffs”), by and through their undersigned counsel, Morrison Cohen LLP, as and for their Complaint, allege as follows:

INTRODUCTION

1. Plaintiffs are compelled to bring this action because Defendants have breached their contractual obligations, circumvented and undermined their agreements with Plaintiffs and induced Plaintiffs to incur millions of dollars in time, effort and expenses pursuing the loan financing agreed to by the parties while Defendants knowingly frustrated the parties’ contracts. This case arises out of two written agreements wherein Plaintiffs agreed to perform consulting services (i) to obtain construction financing for Defendants’ large-scale real estate project in Astoria, Queens; and (ii) to obtain millions of dollars in EB-5 financing for that

project. Plaintiffs spent over a year and a half securing both types of financing, in forms and under terms that were accepted by Defendants. But Defendants abandoned the project at the last minute, informing Plaintiffs that they had elected to sell the Queens properties for \$85 million.

2. Plaintiffs' entitlement to over \$6.8 million in damages is beyond dispute. The services Plaintiffs performed and the compensation they are due is clearly spelled out in two separate written agreements with Defendants. Indeed, one of those agreements (for EB-5 financing) specifically provided that if certain provisions therein were satisfied (which they were), Plaintiffs Greystone EB-5 and EB-5 Lender were entitled to a Break-Up Fee, which included their out of pocket expenses (which expenses were to be reimbursed irrespective of the project moving forward). That Break-Up Fee plus Lender's Expenses total over \$5.4 million in damages. The EB-5 financing agreement also made the Key Principals (here, Defendants Shibber A. Khan ("Khan"), Efim Kogan ("Kogan") and Yung Ching Siu ("Siu")) personally liable for the amounts due.

3. Plaintiffs fully performed their obligations under the two agreements, securing both construction financing and EB-5 financing acceptable to Defendants for their planned seven hundred and eleven (711) unit project. Plaintiffs' performance came at no small cost in time and funds advanced. Among other things, Plaintiffs performed due diligence, analyzed underwriting options, assembled marketing materials, drafted detailed business plans, drafted a private placement memorandum, drafted and revised numerous loan documents, brought the conventional lending opportunity to the market, screened and interfaced with lenders, conducted site tours, visited foreign countries to pitch the EB-5 opportunity, managed the complex EB-5 program requirements, and analyzed and negotiated term sheets. Plaintiffs' work resulted in a \$215 million loan commitment with a fully-executed term sheet from a conventional lender plus the receipt of over \$14 million in escrowed EB-5 funds with a total of

over \$20 million in EB-5 subscriptions.

4. Yet on the eve of the loan closing, Defendants pulled out, stating that they had signed a hard contract to sell the project to a third party. Given the size and complexity of the project and its finances, it is certain that Defendants had been negotiating that contract for many months – months during which Defendants continually assured Plaintiffs that they were proceeding with the project and encouraged Plaintiffs to continue their efforts on Defendants' behalf. Defendants should therefore be required to compensate Plaintiffs the amounts they are due under the terms of the parties' agreements.

PARTIES

5. Plaintiff TBO is a corporation organized and existing under the laws of the State of New York with its principal place of business located at 152 West 57th Street, New York, New York.

6. Plaintiff Greystone EB-5 is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 152 West 57th Street, New York, New York.

7. Plaintiff EB-5 Lender is a limited liability company organized and existing under the law of the State of Delaware with its principal place of business located at 152 West 57th Street, New York, New York.

8. Defendant Criterion Group LLC ("Criterion") is a limited liability company organized and existing under the laws of the State of New York with its principal place of business located at 35-11 36th Street, 3rd Floor, Long Island City, New York.

9. Defendant Khan is an individual who, upon information and belief, resides at 2310 41st Street, Astoria, New York.

10. Defendant Kogan is an individual who, upon information and belief,

resides in Russia.

11. Defendant Siu is an individual who, upon information and belief, resides at 2310 41st Street, Astoria, New York. Upon information and belief, Siu is the ultimate owner of Criterion because of Khan's previous conviction for financial fraud.

12. Defendant David Lubinitsky ("Lubinitsky") is an individual who, upon information and belief, resides at 8 Markwood Road, Flushing, New York.

13. Nominal Defendant 11-12 30th Drive LLC ("Fee Owner") is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business at 35-11 36th Street, Queens, New York.

14. Fee Owner is the owner of the real properties located at 30-77 Vernon Boulevard and 30-80 12th Street, Astoria, New York.

15. Fee Owner is one hundred percent (100%) owned by 11-12 30th Drive Member LLC ("EB-5 Borrower"), which is in turn owned one hundred percent (100%) by LIC Clock Tower LLC ("Clock Tower").

16. Clock Tower is twenty percent (20%) owned and wholly-managed by Criterion (through its wholly-owned entity HYK Properties, LLC).

17. Clock Tower is sixty percent (60%) owned by REIH, Inc., which itself is wholly-owned by Defendant Kogan.

18. Clock Tower is twenty percent (20%) owned by the Aprilia Trust which is a trust governed by the laws of the State of New York and controlled by Defendant Lubinitsky.

JURISDICTION AND VENUE

19. Jurisdiction is proper in this Court under New York Civil Practice Law and Rules ("CPLR") Section 301 with respect to Plaintiffs, Fee Owner and Criterion because each of the parties has its principal place of business located in New York and regularly transacts

or does business in New York. Jurisdiction is proper in this Court under CPLR Section 301 with respect to Khan, Siu and Lubinitsky because they reside in New York and regularly transact or do business in New York. Jurisdiction is proper in this Court under CPLR Section 302 with respect to Kogan because he regularly transacts or does business in New York.

20. Venue is proper in New York County pursuant to CPLR Section 503(c) because all Plaintiffs have their principal places of business located in New York County.

FACTUAL ALLEGATIONS

A. PLAINTIFFS ENGAGE WITH CRITERION TO DISCUSS CONSTRUCTION FINANCING FOR A MULTIFAMILY APARTMENT PROJECT IN QUEENS

21. Plaintiff TBO provides real estate investment banking services to owners and developers in the New York Tri-State area.

22. Plaintiff Greystone EB-5 is an institutional platform for EB-5 program investments. The EB-5 program was established to encourage foreign individuals to invest in the United States and create American jobs in exchange for a U.S. green card. Under this program, a foreign national must invest a minimum of \$500,000 - \$1,000,000 in a new commercial enterprise within the United States, and must create at least 10 U.S. jobs.

23. In June 2016, TBO was introduced to Criterion, who wished to discuss construction financing options for a proposed 711-unit mixed-income multifamily rental apartment development to be located at 30-77 Vernon Boulevard and 30-80 12th Street, Astoria, New York (the "Project").

24. After that introduction, representatives of TBO participated in an introductory telephone call with Khan, the principal of Criterion; Caaminee Pandit ("Pandit"), Criterion's Director for Real Estate Acquisitions & Development; and Matthew Lawrence ("Lawrence"), Criterion's General Counsel.

25. Following the call, TBO met with Criterion to discuss TBO's preliminary

underwriting for the Project. TBO and Criterion also discussed Greystone EB-5's capabilities and Criterion expressed interest in exploring EB-5 investment for the Project. TBO and Criterion agreed to schedule a follow-up meeting to discuss the EB-5 program further.

26. On or about July 7, 2016, TBO drafted an engagement letter to serve as Criterion's exclusive advisor in arranging for construction financing for the Project. Over the next two weeks, TBO prepared for Criterion a detailed underwriting analysis and summary of potential financing options for the Project.

27. On or about July 21, 2016, TBO circulated its detailed underwriting analysis and summary of financing options to Criterion.

28. TBO and Criterion met again to review the analysis of financing options for the Project. At that meeting, Criterion requested that TBO prepare an expanded analysis which would include EB-5 financing.

29. On or about August 4, 2016, Greystone EB-5 had an initial telephone call with Pandit to discuss the possibility of providing EB-5 financing for the Project.

30. Between August 6, 2016 and August 10, 2016, TBO prepared and circulated further financing analyses for Criterion's consideration, including one which factored in EB-5 financing. TBO and Criterion met again, this time with Greystone EB-5 in attendance, to discuss TBO's revised analysis for the Project.

31. Criterion then advised Greystone EB-5 that it wanted to move forward with EB-5 financing for the Project.

B. PLAINTIFFS ENTER INTO AGREEMENTS WITH CRITERION REGARDING THE PROJECT

32. On or about October 18, 2016, TBO and Criterion entered into an Exclusive Right Agreement (the "Exclusive Right Agreement") under which TBO became the exclusive advisor for arranging construction financing for the Project.

33. In exchange for TBO's work as Criterion's exclusive advisor, the Exclusive Right Agreement provided that TBO was to be paid a lump-sum commission equal to sixty-five basis points (.65%) multiplied by the maximum principal amount of (i) the debt arranged for and (ii) any subordinate financing from governmental entities such as the New York City Housing Development Corporation or New York City Department of Housing Preservation and Development. That commission was payable at the closing of the loan.

34. On or about October 19, 2016, Greystone EB-5 and Criterion entered into a term sheet (the "EB-5 Term Sheet") governing the process by which Greystone EB-5 would provide EB-5 financing for the Project. Khan executed the EB-5 Term Sheet both on behalf of Criterion and individually as a "Key Principal" defined in the EB-5 Term Sheet. Kogan and Siu subsequently qualified as "Key Principals" pursuant to the terms of the EB-5 Term Sheet.

35. Pursuant to the EB-5 Term Sheet, EB-5 financing would be secured via the EB-5 Lender, which would conduct an offering of its interests to foreign investors.

36. The EB-5 Lender would then fund an EB-5 loan (the "EB-5 Loan") for a to-be-formed entity known as the "EB-5 Borrower." The EB-5 Borrower in turn would invest the proceeds of the EB-5 Loan in Fee Owner, which owns the Project's property. Fee Owner would use these proceeds for EB-5 compliant uses in connection with the Project.

37. Several provisions of the EB-5 Term Sheet were specifically designated as "binding obligations [which] shall survive the execution of any subsequent loan documentation."

38. Among the "binding obligations" of the EB-5 Term Sheet was a section entitled "Break-Up Fee," which provided in relevant part:

[i]n the event that (i) Lender has commenced marketing of the Offering, (ii) EB-5 Borrower has not timely delivered the Termination Notice, (iii) Mortgage Borrower, or an affiliate thereof, has received a term sheet for the Mortgage Loan on commercially reasonable terms, and (iv) EB-5 Borrower does not proceed with the initial closing of the EB-5 Loan in accordance with the Loan Documents, Lender shall be entitled to receive from Key Principals a Break-Up Fee in an

amount equal to: the sum of (A) the Origination Fee (which shall be calculated on the maximum EB-5 Loan amount), (B) Lender's Expenses (as defined below) incurred to date, plus, to the extent applicable, any up-front administrative or other fees paid to migration agents in connection with the marketing of the Offering and (C) the greater of (i) 5.0% of the maximum EB-5 Loan amount and (ii) \$2,000,000.

39. Another "binding obligation" of the EB-5 Term Sheet was a section entitled "Expenses," which provided in relevant part:

Key Principals and EB-5 Borrower shall reimburse Lender for all reasonable third-party fees and expenses, including, without limitation, legal fees, economic studies, Lender's consultants and review of third party reports, incurred in connection with the evaluation, origination and documentation of the EB-5 Loan, and costs associated with marketing the Offering to EB-5 Investors, which include design and production of marketing collateral, overseas marketing events, and travel expenses for Lender representatives ("*Lender's Expenses*").

C. **PLAINTIFFS BEGIN SEEKING CONSTRUCTION FINANCING FOR THE PROJECT AND ARE ENCOURAGED IN THEIR EFFORTS BY DEFENDANTS**

40. By late October 2016, Greystone EB-5 was already soft-marketing the Project to distribution agents in China.

41. On or about November 2, 2016, TBO formally kicked off the senior loan process for the Project. On or about November 10, 2016, Greystone EB-5 did the same with respect to the EB-5 financing process.

42. Over the next month, TBO worked on and circulated to Criterion a draft financing package for the Project.

43. In early January 2017, TBO met with Criterion to discuss the draft financing package. Then, in February 2017, TBO circulated a final draft of the financing package and a lender list to Criterion, incorporating all comments previously received from Criterion, for review and approval. Criterion approved the package on a phone call and authorized TBO to begin the marketing process to obtain construction financing for the Project.

44. On or about February 16, 2017, TBO formally commenced marketing the

construction financing of the Project. The financing package was initially distributed to 55 different potential lenders. Over the next two months, TBO received and evaluated numerous draft financing term sheets from various lenders and conducted site tours of the Project property for potential lenders.

45. On or about April 18, 2017, TBO circulated a detailed analysis of the financing term sheets it had received and recommended the selection of Mack Real Estate Credit Strategies, L.P. (“Mack”) as lender. Criterion approved the recommendation and authorized TBO to pursue a deal with Mack.

46. From April 19, 2017 through May 4, 2017, TBO and Criterion negotiated a binding commitment from Mack to provide \$215 million in construction financing for the Project. On or about May 5, 2017, Criterion executed a term sheet and sent it to Mack for countersignature.

47. Prior to signing the term sheet, Mack indicated that it had received a tip the Project site was being actively marketed for sale. In response, Khan vehemently denied knowledge about the listing of the Project site for sale and reiterated Criterion’s commitment to developing the Project. Nevertheless, Khan revealed for the first time that Lubinitsky was pursuing a sale of the Project site without Criterion’s authorization.

48. On May 10, 2017, Criterion and Mack signed a term sheet and Criterion sent Mack the required \$400,000 good faith deposit shortly thereafter.

49. On or about May 18, 2017, Mack and Criterion held a kick-off call to begin working toward closing Mack’s construction loan.

**D. PLAINTIFFS TRAVEL TO CHINA TO OBTAIN
EB-5 FINANCING FOR THE PROJECT**

50. On or about June 5, 2017, representatives of Greystone EB-5 met with representatives of Beijing Overseas Education & Immigration Consult Service Co., Ltd. (GDOS

Group), one of the largest and most successful EB-5 distribution agents in China, at Greystone EB-5's New York offices to introduce the EB-5 financing for the Project.

51. On June 12, 2017, Greystone EB-5 delivered a notice informing Defendants of the Formal Marketing Commencement Date, as that term is defined in the EB-5 Term Sheet. Consequently, Defendants had until June 22, 2017 to deliver a Termination Notice under the EB-5 Term Sheet. No such Termination Notice was ever received.

52. In or about early June 2017, Greystone EB-5 finalized the offering documents for the EB-5 financing including a comprehensive business plan, private placement memorandum, subscription agreement and limited liability company agreement. On or about June 14, 2017, these documents were submitted to the United States Citizenship and Immigration Services.

53. On or about June 14, 2017, members and officers of Criterion including Khan, Pandit and Lawrence filed a marketing video for the EB-5 financing at Greystone EB-5's offices.

54. Over the course of approximately June 15, 2017 through June 21, 2017, representatives of Greystone EB-5 traveled to China for the launch of the EB-5 financing raise. The Greystone EB-5 team held seminars in cities such as Shanghai, Beijing, Guangzhou, Shenzhen and Nanjing.

55. Greystone EB-5, together with Khan and Pandit, continued to hold seminars in China to market the EB-5 financing for the Project into July 2017, and Greystone EB-5 continued these seminars into November 2017.

E. THE PARTIES FORM A WORKING GROUP TO FINALIZE A CLOSING ON THE LOAN FINANCING

56. Beginning in or about June 2017, a working group consisting of representatives of Plaintiffs, Mack, Criterion and their respective counsel began to have weekly

calls to track progress on the loan documentation. Initially, a target closing date of August 2017 was established. That target was later pushed back by a number of months.

57. Through mid-July 2017 and into September 2017, TBO continued to edit the various loan documents relating to the construction financing, followed up on the status of the New York City Department of Building (“DOB”) permit for the Project that Criterion was supposed to obtain, and performed other tasks to prepare for the closing of the construction loans. Greystone EB-5 continued to market the Project overseas to potential investors, draft and negotiate the loan documents, edit the EB-5 agreements, discuss with Criterion ways to make the Project stand out to potential investors and even began working to set up a bank account for Kogan who needed to show \$25 million in U.S. liquid assets as a condition of closing. Despite Greystone EB-5’s assistance, Kogan never did show proof of the requisite \$25 million in U.S. liquid assets.

58. By early October 2017, all of the transaction documents for the loan closing were in close to final form. On or about October 9, 2017, Criterion unequivocally assured Plaintiffs, Mack and the rest of the working group that it was ready to close on the loan financing.

59. Through the end of November 2017, Plaintiffs worked furiously to finalize the loan documents, including the incorporation of Criterion’s many comments which caused Plaintiffs to incur further time and expense, in order to meet a hard deadline of December 7, 2017 that the working group had agreed upon.

60. On or about November 28, 2017, Greystone EB-5 received a telephone call from David Kronman (“Kronman”) of Cape Advisors indicating that Kronman was evaluating a potential acquisition of the Project site and that Khan had authorized him to contact Greystone EB-5. When Greystone EB-5 notified Khan about this call, Khan stated that he was

not actively marketing the Project site but that Lubinitsky was claiming Khan had been impeding a sale of the Project site, so Khan wanted to show “cooperation” in the process. However, Khan reiterated his, Kogan’s and Criterion’s commitment to developing the Project and closing on the loan financing.

61. On or about December 1, 2017, Criterion received formal notice from the DOB that Criterion had not satisfied the DOB’s objections regarding the Project and that the DOB was therefore issuing a revocation letter for the Project. Because this revocation threatened to derail the entire Project, TBO began working closely with Criterion and attorneys from Stroock & Stroock & Lavan LLP to strategize ways to reinstate the permit application. On or about December 10, 2017, TBO sent an email to Mack with detailed steps on how to reinstate the DOB permit application in an effort to get Mack to hold open its loan commitment. Khan and Lawrence, who were copied on this email, subsequently confirmed that they would move forward with this plan.

62. On or about December 13, 2017, Mack agreed to proceed with the closing on the loan and an initial advance of \$25 million, subject to delivering the DOB permit as a condition to further advances and the closing of the loan by the end of 2017. However, on or about December 14, 2017, Khan informed the working group that Kogan was not willing to proceed with closing on the loan until the DOB permit had been obtained.

63. On or about December 15, 2017, Plaintiffs, Criterion, Khan, Kogan and Kogan’s legal counsel held a conference call to discuss the potential risks and costs of not proceeding with the loan closing.

64. After the call, Khan indicated to Plaintiffs that he was “confident” that the loan financing would close, and that Plaintiffs should continue working to finalize the documents for a closing the following week.

65. Mack subsequently issued a written notice to Criterion warning that if the loan did not close by December 29, 2017, Mack would immediately terminate its loan commitment. Greystone EB-5 similarly sent a reservation of rights letter to Criterion on or about December 15, 2017 and another to Lubinitsky on or about December 27, 2017.

66. Between December 16, 2017 and December 27, 2017, Plaintiffs and their counsel, together with Criterion's general counsel and Criterion's outside counsel, worked through the holidays and around the clock to finalize the loan documents (including the negotiation and completion of a settlement statement) to meet the December 29, 2017 deadline. On or about December 22, 2017, Khan sent an email to Mack stating that he thought the loan closing "will get done next week."

F. DEFENDANTS' DECEPTION IS REVEALED

67. On or about December 28, 2017, Khan informed the working group that Kogan had decided not to move forward with the loan closing.

68. Then, on or about January 10, 2018, Khan called Plaintiffs and informed them that Criterion would be selling the Project site to Cape Advisors for \$85 million. Khan also noted that there was a Russian equity partner working with Cape Advisors. This was the first time that Khan had ever mentioned to Plaintiffs the existence of negotiations or a contract to sell the Property site. Khan claimed that he had not been involved in the negotiations of the sale.

69. On or about January 11, 2018, Plaintiffs had a telephone call with Kronman of Cape Advisors. Kronman confirmed that Cape Advisors had a hard contract to purchase the Property site for \$85 million and was targeting a closing by mid-March 2018. It was clear from the hard nature of the contract that Cape Advisors must have been actively working on the deal for months, and that negotiations must have been ongoing during December 2017, when Plaintiffs and their counsel were hard at work finalizing the loan documents at

Criterion's insistence.

70. On January 12, 2018, Greystone EB-5 delivered a written demand for the Payment of the Break-Up Fee and Lender's Expenses. Under the EB-5 Term Sheet, the payment of the Break-Up Fee was due within thirty (30) days of demand.

71. The EB-5 Term Sheet provided that the Key Principals and the EB-5 Borrower were required to pay Lender's Expenses. Included in Lender's Expenses was a one hundred and fifty thousand dollar (\$150,000.00) Expense Deposit that became due in August 2017 and which was never paid.

72. On or about January 18, 2018, TBO sent a formal demand letter to Criterion for the payment of its Commission pursuant to the Exclusive Right Agreement based upon the services rendered by TBO in connection with the negotiations and execution of a term sheet with Mack.

73. Nevertheless, as of the date of this Complaint, Criterion has failed to pay TBO the Commission owed pursuant to the Exclusive Right Agreement, and Criterion, Khan, Kogan and Siu have failed to pay Greystone EB-5 and EB-5 Lender the Break-Up Fee and Expenses owed pursuant to the EB-5 Term Sheet.

AS AND FOR A FIRST CAUSE OF ACTION
(BREACH OF THE EB-5 TERM SHEET AGAINST CRITERION, KHAN, KOGAN
AND SIU)

74. Plaintiffs repeat and re-allege each and every paragraph set forth above as if fully set forth herein.

75. Greystone EB-5, Criterion and Khan are parties to the EB-5 Term Sheet.

76. Pursuant to the section of the EB-5 Term Sheet entitled "Break-Up Fee," which was specifically made a binding section of the EB-5 Term Sheet,

[i]n the event that (i) Lender has commenced marketing of the Offering, (ii) EB-5 Borrower has not timely delivered the Termination Notice, (iii) Mortgage

Borrower, or an affiliate thereof, has received a term sheet for the Mortgage Loan on commercially reasonable terms, and (iv) EB-5 Borrower does not proceed with the initial closing of the EB-5 Loan in accordance with the Loan Documents, Lender shall be entitled to receive from Key Principals a Break-Up Fee in an amount equal to: the sum of (A) the Origination Fee (which shall be calculated on the maximum EB-5 Loan amount), (B) Lender's Expenses (as defined below) incurred to date, plus, to the extent applicable, any up-front administrative or other fees paid to migration agents in connection with the marketing of the Offering and (C) the greater of (i) 5.0% of the maximum EB-5 Loan amount and (ii) \$2,000,000.

77. Pursuant to the section of the EB-5 Term Sheet entitled "Expenses," which was also specifically made a binding section of the EB-5 Term Sheet,

Key Principals and EB-5 Borrower shall reimburse Lender for all reasonable third-party fees and expenses, including, without limitation, legal fees, economic studies, Lender's consultants and review of third party reports, incurred in connection with the evaluation, origination and documentation of the EB-5 Loan, and costs associated with marketing the Offering to EB-5 Investors, which include design and production of marketing collateral, overseas marketing events, and travel expenses for Lender representatives ("*Lender's Expenses*"). An estimate of Lender's Expenses is attached as Schedule 3 of this Term Sheet.

78. Greystone EB-5 and EB-5 Lender have performed all their obligations necessary to obtain the "Break-Up Fee" and "Expenses" under the terms of the EB-5 Term Sheet.

79. As discussed more fully above, all the conditions were met under the EB-5 Term Sheet which triggered the requirement that the EB-5 Lender be paid the Break-Up Fee. The EB-5 Lender began the marketing of the EB-5 financing offering, and the EB-5 Borrower did not timely deliver a Termination Notice as required under the EB-5 Term Sheet. The Mortgage Borrower received a term sheet for the EB-5 financing on commercially reasonable terms, but the EB-5 Borrower did not proceed with the closing of the EB-5 Loan. Pursuant to the terms of the EB-5 Term Sheet, the EB-5 Lender (an entity managed and controlled by Greystone EB-5) was due the amounts specified under the binding "Break-Up Fee" and "Expenses" sections.

80. The “Key Principals” section of the EB-5 Term Sheet defines the Key Principals as Shibber Khan and such other persons approved by Lender. Subsequent to the execution of the EB-5 Term Sheet, Kogan and Siu qualified as Key Principals by virtue of being designated as required guarantors of the EB-5 Loan, thus becoming liable for, *inter alia*, the Break-Up Fee and Lender’s Expenses under the term Sheet, along with Khan.

81. On January 12, 2018, Greystone EB-5 delivered a written demand for the payment of, *inter alia*, the Break-Up Fee and Lender’s Expenses. Pursuant to the EB-5 Term Sheet, Defendants had until February 12, 2018 to make the required payment of the Break-Up Fee.

82. Criterion, Khan, Kogan and Siu have failed to pay Greystone EB-5 and the EB-5 Lender the amounts due under the “Break-Up Fee” and “Expenses” sections of the EB-5 Term Sheet, thus breaching the EB-5 Term Sheet.

83. As a result of Criterion, Khan, Kogan and Siu’s breach of the EB-5 Term Sheet, Greystone EB-5 and the EB-5 Lender have suffered damages in an amount to be determined at trial, but believed to be in excess of \$5,481,097.00, consisting of: (i) the Origination Fee of \$862,500; (ii) Lender’s Expenses of \$1,743,597; and (iii) liquidated damages of \$2,875,000 (being the greater of \$2,000,000 and 5% of the maximum EB-5 Loan amount, as set forth in the EB-5 Term Sheet).

AS AND FOR A SECOND CAUSE OF ACTION
(BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
AGAINST CRITERION)

84. Plaintiffs repeat and re-allege each and every paragraph set forth above as if fully set forth herein.

85. TBO and Criterion are parties to the Exclusive Right Agreement.

86. The express purpose of the Exclusive Right Agreement is to compensate

TBO for services rendered as the exclusive advisor for debt financing for the Project.

87. Pursuant to the section of the Exclusive Right Agreement entitled “Commissions,” TBO was due a Commission upon closing of loan financing equal to sixty-five basis points (.65%) multiplied by the maximum principal amount of (i) the debt arranged for and (ii) any subordinate financing from governmental entities such as the New York City Housing Development Corporation or New York City Department of Housing Preservation and Development.

88. In order to fulfill its obligations under the Exclusive Right Agreement, TBO worked tirelessly from (and even before) the execution of the Exclusive Right Agreement through early 2018 to obtain construction financing for the Project, and was successful in negotiating and procuring a binding commitment with Mack to provide said financing.

89. Although TBO’s Commission would have come due upon the closing of the loan financing, Criterion’s willful misconduct precluded the closing from occurring. In particular, Criterion misrepresented to TBO for months that it was fully committed to closing on the loan financing and developing the Project, while Criterion secretly was negotiating to sell the Project site to Cape Advisors.

90. By precluding the closing on the loan financing with Mack due to its bad faith conduct, Criterion has breached the implied covenant of good faith and fair dealing that is inherent in every contract.

91. As a result, TBO has suffered damages in an amount to be determined at trial, but believed to be in excess of \$1,397,500.00.

AS AND FOR A THIRD CAUSE OF ACTION
(QUANTUM MERUIT AGAINST CRITERION)

92. Plaintiffs repeat and re-allege each and every paragraph set forth above as if fully set forth herein.

93. Plaintiff TBO performed services for Criterion in good faith and at Criterion's request. Criterion accepted TBO's services.

94. The services performed by TBO were consulting services in connection with securing construction financing for the Project. TBO's services were performed over the course of a year and a half: from July of 2016 through the end of 2017. The services rendered by TBO were substantial, as set forth above.

95. TBO reasonably expected to be compensated by Criterion for the consulting services it rendered. TBO's expectation was based on discussions with Criterion and the drafting and execution of the Exclusive Right Agreement.

96. TBO's services constituted full performance under the Exclusive Right Agreement, as TBO secured construction financing for the Project on terms acceptable to Criterion.

97. TBO and Criterion had agreed on the reasonable value of the services, to wit: sixty-five basis points (.65%) multiplied by the maximum principal amount of the debt arranged for, to wit: \$1,397,500.00.

98. As a result, TBO has suffered damages in an amount to be determined at trial, but believed to be in excess of \$1,397,500.

AS AND FOR A FOURTH CAUSE OF ACTION
(TORTIOUS INTERFERENCE WITH CONTRACT AGAINST LUBINITSKY)

99. Plaintiffs repeat and re-allege each and every paragraph set forth above as if fully set forth herein.

100. TBO and Criterion are parties to the Exclusive Right Agreement.

101. At all relevant times, Lubinitzky knew of the existence of the Exclusive Right Agreement and that TBO and Criterion were parties thereto.

102. Greystone EB-5, Criterion and Khan are parties to the EB-5 Term Sheet.

103. At all relevant times, Lubinitsky knew of the existence of the EB-5 Term Sheet and that Greystone EB-5, Criterion and Khan were parties thereto.

104. Lubinitsky intentionally procured Criterion's breach of the Exclusive Right Agreement and Criterion's and Khan's breach of the EB-5 Term Sheet by pursuing undisclosed negotiations for the sale of the Project site with Cape Advisors, all the while knowing that Plaintiffs and their counsel were hard at work to finalize the closing of the loan and EB-5 financing for the Project.

105. Lubinitsky's conduct was not justified by any economic considerations respecting the Project.

106. Because of Lubinitsky's misconduct, Criterion breached the Exclusive Right Agreement and Criterion and Khan breached the EB-5 Term Sheet.

107. As a result, Plaintiffs have suffered damages in an amount to be determined at trial, but believed to be in excess of \$6,878,597.00.

WHEREFORE, Plaintiffs hereby demand judgment as follows:

a) on their First Cause of Action, for damages jointly and severally against Khan, Kogan and Siu in an amount to be determined at trial but believed to be in excess of \$5,481,097.00;

b) on their First Cause of Action, for damages jointly and severally against Criterion, Khan, Kogan and Siu in an amount to be determined at trial but believed to be in excess of Lender's Expenses of \$1,743,597.00;

c) on their Second Cause of Action, for damages against Criterion in an amount to be determined at trial but believed to be in excess of \$1,397,500.00;

d) on their Third Cause of Action, for damages against Criterion in an amount to be determined at trial but believed to be in excess of \$1,397,500.00;

e) on their Fourth Cause of Action, for damages against Lubinitsky in an amount to be determined at trial but believed to be in excess of \$6,878,597.00; and

f) for such other and further relief as to which Plaintiffs may be entitled, including their reasonable attorneys' fees, costs and disbursements, and such other relief as to the Court may seem just and equitable.

Dated: New York, New York
March 5, 2018

Yours etc.,

MORRISON COHEN LLP

By: 

David B. Saxe
Y. David Scharf
Christopher Milito
Joaquin Ezcurra

909 Third Avenue
New York, New York 10022
(212) 735-8600
*Attorneys for Plaintiffs The Bassuk
Organization, Inc., Greystone EB-5
Holdings Corp. and GS EB5 VI LLC*

Index No. _____/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

THE BASSUK ORGANIZATION, INC.
GREYSTONE EB-5 HOLDINGS CORP. and GS EB5 VI LLC,

Plaintiffs,

-against-

CRITERION GROUP LLC, SHIBBER A. KHAN,
EFIM KOGAN, YUNG CHING SIU and DAVID LUBINITSKY,

Defendants,

-and-

11-12 30th DRIVE LLC

Nominal Defendants.

SUMMONS AND COMPLAINT

ATTORNEYS FOR PLAINTIFFS

MorrisonCohen^{LLP}

909 Third Avenue, New York, NY 10022-4731 •
p:212.735.8600 • f:212.735.8708